



UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:)
)
) Docket Number: SE1603709,
) F/V Paradise
 William Joseph Annunzio,)
 D/B/A Texas Blue Water Fishing)
)
 Respondent.)
)
)

INITIAL DECISION AND ORDER

Date: November 9, 2021

Before: Christine Donelian Coughlin, Administrative Law Judge,
U.S. Environmental Protection Agency¹

Appearances: For the Agency:
Loren Remsberg, Esq.
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Respondent:
William J. Annunzio, *pro se*
Schertz, TX

¹ The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011. *See* 5 U.S.C. § 3344; 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 June 18, 2019, to William Joseph Annunzio and Texas Blue Water Fishing (collectively “Respondent”). The NOVA charges Respondent, as the owner and operator of the F/V Paradise dba Texas Blue Water Fishing, with three violations of federal law, each occurring on or about October 12, 2017. In Count 1, Respondent is charged with engaging in charter fishing for red snapper in the Exclusive Economic Zone (“EEZ”) without a valid charter vessel permit on or about October 12, 2017, in violation of the Magnuson-Stevens Fishery Management and Conservation Act (“Magnuson Stevens Act” or “Act”), 16 U.S.C. § 1857(1)(A), and its implementing regulations, 50 C.F.R. §§ 622.13(a) and 622.20(b). For Count 1, the Agency seeks a penalty of \$17,500. In Count 2, Respondent is charged with possessing thirteen red snapper harvested from the EEZ during the seasonal closure of the recreational sector for red snapper when the bag limit for such snapper was zero, in violation of the Act, 16 U.S.C. § 1857(1)(A), and its implementing regulations, 50 C.F.R. §§ 622.13(n) and 622.34(b). For Count 2, the Agency seeks a penalty of \$6,000. In Count 3, Respondent is charged with failing to use non-stainless steel circle hooks when fishing with natural baits, in violation of the Act, 16 U.S.C. § 1857(1)(A), and its implementing regulations, 50 C.F.R. §§ 622.13(l) and 622.30(a). For Count 3, the Agency seeks a penalty of \$500. The total penalty sought by the Agency for these alleged violations is \$24,000.

In response to the NOVA, Respondent requested a hearing on the alleged violations, and the matter was forwarded to this Tribunal. By order dated August 22, 2019, I was designated to preside over the litigation of this matter. On August 23, 2019, 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. Following an extension of time granted to Respondent to file his PPIP, Respondent filed a document in response to the PPIP Order which set out his disputes about the proposed evidence submitted by the Agency but which did not otherwise set forth any proposed evidence to be submitted by Respondent at an evidentiary hearing. Consequently, the Agency filed a Motion to Allow for Additional Discovery and Compel Response to Attached Written Request for Admission, which I granted. Respondent answered the Agency’s Request for Admissions and subsequently filed his answers with this Tribunal.

A hearing in this matter was scheduled to commence on April 15, 2020 in San Antonio, Texas but was postponed due to the coronavirus public health emergency and corresponding government guidance.² On January 11, 2021, an Order Rescheduling Hearing was issued that established a new hearing date of April 21, 2021, continuing as necessary through April 22, 2021. The hearing was scheduled to be conducted by videoconference due to the ongoing COVID-19 pandemic.

² See Order Postponing Scheduled Hearing (March 18, 2020).

On April 21, 2021, I conducted the evidentiary hearing in this matter by videoconference. At the hearing, the Agency presented Agency Exhibits (“AX”) 1 through 8, which were admitted into evidence. Additionally, Respondent’s answers to the request for admissions was admitted into evidence as AX 9. The Agency also presented the testimony of four witnesses: Matthew Roberson (“Agent Roberson”), a Special Agent in the Office of Law Enforcement (“OLE”) with the National Marine Fisheries Services (“NMFS”) component of NOAA; John O’Malley (“Agent O’Malley”), an Assistant Special Agent in Charge with the OLE; Clinton Arnold (“Agent Arnold”), a Special Agent with the Department of Homeland Security, Coast Guard Investigative Service; and Peter Hood, (“Mr. Hood”), the Gulf of Mexico Branch Chief in the Sustainable Fisheries Division of the Southeast Regional Office of NMFS. Respondent testified on his own behalf and cross-examined Agency witnesses.

On May 19, 2021, the parties were provided with the official transcript of the evidentiary hearing³ simultaneously with the issuance of an Order Scheduling Post-Hearing Submissions that established various post-hearing filing deadlines. In accordance with these deadlines, the Agency filed a Motion to Conform Hearing Transcript to Testimony, which I granted by Order dated June 28, 2021. The parties timely filed their Initial Post-Hearing Briefs and the Agency timely filed its Reply Brief. Respondent did not file a Reply Brief.

II. STATEMENT OF THE ISSUES

a. Liability

The NOVA alleges three different violations. In assessing liability, I must determine whether, on October 12, 2017, Respondent unlawfully: (1) engaged in charter fishing for red snapper in the EEZ without a valid charter vessel permit, in violation of 16 U.S.C. § 1857(1)(A) and 50 C.F.R. §§ 622.20(b), 622.13(a); (2) possessed thirteen red snapper harvested from the EEZ during the seasonal closure of the recreational sector for red snapper when the bag limit for red snapper was zero, in violation of 16 U.S.C. § 1857(1)(A) and 50 C.F.R. §§ 622.34(b), 622.13(n); and (3) failed to use non-stainless steel circle hooks when fishing with natural baits, in violation of 16 U.S.C. § 1857(1)(A) and 50 C.F.R. §§ 622.30(a), 622.13(l).

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, the Magnuson-Stevens Act requires that I 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

³ Citations to the hearing transcript are made in the following format: “Tr. [page].”

Respondent has lived in Texas for approximately 16 years. Tr. 162. He obtained his Captain's license and began a charter-fishing business, d/b/a Texas Blue Water Fishing, which he owned and operated for at least 10 years, leading up to and including the time of this incident. Tr. 164, 193, 196; AX 9 ¶ 2. Respondent owned and operated a U.S. Coast Guard Documented vessel, the F/V Paradise, that he used for his charter-fishing services. Tr. 162-66; AX 4; AX 9 ¶ 1. The F/V Paradise can carry as many as twelve people, however Respondent typically limited the carrying-capacity to five passengers on his charter-fishing trips. Tr. 166. Respondent maintained a website that advertised his charter-fishing business, but in addition to his business website, Respondent also advertised charter-fishing trips through other means, like Craigslist and the outside of his vehicle. Tr. 167, 193; AX 1 at 12-18; AX 2 at 4; AX 3 at 16. While Respondent's charter-fishing trips generally targeted the species of fish his clients desired, he highlighted four or five trips on his website that were specifically designed to target certain species of fish. Tr. 167. For example, his business advertised "bottom fishing," which is known to include red snapper, a popular species of fish sought by fishing clients and which comprised roughly 40 percent of Respondent's business. Tr. 167-68, 194. Indeed, charter-fishing for red snapper in the Gulf of Mexico and in Texas is one of the bigger fisheries. Tr. 25. Respondent typically charges \$1,800 for a 12- to 16-hour chartered fishing trip, plus fuel costs that average \$800 to \$1,200 per trip. Tr. 166. These fees are included in his advertising. AX 1 at 12.

At no time did Respondent possess a federal charter vessel permit that authorized him to engage in charter fishing for red snapper or other reef fish in the Gulf EEZ. Tr. 168-69; AX 5; AX 9 ¶ 7. Respondent asserts he was unaware of federal permitting requirements and accessed NOAA purely for marine weather forecasts. Tr. 169, 199; AX 9 ¶ 6. He maintains that neither the U.S. Coast Guard Documentation Center that documented his vessel nor the Texas Parks and Wildlife department that issued him an "all-water guide license" made him aware of the federal permitting requirements for a headboat or for-hire charter fishing vessel. Tr. 169, 208. Nevertheless, Respondent concedes that the commercial fishing guide he received from the Texas Parks and Wildlife department when he obtained his all-water guide license contains a notification statement that recreational and commercial fishing that takes place more than nine nautical miles off the coast of Texas is in federal waters and subject to rules and regulations that may differ from those in state waters. Tr. 202-03. While the fishing guide also alerts individuals to contact the Gulf of Mexico Fishery Management Council (and provides a telephone number for doing so) to ensure compliance with federal regulations, Respondent did not attempt to contact the Gulf Council. Tr. 203.

Although a "private angler" or "recreational angler" is required to maintain a state fishing license to "land fish" in state and federal waters, a headboat or "for-hire" operator is required to have a federal permit to fish in federal waters for reef fish, like red snapper. Tr. 152-53, 155-57. The distinction is tied to the fact that a private or recreational angler is one who engages in fishing for personal enjoyment whereas a headboat or for-hire charter fisherman is engaged in a business transaction whereby the operator is charging a fee to passengers for fishing services. Tr. 155-57.

Respondent acknowledges that while the U.S. Coast Guard Documentation of his vessel allowed him to take his vessel outside state waters and to travel internationally, it did not address where he could fish or what type of fish he was permitted to catch and retain. Tr. 173-74.

Likewise, while Respondent's U.S. Coast Guard Captain's license certified that he was capable of safely operating a vessel and was legally allowed to operate a for-hire charter fishing vessel carrying passengers, it is distinct from NOAA fishing permits and licenses that "allow that vessel to go out and catch those resources that are licensed or on the permit." Tr. 216.

In 2017, NOAA law enforcement received "numerous complaints" from members of the charter-fishing industry alleging that "for-hire" charter fishing trips were entering federal waters, harvesting red snapper, and landing those snapper state-side in Texas, presumably without a Gulf of Mexico charter reef fish permit that authorizes the catching and harvesting of reef fish, like red snapper. Tr. 20-21. Due to a moratorium on the issuance of new permits in 2017 and thereafter, the only way to obtain such a permit would be through the purchase of a permit that was already issued, the cost of which could be as high as \$20,000. Tr. 22.

After receiving complaints about unpermitted fishing charters, Agent Roberson initiated an investigation into the charter operations he could identify in his area of operation. Tr. 26. To that end, he examined "social media platforms" that historically host such charter operations, as well as "marinas, business cards, [and] things that were out there for advertising charter vessels." Tr. 26. From this collection of charter operations, Agent Roberson delved further to better ascertain which charters may be entering federal waters without a permit to do so, and he developed an operational plan to focus on those charters and to gather evidence about any illegal activity. Tr. 26-27.

Following approval by management, Agent Roberson began to work undercover by posing as a customer interested in chartering fishing trips aboard suspect charter fishing operations. Tr. 27. He came across Respondent's operation through an advertisement on Craigslist and took note of the "12-hour and multi-day trips to reefs and rigs," which, based on his experience, was suggestive of fishing in "areas that hold red snapper" and which are long enough in duration to go further offshore into federal waters. Tr. 29-30; AX 1 at 12. Agent Roberson decided to investigate further by exploring Respondent's business website and, posing as a member of a catering business who wanted to charter a fishing trip for himself and some employees, he contacted Respondent by telephone to inquire about an 8- to 12-hour fishing trip advertised on the website that targeted reef and bottom fish. Tr. 30-34; AX 1 at 13-18; AX 9 ¶ 3. Following this conversation, Agent Roberson felt assured that Respondent was operating a legitimate charter fishing business and that, given the duration of the trip and the type of fish targeted, he was likely fishing in federal waters. Tr. 32-34.

After this conversation, Agent Roberson and a member of his enforcement team conducted a search of Agency records to determine if Respondent⁴ possessed any current charter vessel federal permits for Gulf reef fish in 2017, and they found that he did not. Tr. 34-35; AX 5; AX 9 ¶ 7. Respondent did possess a U.S. Coast Guard license to operate a for-hire charter vessel. Tr. 121-22.

⁴ The search included Respondent individually, his business name, and his vessel, the F/V Paradise. Tr. 34-35.

Agent Roberson then booked a chartered fishing trip with Respondent, for which he paid a deposit of \$1,000, and that trip subsequently took place on October 12, 2017. Tr. 36-37; AX 1 at 2-3, AX 9 ¶ 3. Agent Roberson did not participate in the chartered fishing trip because Agency policy prohibited him from doing so, as he was the “Case Agent” in charge of the investigation. Tr. 38. However, other members of Agent Roberson’s “covert undercover team”—Agents O’Malley and Arnold, and a third Special Agent, Mario Cintron,⁵—participated in the chartered fishing trip. Tr. 37-38, 41-42; AX 1 at 3. Agent Roberson met with the undercover team the morning of and just prior to the start of the fishing trip on October 12, 2017 to review the equipment to be used in the investigation—namely, a GPS data logger that can be “carried covertly on one’s person,” a handheld GPS navigation device, and two digital cameras—and to confirm that each piece of equipment was in working order and accurate. Tr. 39-41, 60-63, 112; AX 2 at 1.

Thereafter, Agents O’Malley, Arnold, and Cintron boarded the F/V Paradise from its boat slip in Port O’Connor. Tr. 63, 112-113; AX 1 at 3. From the rear of the vessel, Agent O’Malley photographed Respondent’s truck, which displayed signage advertising his business and trips of double-digit hours in duration, which in turn suggested to Agent O’Malley that such trips would likely involve “significant distance offshore” and potentially overnight stays aboard the vessel. Tr. 63-65; AX 2 at 4; AX 7, Photo 1521; AX 9 ¶ 2. Respondent, the Captain of the F/V Paradise, was on board the vessel as was a crewmember, a First Mate named Devin. Tr. 66, 168. Agent O’Malley told Respondent that their boss who organized the trip (Agent Roberson) was unable to be there but that they were otherwise prepared to go ahead with the trip and had the funds to pay for the charter. Tr. 66.

Prior to departing, the Agents received a pre-trip safety briefing in the cabin by Devin. Tr. 67, 113. Respondent advised that GPS devices were not permitted on the vessel and advised Devin to “ask them about the snapper,” after which Respondent left the cabin area and returned to the rear deck of the vessel, seemingly out of listening range. Tr. 67-69. Devin then proceeded to explain that the Agents had a choice to either stay in shallow water and catch small snapper or go into deeper water and catch big snapper. Tr. 67, 114. At one point, Agent O’Malley recalled, Devin mentioned the possibility of fishing up to 40 miles offshore. *Id.* The Agents opted for the latter, that is, to travel into deeper water to catch larger snapper. *Id.* Devin forewarned the Agents that “if we were stopped by law enforcement, to make sure and say that we could see the beach,” the implication being that you can see the beach from state waters but not once you have traveled further offshore and entered federal waters. Tr. 68, 114, 117-118. Additionally, while the red snapper season was closed in federal waters, the season to fish for red snapper in state waters remained open. Tr. 71. From this, Agent O’Malley gathered that the plan was to fish in federal waters. Tr. 71. Respondent was aware of the seasonal closure for red snapper in federal waters, or the Gulf EEZ, meaning that the bag and possession limit for red snapper was zero at the time of this incident. Tr. 174; AX 9 ¶ 8.

Following the safety briefing, Devin advised Respondent that “they are good to go on the snapper,” and Respondent rejoined the group. Tr. 67, 69. Respondent’s account of this

⁵ Special Agent Cintron worked for the U.S. Coast Guard Investigative Service at the time of this incident. AX 1 at 3.

exchange, which he asserts he was able to overhear from “up top,” is not all that dissimilar. Tr. 177. According to Respondent, “we [presumably referring to his crewmember/First Mate Devin] communicated to them before we left state water what the deal was” Tr. 176. Respondent acknowledged that Devin likely informed the Agents that fishing for snapper in state waters would yield “little ones” and only after “a lot of culling to get anything decent” but that there are bigger fish in federal waters despite the seasonal closure. Tr. 181, 183. He also agreed that the Agents were told to say they could see the beach or land if they were stopped by law enforcement. Tr. 181. Respondent asserted that Devin informed him that the Agents “want the big snapper, and they don’t care, let’s go get big snapper” and that they were “good to go on the snapper,” with the implication being that “big snapper” is found in deeper federal waters. Tr. 178, 183, 220. Respondent’s position is that it was the Agents’ choice to fish for red snapper in federal waters during the seasonal closure and any responsibility for that decision and getting caught for doing so rested with them (“And if we get caught, they’re on their own. I don’t know nothing about it is basically where I was at.”). Tr. 175-76, 183-84. Nevertheless, Respondent acknowledged that as the operator of the vessel, he bore responsibility for his actions in taking the Agents into federal waters to fish for red snapper during the seasonal closure and that he “knew it was wrong,” but he argued that he felt pressured to do so. Tr. 184.

According to Agent O’Malley, they began trolling for fish in state waters and then continued into federal waters. Tr. 72-74. While trolling, Agent O’Malley observed an oil platform that he confirmed with Devin, who estimated it was “about ten miles offshore,” which was an indication to Agent O’Malley that the F/V Paradise was “about to cross into federal waters” given that state waters end at nine miles offshore. Tr. 74, 77. Agent Arnold also observed passing “several offshore rigs” and being unable “to see the shoreline,” which led him to conclude that the F/V Paradise had entered federal waters. Tr. 116. They continued for “almost another two hours” before ending up at a fishing area marked on nautical charts as a “fish haven . . . approximately 21.2 miles offshore.” Tr. 74-75; AX 1 at 3. Respondent advised that they were in “about 106 feet of water” at which time Agents O’Malley and Arnold dropped their fishing lines to a depth of 94 to 96 feet, per the “counters on the reels.” Tr. 75-77. This water depth was further confirmation to Agent O’Malley that they were in federal waters, because the state water boundary of nine miles offshore corresponds to just over 60 feet to 80 feet in depth. Tr. 77, 179.

As Agents O’Malley and Arnold quickly began catching red snapper,⁶ Devin assisted them by removing the caught fish from the hook, placing them in the fish box, and replacing the fishing lines with bait so that they could continue fishing. Tr. 76, 117. They caught and kept 13 red snapper while fishing in this part of the “fish haven,” which Agent O’Malley documented by taking a photo of all the red snapper that they caught and that had been placed in the fishing box. Tr. 76, 79, 88-89; AX 1 at 4, 41-42; AX 7, photo 1526; AX 8. While the retention limit for red snapper in state waters was four fish per person, that is, a maximum of 12 fish to keep if all three Agents were fishing, the federal limit was zero. Tr. 79-80, 117-18; AX 1 at 4. They continued to fish in a second fishing spot also located in the “fish haven,” and although they “immediately started catching fish,” they did not keep them. Tr. 80.

⁶ Agent Cintron was not feeling well so he remained in the cabin area of the F/V Paradise, and he did not fish. Tr. 115-18.

Throughout the fishing trip, Respondent was the sole operator of the F/V Paradise. Tr. 81. Agent O'Malley observed that the F/V Paradise was equipped with a "Lowrance Chartplotter type device" that could provide the operator with GPS, navigational charts, and sonar capabilities. Tr. 81-82. All of the equipment to fish—such as, rods, natural bait in the form of ribbonfish and sardines, and hooks—were supplied by Respondent. Tr. 77-78, 116-17, 195. The type of hook used to catch the red snapper was a J-hook, which "is a type that is not permitted for fishing for reef fish with natural bait." Tr. 77-78, 86-87, 119; AX 1 at 4; AX 3 at 2, 5-6; AX 7, photo 3104; AX 8; AX 9 ¶ 16. J-hooks, by design, tend to set in the stomach or esophagus of a fish when it is hooked, which reduces the likelihood of survival if the fish is released back into the water. Tr. 141. Circle hooks, on the other hand, are designed such that the "hook is pointed back towards the shaft" and is therefore much less likely to get caught inside of the fish, thereby increasing the chances of survival if the fish is released back into the water. Tr. 142. According to Respondent, he has both J-hooks and circle hooks on his vessel, and he does not know why J-hooks were used when Devin prepared the rods for fishing. Tr. 186-88.

At the conclusion of the fishing trip, the catch was "laid out on a tarp" for photographs of the fish with the Agents. Tr. 81. Agent O'Malley then paid Respondent \$1,500 for the balance owed for the chartered fishing trip, including a gratuity. Tr. 81. The total trip cost, including the previous \$1,000 deposit, was \$2,500. Tr. 36, 81, 194.

Following the fishing trip, Agent Roberson reunited with his team to discuss the trip, and during that meeting Agent O'Malley shared his belief that the F/V Paradise had entered federal waters. Tr. 43, 82. Agent Roberson recalled that Agent O'Malley mentioned that he had observed a rig that they passed in the water during the fishing trip and that [Devin] advised that the rig was approximately ten miles from shore. Tr. 43. He also recalled Agent O'Malley noting that they had traveled a significant amount of time in an offshore direction, after which he was unable to see land and that he suspected they were in federal waters when they harvested red snapper. Tr. 43.

Agent O'Malley subsequently downloaded and plotted all the data he collected from the GPS tracking and photography equipment he used to document their fishing trip on the F/V Paradise on October 12, 2017. Tr. 97; AX 3. Specifically, he plotted the track of the F/V Paradise throughout the fishing trip and marked the locations at which they caught and retained red snapper. Tr. 89-98; AX 6-AX 8. In so doing, Agent O'Malley confirmed that all the red snapper that they caught and retained occurred within the "fish haven" area that is "located approximately 21.2 miles offshore in federal waters." Tr. 98; AX 6-AX 8. Additionally, and as a means of comparison, Agent O'Malley requested that an investigative analyst in his office, who has access to different computer software, plot the data he collected. Tr. 97. Agent O'Malley then compared both accounts of the plotted activity and found them to be the same. Tr. 97-98. Agent O'Malley prepared a report documenting his observations aboard the F/V Paradise on October 12, 2017 and the data he gathered from the trip and turned over all his materials to Agent Roberson. Agent Roberson then processed the evidence that was gathered by his team during the fishing trip—evidence that collectively established that the F/V Paradise fished with prohibited gear and harvested red snapper during the closed season while in federal waters—and he prepared his investigative reports about the incident. Tr. 43-45; AX 1-AX 2.

Agent Roberson's investigative reports and supporting evidence was then forwarded to NOAA enforcement for prosecutorial consideration. Tr. 43.

The Gulf reef fish fishery is managed jointly between NMFS and the Gulf council, which is one of eight regional fishing management councils that develop recommendations for NMFS to implement. Tr. 127. The Gulf council is comprised of fishermen in the commercial, recreational, and for-hire sectors, as well as academics and occasionally representatives from non-governmental organizations. Tr. 128. With regard to the red snapper species, it is considered "highly desirable" and has been "fished for a long time," so much so that the stock was considered depleted and "overfished," necessitating a rebuilding plan. Tr. 130. As a consequence, NMFS has been "working on rebuilding this stock for a long time." Tr. 130. As the stock began to recover, NMFS adjusted the amount of fish permitted to be harvested by fishermen by setting "quotas," or allowable catch limits, that they manage to ensure that catch limits are not exceeded. Tr. 131.

As it relates to the recreational fishing sector, NMFS imposes "size limits" and "bag limits" and establishes seasons in which red snapper is "open" and available to be fished. Tr. 131-32. The size limitations are designed to "protect the stock from a reproduction standpoint" and the bag limit and season restrictions are designed to "constrain the fishing effort" and "limit how many fish get caught" and brought "into the dock." Tr. 132. The length of the "season" can also change depending upon the state of stock rebuilding. Tr. 133.

Another stock management tool that NMFS uses relates to permit requirements. Tr. 133. Here, and at the urging of the Gulf fishing management council,⁷ NMFS implemented a "limited access" system whereby the number of permits that allow fishing for red snapper was limited. Tr. 134. Such "limited access" means that once a certain number of permits is issued by NMFS, no further permits will be issued. Tr. 134. Consequently, a headboat (also referred to as "for-hire") or charter fisherman who does not have such a permit may enter the fishery by purchasing a permit from one who does and then transferring that permit to the headboat or charter fisherman's vessel. Tr. 134-35. Certain conservation-related requirements are attached to these permits, including "a captain and crew bag limit prohibition" that limits the number of fish allowed to be caught per person aboard the vessel, excluding the captain and crewmember. Tr. 136-37. Another conservation-related limitation deals with the impacts a federal permit has on the permissibility to fish in state and/or federal waters during the respective open and closed seasons. Specifically, if a headboat or charter fisherman has this federal permit for their vessel, then once the federal season is closed, no fishing is permitted in federal or state waters even if the season remains open in state waters. Tr. 138-39.

These federal permits have been in existence for "close to 25 years." Tr. 140. Nevertheless, the NMFS regional office that covers the Gulf of Mexico fishery⁸ will occasionally receive telephone calls from fishermen and for-hire operators who are inquiring about the

⁷ There are eight regional fishing management councils, of which the Gulf council is one, that develop recommendations for NMFS to implement. Tr. 127.

⁸ Specifically, the NMFS Southeast Regional Office, Sustainable Fisheries Division, Gulf of Mexico Branch. Tr. 126, 140.

process and requirements to enter the fishery. Tr. 140. In response, information about the federal permitting requirements and limited access is communicated to those who inquire. Tr. 140. Additionally, NMFS communicates any regulatory changes to the public through, for example, fishery bulletins and website postings. Tr. 150. NMFS also has web pages dedicated to the subject of permit requirements with a “frequently asked questions” page to obtain information. Tr. 150. Aside from NMFS fishery information, the Gulf council also provides information to the community about the fishing industry. Tr. 151-52.

IV. LIABILITY

a. Principles of Law Regarding Liability

To prevail on its claim that Respondent violated the Magnuson Stevens Act and 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*, Docket No. SE010091FM, 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*, Docket No. NE970052FM/V, 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)).

Violations of the Act are strict liability offenses, and, therefore, state of mind is irrelevant in determining whether a violation occurred. *Rodier*, Docket No. NE1603827, 2019 WL 7168050, at *5 (NOAA Dec. 17, 2019) (citing *Accursio Alba*, 2 O.R.W. 425, 673 (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*, Docket No. SE0801361FM, 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.”)

The 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 Act to include, inter alia, “any individual, . . . corporation, partnership, association, or other entity” 16 U.S.C. § 1802(36).

Implementing regulations make it “unlawful for any person to . . . [e]ngage in an activity for which a valid Federal permit, license, or endorsement is required under this part without such permit, license, or endorsement.” 50 C.F.R. § 622.13(a). In particular, “[f]or a person aboard a vessel that is operating as a charter vessel or headboat to fish for or possess Gulf reef fish, in or from the EEZ, a valid charter vessel/headboat permit for Gulf reef fish must have been issued to the vessel and must be on board” 50 C.F.R. § 622.20(b). The term “Gulf reef fish” includes Red snapper. 50 C.F.R. § 622.2 & tbl.3 of app. A to pt. 622. The term “EEZ” refers to

the Exclusive Economic Zone and is that area adjacent to the United States that encompasses all waters from the seaward boundary of each of the coastal states to a line 200 nautical miles from the baseline from which the territorial sea of the United States is measured. 50 C.F.R. § 600.10. The term “Charter vessel” means a vessel less than 100 gross tons (90.8 mt) that is subject to the requirements of the USCG to carry six or fewer passengers for hire and that engages in charter fishing at any time during the calendar year. 50 C.F.R. § 622.2. “Headboat” means a vessel that holds a valid Certificate of Inspection (COI) issued by the USCG to carry more than six passengers for hire. 50 C.F.R. § 622.2. 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. 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.” 50 C.F.R. § 600.10.

Further, regulations make it

“unlawful for any person to . . . [f]ish in violation of the prohibitions, restrictions, and requirements applicable to seasonal and/or area closures, including but not limited to: Prohibition of all fishing, gear restrictions, restrictions on take or retention of fish, fish release requirements, and restrictions on use of an anchor or grapple, as specified in this part or as may be specified under this part.”

50 C.F.R. § 622.13(n). “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” 50 C.F.R. § 622.34(b). Specific to 2017, NOAA reopened the recreational season for red snapper in the Gulf EEZ on weekends from June 16, 2017 through September 4, 2017 for private recreational fishers. For recreational harvest by for-hire fishing vessels, the season closed July 20, 2017. Once closed, the bag and possession limit for red snapper is zero. *See Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Revised 2017 Recreational Fishing Season for Red Snapper Private Angling Component in the Gulf of Mexico*, 82 Fed. Reg. 27777 (June 19, 2017) (Temporary Rule); *see also* AX 1 at 32-36.

Additionally, regulations make it “unlawful for any person to . . . [u]se or possess prohibited gear or methods or possess fish in association with possession or use of prohibited gear, as specified in this part.” 50 C.F.R. § 622.13(l). Specifically, “[f]or a person on board a vessel to fish for Gulf reef fish in the Gulf EEZ, the vessel must possess on board and such person must use the gear as specified in paragraphs (a) . . . of this section,” which provides for the requirement to use “non-stainless steel circle hooks . . . when fishing with natural baits” 50 C.F.R. § 622.30 (a). “Circle hook” means a fishing hook designed and manufactured so that the point is turned perpendicularly back to the shank to form a generally circular, or oval, shape. 50 C.F.R. § 622.2.

b. Arguments Regarding Liability and Analysis

In the Agency’s Initial Post-Hearing Brief (“Agency Br.”), it argues that there is no dispute as to the facts supporting each of the charged violations in this case. Agency Br. at 8.

The Agency recounts that Respondent acknowledged taking the Agents on a for-hire, or chartered, fishing trip into federal waters without a permit, specifically to the “fish haven” in the EEZ, where they harvested 13 red snapper during the seasonal closure. Agency Br. at 8-9. Further, and contrary to Respondent’s arguments, the Agency contends that Respondent bears responsibility for the violative conduct that took place aboard the F/V Paradise that he solely owned and operated. Agency Br. at 8-9. Specifically, the Agency points out that

[Respondent] alone drove the boat and chose the fish haven 21.2 miles offshore. Tr. 168; *see also* AX 9 ¶ 12. He supplied the fishing rods, bait, hooks, ice, and coolers. Tr. 194-95. His employee [Devin] baited the hooks, gave fishing instructions, and dehooked the fish. Tr. 194, 76. He steadied the boat over the fish haven so the agents could keep catching red snapper. Tr. 96. But for these acts, there would be no harvest.

Agency Br. at 9. Moreover, citing to regulatory authority and caselaw, the Agency asserts that “compliance with catch limits and other requirements” rests with vessel owners and operators and that it is the vessel’s captain who is responsible for operation of the vessel and complying with bag and possession limits, not the passengers. Agency Br. at 9-10. As to the gear violations, the Agency notes that “[a]lthough Respondent concedes that J hooks were on board and fished with, he places the blame on Devin,” again attempting to shift blame for operations on board the vessel for which he was ultimately responsible, if not directly then vicariously. Agency Br. at 11.

With regard to Respondent’s claim that he was entrapped by the Agents who operated undercover while aboard his vessel on October 12, 2017, the Agency argues that such a criminal defense is inapplicable to this administrative civil enforcement matter and that even if such a defense were applicable, Respondent has failed to establish the elements of entrapment, namely, government inducement of the crime and a lack of predisposition on the part of the respondent. Agency Br. at 11-12. To this point, the Agency, citing caselaw, argues that inducement involves government overreach and conduct that is “sufficiently excessive” and “extreme” and “requires more than mere solicitation by the government.” Agency Br. at 12 (citing *United States v. Wright*, 333 Fed. App’x 772, 776 (4th Cir. 2009)). Reviewing the factual evidence presented at hearing, the Agency recounts that it was Respondent who publicly advertised chartered fishing trips, who piloted the vessel “twenty miles offshore” into federal waters to fish, who chose the fishing spot, the “fish haven,” in which to fish for red snapper, and who provided all the fishing gear and assistance to fish throughout the trip. Agency Br. at 12. Further, the Agency contends that the corroborating and “credible and unbiased” testimony of the Agents should be given greater weight and credibility than that of Respondent, who “has an incentive to avoid a civil penalty” and whose account was inconsistent. Agency Br. at 12-13. Lastly, the Agency asserts “Respondent was predisposed to commit the violations” as evidenced by “his advertisements for offshore, multiday trips for deep water species, Tr. 29-31, 64-65, his familiarity with the distant fish haven, Tr. 96, his forbidding GPS devices on his vessel, Tr. 67, and his deckhand’s instruction to lie to law enforcement (which Respondent heard). Tr. 181.” Agency Br. at 13. To add further support for such predisposition, the Agency references an incident on July 6, 2019 that Respondent acknowledged during the hearing whereby, after having been served with the

NOVA in this matter and put on notice of the alleged violations of law for his actions, he subsequently took passengers for a chartered fishing trip aboard the F/V Paradise to the “fish haven” to fish for red snapper and was boarded by Texas law enforcement. Agency Br. at 13 (citing Tr. 209-212).

In Respondent’s Initial Post-Hearing Brief (“Resp’t’s Br.”),⁹ he argues that this enforcement action is “entirely based on a sting operation which can be proven to be ‘entrapment,’” and he asserts the Agents “continually tried to persuade [him] to [] commit several crimes.” Resp’t’s Br. From an evidentiary standpoint, Respondent notes that statements attributed to Devin are hearsay, as “Devin was not questioned by the attorneys or judge of this case,” and he argues that such statements are inaccurate. Resp’t’s Br. Lastly, he notes that it is ironic that, while Respondent has been charged with these violations, the GPS data the Agents relied upon show that they “exceeded the speeding laws” in connection with this incident. Resp’t’s Br.

In the Agency Reply Brief (“Reply Br.”), the Agency argues that “the facts establishing liability for three violations remain uncontested” and that Respondent has not presented “any legitimate defenses or reasons that the assessed penalty is unjust.” Reply Br. at 1. With regard to Respondent’s entrapment allegations, the Agency reiterates that “entrapment is not available as a defense in this forum, but that if it were, Respondent cannot meet its elements.” Reply Br. at 1. The Agency challenges Respondent’s assertion that he was continually persuaded to commit wrongdoing by pointing out that if such assertions were true, “it would make no sense for Respondent and Devin to offer the agents a better fishing experience for bigger snapper in deeper (federal) waters.” Reply Br. at 2 (citing Tr. 67, 113, 178, 183). The Agency notes that Respondent’s claims, while improbable, are unsupported and self-serving given Respondent’s “incentive to reduce his exposure to a civil penalty.” Reply Br. at 2. In contrast, the Agency contends that the testimony offered by Agent O’Malley—who has “twenty-six years of law enforcement experience, and [is] practiced in conducting undercover operations” and who lacks any bias or motive to testify untruthfully—was “detailed, candid testimony corroborated by photographs, contemporaneous written reports, and the eyewitness testimony of Special Agent Arnold.” Reply Br. at 2 (citing Tr. 57-59).

With regard to Respondent’s hearsay arguments as to statements attributed to Devin, the Agency notes that “[h]earsay is not inadmissible in this proceeding . . . and Devin’s actions and statements within the scope of his employment as First Mate are relevant and probative to Respondent’s liability and culpability.” Reply Br. at 2 (citing 15 C.F.R. § 904.251(a)(2)). Moreover, the Agency questions “what statements by Devin, if any, Respondent contests, particularly because he testified that he heard them when questioned by the Court.” Reply Br. at 2 (citing Tr. 181, 183-84). Lastly, the Agency notes that Respondent could have called Devin as a witness to testify at the evidentiary hearing if he had wanted to do so. Reply Br. at 2.

As to Respondent’s claims that the Agents exceeded speed limitations while en route to the F/V Paradise’s location, the Agency contends that “[n]either the agents’ driving speed nor the

⁹ Respondent’s Initial Post-Hearing Brief consists of a single page. Thus, there is no page number reference when it is cited in this decision.

applicable speed limit are facts in evidence, nor are they relevant to any claim or defense at issue in this action.” Reply Br. at 3.

c. Analysis of Liability

My review of the uncontested facts in this case, including facts derived from the credible testimony and documentary evidence presented, and application of the pertinent provisions of law lead me to conclude that Respondent is liable for the charged violations of federal law as outlined in Counts 1 through 3. My analysis follows.

As detailed above, the Act and its implementing regulations set out certain prohibitions that apply to the facts of this case. First, it is unlawful to operate a charter vessel or headboat to fish for Gulf reef fish, which includes red snapper, in the EEZ without a valid federal permit. Second, it is unlawful to possess red snapper from the EEZ during the seasonal closure of the recreational sector for red snapper. Third, it is unlawful to fish for red snapper in the EEZ using prohibited gear, namely something other than non-stainless steel circle hooks when fishing with natural bait.

Respondent concedes that he operated the for-hire charter vessel, the F/V Paradise, on October 12, 2017 to fish for red snapper without a federal permit and that he (through his business d/b/a Texas Blue Water Fishing) earned \$2,500 for his charter fishing services on this date. He acknowledges that the season was closed to red snapper in federal waters at this time, thus it was illegal to possess red snapper. Nevertheless, 13 red snapper were harvested during this for-hire charter fishing trip from the “fish haven” area, a known fishing area that is marked on nautical charts and that is roughly 21.2 miles offshore, well into federal waters. Respondent does not dispute and the evidence clearly establishes that these 13 red snapper were caught in federal waters, i.e., in the EEZ. Respondent also acknowledges that prohibited gear—that is, J-hooks rather than non-stainless steel circle hooks—were used to fish for these red snapper with natural bait.

In defense to liability, Respondent argues that statements attributed to his sole crewmember and First Mate, Devin, are hearsay and are inaccurate. Citing to the procedural regulations applicable to this case found at 15 C.F.R. § 904.251(a)(2), the Agency notes in its response that hearsay is admissible in these proceedings. While the Agency’s reference is accurate, the reliability of evidence remains an appropriate consideration when evaluating evidence presented at hearing and when determining what amount of weight, if any, is to be attributed to a piece of evidence. Indeed, the same cited regulatory provision provides some elaboration on this point and states that “[a]ll evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing.” 15 C.F.R. § 904.251(a)(2).

With these considerations in mind, I find there to be no material conflicts regarding the statements attributed to Devin and no reason to question the reliability of such evidence, particularly as presented by Agency witnesses. Although Respondent argues that the statements attributed to Devin by the testimony of Agency witnesses present an inaccurate accounting of what transpired, Respondent’s own testimony about what he believes was communicated to the

Agents through Devin corroborated the salient points. Notably, Respondent conceded that, through Devin, the Agents were informed that bigger red snapper would be found in deeper federal waters even though the season was closed to such fishing and that when the Agents opted to fish for these bigger red snapper, Respondent was advised by Devin of their choice, stating they were “good to go on the snapper.” Respondent also conceded that the Agents were advised by Devin to say they could see the beach or land if they were stopped by law enforcement, which would be indicative of a location in shallower state waters versus federal waters where land would not be visible. Respondent also acknowledged that he knew his actions were wrong and that, as the vessel captain and operator, he bore ultimate responsibility. Further, the testimony presented by Agents O’Malley and Arnold regarding their conversations with Devin (that apparently Respondent overheard despite being “up top” and seemingly out of earshot when the conversations took place) was credible. As the Agency noted, their testimony was consistent, detailed, and supported by other evidence in the record, including a supplemental investigative report by Agent O’Malley (AX 3) that was prepared within two weeks of the incident. Consequently, I do not find Respondent’s hearsay argument and claims of inaccuracy persuasive.

As to the gear violation, that is the use of J-hooks rather than non-stainless steel circle hooks when fishing with natural bait, the documentary evidence supports and Respondent acknowledged that the rod/reel fishing equipment used during this trip to catch the harvested red snapper was fitted with J-hooks even though circle hooks were allegedly available on the vessel. At the hearing he noted that First Mate Devin prepared the fishing equipment for the Agents’ use and that he did not know why J-hooks were used. Nevertheless, as the owner and Captain of the vessel and the employer of Devin, Respondent bore responsibility for the chartered fishing services he provided to paying clients, including responsibility for the fishing equipment that he provided during such trips. Respondent’s lack of explanation for the use of prohibited gear used during this incident does not diminish his responsibility for the violative conduct.

Respondent argues that this enforcement action stemmed from a “sting operation” that amounts to “entrapment” and that he was continually persuaded to commit several crimes by the Agents. The Agency set forth its arguments in opposition to such claims, which I find convincing and supported by the evidentiary record. As a threshold matter, the Agency notes that “[e]ntrapment is a criminal defense that administrative courts have declined to extend to civil penalty proceedings.” Agency Br. at 12 (citing *TOH, Inc.*, 2015 WL 13815670, at *11-12 (HHS App. 2015) (entrapment defense not available in federal civil litigations); *A-O Broad. Corp.*, 20 FCC Rcd. 756, 760 (Jan. 3, 2005) (same); *but see Anthony*, 1978 WL 17876, at *3 (Interior App. 1978)). Setting aside the issue as to applicability of an entrapment defense to an administrative civil enforcement action, the facts of this case do not otherwise support and establish such a defense.

Entrapment requires a defendant to prove “‘overbearing and outrageous conduct’ on the Government’s part.” *United States v. Macedo-Flores*, 788 F.3d 181, 187 (5th Cir. 2015) (quoting *United States v. Stephens*, 717 F.3d 440, 446 (5th Cir. 2013)). “To establish the defense of true entrapment, a defendant must make a prima facie showing of (1) his lack of disposition to commit the offense and (2) some governmental involvement and inducement more substantial than simply providing an opportunity to commit the offense.” *Id.* See also *United States v. Bradfield*, 113 F.3d 515, 521 (5th Cir. 1997) (“The critical determination in an entrapment

defense is whether criminal intent originated with the defendant or with the government agents.”). “Many factors may indicate a defendant’s predisposition, including ‘a showing of a defendant’s desire for profit, his eagerness to participate in the transaction, his ready response to the government’s inducement offer, or his demonstrated knowledge or experience in the criminal activity under investigation.’” *United States v. Chavez*, 119 F.3d 342, 346 (5th Cir. 1997) (quoting *United States v. Madrigal*, 43 F.3d 1367, 1370 (10th Cir. 1994)). Determining predisposition

focuses upon whether the defendant was an ‘unwary innocent’ or, instead, an ‘unwary criminal’ who readily availed himself of the opportunity to perpetrate the crime. A lack of predisposition can appear from, for example, lack of prior interest or experience related to the crime, significant hesitation or unwillingness, or attempts to return discussion to lawful conduct.

Macedo-Flores, 788 F.3d at 187-88 (citations omitted). In any event, a defendant cannot put forth an entrapment defense where he “promptly avails himself of a criminal opportunity.” *Id.* at 188.

The facts of this case do not support Respondent’s claim of entrapment. The violative conduct at issue in this case originated with Respondent, not the Agency. The facts reveal that at the time of this incident Respondent maintained a for-hire charter fishing business, Texas Blue Water Fishing, that he advertised through a variety of means including Craigslist. This advertising highlighted fishing trips designed for particular species, such as advertising “bottom fishing” trips, a term that is known to include the popular red snapper species. He also advertised his business through vehicle signage, which identified charter fishing trips of double-digit hours in duration, suggestive of the potential for overnight stays aboard the fishing vessel and significant travel offshore. Respondent’s advertising included the typical fee he charged for his charter fishing services to which certain costs, such as fuel, were added. It was in response to Respondent’s business advertising that this for-hire charter fishing trip was secured, a trip for which Respondent profited financially through the fees he charged and the fuel costs he recovered.

As the Agency also pointed out, Respondent alone piloted the F/V Paradise vessel as its Captain and he alone chose the fishing spot, the “fish haven,” that was over 21 miles offshore and well into federal waters, to fish for red snapper at a time when the season was closed to such fishing and when he lacked the federal permit that might have otherwise authorized such fishing. While Respondent has claimed he was pressured to fish for bigger red snapper in deeper federal waters, the uncontested facts do not support such a claim. During the evidentiary hearing Respondent acknowledged that “we” communicated to the Agents “what the deal was” before leaving state waters. He acknowledged that his employee, First Mate Devin, would have likely informed the Agents that staying in state waters would not yield decent catch and that bigger red snapper are found in deeper federal waters. Indeed, the testimony of Agents O’Malley and Arnold confirm as much. After being presented with this choice and opting for the seemingly better alternative, that is, to fish for bigger snapper in federal waters, Devin informed Respondent that the Agents were “good to go on the snapper.” Notably, this choice that was

presented to the Agents originated from Respondent through his First Mate, not from the Agency. Respondent also agreed that the Agents were instructed to say that they could see the beach, or land, if stopped by law enforcement, effectively advising the Agents to lie about their actual location when fishing for (and catching) red snapper in offshore waters where land was not visible. To impose such an instruction demonstrates knowledge and experience with state and federal boundaries on the water and further supports the lack of innocence on the part of Respondent.

The facts of this case do not demonstrate that Respondent was pressured to do anything. Nor do the facts reveal any hesitancy or unwillingness on the part of Respondent to engage in the violative conduct he committed. His allegation at hearing—that he felt pressured by Devin’s communication to him that the Agents “want the big snapper, and they don’t care, let’s go get big snapper” and that they were “good to go on the snapper”—is unavailing. *See* Tr. 178, 183, 220. Respondent owned this charter fishing business. He owned and was sole Captain of the vessel, the F/V Paradise, that he used for that business. He was the employer of Devin, his First Mate on the vessel. Respondent was the one in control throughout the fishing trip and the one, as he acknowledged, who bore responsibility for taking the Agents into federal waters to fish for red snapper without a permit and during the seasonal closure. The fact that government law enforcement agents booked and participated in this charter fishing trip merely provided an opportunity for any wrongdoing to be detected, not to be caused. Consequently, even if such a defense had applicability to administrative civil enforcement proceedings, I agree with the Agency that the facts of this case do not establish the elements of an entrapment defense.

The substantial and uncontroverted evidence presented in this case establishes that Respondent is liable for the charged violations set out in Counts 1 through 3 of the NOVA dated June 18, 2019. Having determined that liability is established, I turn next to my review and assessment of any monetary penalty to be imposed for the violative conduct.

V. PENALTY

a. Principles of Law Regarding Civil Penalty

Having determined that Respondent is liable for the charged violations, I must next determine the appropriate civil monetary penalty to impose, if any, for the violations. To this end, I have considered 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).

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 \$195,047 for each violation. *See* 16 U.S.C. § 1858(a); The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410 (as amended by the Debt Collection and Improvement Act of 1996, Pub. L. 104-134); 15 C.F.R. § 6.4(f)(15). *See also* Civil Monetary Penalty Adjustments for Inflation, 86 Fed. Reg. 1764 (Jan. 11, 2021) (Final Rule). No penalty assessment may be made unless the alleged violator is given notice and opportunity for a hearing conducted in accordance with the Administrative Procedure Act. 16 U.S.C. § 1858(a) (citing 5 U.S.C. § 554).

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. pt. 904, provide that

[f]actors 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 I am not “required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document.” *Nguyen*, 2012 WL 1497024, at *8; *see also* 15 C.F.R. § 904.204(m). I 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 urges that I impose the \$24,000 penalty assessed in the NOVA because it “is reasonable and necessary to convey to Respondent and other fishermen the gravity of the infractions.” Agency Br. at 14. Noting that the red snapper fishery “has been rebuilding for over thirty years,” the Agency argues that Respondent’s actions, which violate “core protections” and “essential elements of the rebuilding plan,”¹⁰ serve to “jeopardize the recovery of the stock.” Agency Br. at 14.

¹⁰ Specifically, the Agency refers to “a limited access permit for charter fishermen, permit requirements that apply even in state waters, seasonal closures, and a circle hook requirement to reduce post-release mortality” as essential elements of the rebuilding plan. Agency Br. at 14 (citing Tr. 131-34, 137-39, 141-42).

The Agency argues that “Respondent’s non-permitted fishing undermines the sacrifices made by permitted fishermen to protect the red snapper stock and gives him an unfair advantage because he can offer lower prices and more fishing days[,]” and it asserts that Respondent’s violative behavior was “continuous.” Agency Br. at 14. This, coupled with the numerous complaints the Agency receives, “underscore[s] the enduring nature of the problem” and supports the necessity of assessing a penalty that will serve as a general deterrence. Agency Br. at 14. Further, by violating the seasonal closure for red snapper, a management tool that serves to manage the quantity of harvested red snapper and maximize the fishing season, Respondent (and others like him who disregard such closures) compromised the rebuilding of the stock and NMFS monitoring efforts and made meaningless the sacrifices made by legitimate charter fishermen. Agency Br. at 15. As to the use of prohibited J hooks when using natural bait, the Agency argues that Respondent’s actions pose greater danger to fish because of the damage done to fish when such hooks are swallowed that, in turn, “increase the likelihood that the fish will die even if released.” Agency Br. at 15 (citing Tr. 140-42). Recounting that Respondent took the Agents to “a second fishing spot for catch and release fishing,” the Agency argues that “there is a greater probability that these fish died even though they were released.” Agency Br. at 15 (citing Tr. 79-80).

The Agency contends that Respondent committed these violations “intentionally.” Agency Br. at 15. The Agency observes that Respondent acknowledged that the federal red snapper season was closed at the time of this violation but he entered federal waters to fish anyway, and that he did not dispute that J-hooks, rather than circle hooks, were used during the fishing trip. The Agency asserts this “was emblematic of Respondent’s conscious disregard for the conservation measures in place to protect the stock.” Agency Br. at 15, 18 (citing Tr. 174, 186-87).

Noting the wealth of information available to fishermen in such a regulated industry,¹¹ the fact that “Gulf reef fish charter permits have been required for more than twenty-five years,” and the fact that Respondent has operated “full-time in the industry for more than ten years, and fishing for Gulf red snapper all his life,” the Agency asserts that Respondent’s claims of ignorance regarding permit requirements is “simply not plausible.” Agency Br. at 16 (citing Tr. 133-35, 140, 196-97). Moreover, citing to specific instances during the evidentiary hearing in which Respondent offered inconsistent testimony, the Agency urges that I should not find Respondent credible. Agency Br. at 16-17 (citing Tr. 105, 163, 183, 210). If not intentionally, the Agency asserts Respondent “was at a minimum willfully ignorant.” Agency Br. at 17. In support, the Agency points to a Texas fishing guidebook that Respondent acknowledged receiving, which warns that “fishing more than nine nautical miles off the coast of Texas is in federal waters and subject to [] rules and regulations that may differ from those in state waters’ and to contact the Gulf Council to ensure . . . compliance,” which Respondent failed to do. Agency Br. at 17 (citing Tr. 202-03).

¹¹ The Agency identifies, as examples, the bulletins issued by email and available on websites by NMFS and the Gulf Council, as well as “myriad websites by NOAA, the Council, the Gulf States, non-profit organizations, and fishing associations” that are “readily available to anyone with a computer or a phone, both of which Respondent has.” Agency Br. at 16 (citing Tr. 22, 149-50, 198-99).

The Agency also argues that “Respondent benefitted financially from his failure to obtain a permit.” Agency Br. at 18. Noting that Respondent earned \$2,500 for the fishing trip in this case and that “he avoided the significant cost of up to \$20,000 for the permit” he never obtained, the Agency argues that “the penalty should be adequate to disgorge these gains, particularly because there are unknown additional profits and avoided costs from his operations throughout the years.” Agency Br. at 18 (citing Tr. 22, 194)

Lastly, the Agency notes that Respondent did not provide financial information in support of an inability to pay and should therefore be presumed able to pay the penalty. Agency Br. at 18-19 (citing 15 C.F.R. § 904.108(c) and Tr. 214).

With regard to penalty-related arguments, Respondent contends that “comparable NOAA cases are fined far less than [his].” Resp’t’s Br. Further, he asserts that he lost his business as a consequence of this enforcement action and has been unsuccessful in obtaining unemployment assistance or steady work, instead having to rely on “as-needed” work he performs for a family friend. Resp’t’s Br.

In its reply, the Agency contends that Respondent’s nonspecific claims about comparable NOAA cases involving lower fines are unavailing since there was nothing exceptional in the way the Agency investigated and charged this case and that any proposed penalty was developed in accordance with its Penalty Policy, “taking into account the unique facts, the gravity of the offenses, and Respondent’s culpability.” Reply Br. at 3. With regard to Respondent’s claims of financial hardship, the Agency counters that such claims are “not proper at this stage” given that Respondent failed to submit financial information to the Agency prior to hearing and thus any argument regarding an inability to pay a proposed penalty has been waived. Reply Br. at 3. Moreover, the Agency questions Respondent’s assertion that he lost his business due to this incident “because he was still operating charters as recently as July 6, 2019.” Reply Br. at 3 (citing Tr. 209-12).

c. Analysis of Civil Penalty and Assessment

i. Nature, Circumstances, Extent, and Gravity of the Alleged Violation, and Respondent’s Culpability

I have found the Agency’s arguments persuasive with regard to my review of these penalty factors. The evidence presented demonstrates that the red snapper stock that was once considered overfished and depleted has been in a state of rebuilding for quite some time. In this regard, various stock management tools have been implemented to facilitate restoration of the stock. Some of these tools are those which Respondent violated, thereby compromising such rebuilding efforts by NMFS in conjunction with the Gulf council. Specifically, the permit requirements that have been implemented as part of the limited access system to fish for Gulf reef fish (which includes red snapper) is a significant tool and one that the Gulf council urged NMFS to implement. By disregarding the limited access permit requirements, Respondent not only compromised the red snapper stock rebuilding efforts of NMFS and the Gulf council but

also minimized the efforts and financial sacrifices of those law-abiding charter fishing operations that appropriately obtained and paid for a costly federal permit.

At the hearing, Respondent appeared to argue in his defense that he was unaware of federal permitting requirements and that the U.S. Coast Guard— from which he obtained his vessel documentation and Captain’s license—failed to notify him of such requirements. I find this argument unconvincing. These federal permits have been in existence for nearly 25 years with ample information about them communicated through fishery bulletins, website postings, and the local Gulf council. And it is evident from the evidence presented at the hearing that the charter fishing industry, as a whole, is well aware of these requirements because complaints from that industry about non-compliance gave rise to the Agency’s investigation into this matter. The U.S. Coast Guard does not issue these federal permits and Respondent’s attempt to shift the responsibility of knowing applicable legal requirements in the highly regulated fishing industry in which he chose to operate is unavailing. Moreover, as revealed through testimony, the all water guide license that Respondent obtained from the Texas Parks and Wildlife department put him on notice of the application of different rules and regulations when operating in federal waters, which was clearly defined as nine nautical miles off the coast of Texas, and further directs individuals to contact the Gulf council at a specified telephone number, which Respondent failed to do. The evidence presented leads me to conclude that Respondent’s actions were at a minimum reckless if not intentional.

Another critical stock management tool that Respondent disregarded was the seasonal closure of red snapper in the EEZ. The length of the season during which red snapper fishing is allowed can vary depending upon the status of the rebuilding of the stock. This season limitation is designed to constrain the fishing effort and is used with other tools like size and bag limits that strive to limit the amount of fish caught. At the time of this incident, the season for the recreational sector for red snapper was closed, and the possession limit was zero. Respondent knew the season was closed and that it was illegal to harvest red snapper from federal waters, but he engaged in the unlawful conduct anyway. His actions were clearly deliberate and thus intentional.

Lastly, Respondent failed to take adequate care to ensure that the rod/reel equipment he furnished his paying clients during this incident were outfitted with the appropriate hooks for natural bait, namely non-stainless steel circle hooks. Instead, as a consequence of his negligence, J-hooks were used, which by design tend to lodge in the stomach or esophagus of a fish when it is hooked thereby reducing the likelihood of survival if the fish is then released back into the water. Circle hooks, on the other hand, are less likely to get caught within the fish because of the hook’s circular design and thus increase the chances of survival if the fish is released back into the water. The evidence presented shows that Respondent took the Agents for catch-and-release fishing during this trip, making his failure to abide by this gear restriction especially concerning.

ii. History of Violations, and Other Matters as Justice May Require

Although there were references during testimony to other state citations Respondent may have received,¹² those were not considered in the Agency’s penalty assessment,¹³ and I have not considered them in my review of this matter. It should also be noted that while Respondent during the evidentiary hearing and in his post-hearing brief referred to financial hardship due to a loss of steady employment, he had not previously advanced an inability to pay the proposed penalty argument and has provided no supporting documentation to the Agency.¹⁴ Thus, such an argument will not now be entertained for the first time by this Tribunal.

With regard to economic benefit, the evidence before me reveals that Respondent earned \$2,500 for his charter fishing trip services during which he engaged in the cited violations of federal law. The Agency’s argument that Respondent should not benefit financially from his illegal conduct is compelling, and I am in agreement. The Agency accounted for this economic benefit in its proposed penalty calculation,¹⁵ and I find it appropriate to also consider in my penalty assessment. My review of this record reveals no additional considerations that may impact my assessment and imposition of a monetary penalty. While Respondent has alluded to alleged vehicular speed limit violations by Agency witnesses on the day of the incident, I find no relevance to such claims and they do not bear on the issues I must resolve in this matter.

In my penalty evaluation, I have considered the above-referenced penalty factors and the arguments presented by the parties, taking special note of the gravity of Respondent’s illegal conduct, the extent of harm and impacts from such conduct, Respondent’s level of culpability, and the economic benefit he obtained from his violative conduct. Based on my review, I conclude that the evidentiary record supports the penalty proposed by the Agency. Accordingly, I assess a civil monetary penalty of \$24,000 for Respondent’s violations of federal law as charged in the NOVA.

VI. DECISION AND ORDER

Respondent is liable for the charged violations in this case. A civil monetary penalty of \$24,000 is imposed for the charged violations. 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.

¹² E.g., references to citations for operating a charter in state waters without the appropriate permit, or guide license, and for an expired Captain’s license, both of which Respondent subsequently renewed. Tr. 212-13.

¹³ See Preliminary Worksheet-Recommended Assessment of Penalty And/Or Permit Sanction (“Penalty Worksheet”) that was enclosed with the NOVA as part of the Agency’s transmittal of this enforcement matter to this Tribunal on August 20, 2019.

¹⁴ See Order to Submit PPIP (Aug. 23, 2019) (providing explicit instructions with regard to any “inability to pay” argument); *see also* Tr. 214.

¹⁵ See Penalty Worksheet.

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: November 9, 2021
Washington, D.C.