



UNITED STATES DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF: )  
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 )  
**William C. McLaughlin, III,** )  
 )  
 Respondent. )  
 )

**Docket Number: NE2003013,  
F/V Just for the Haters**

**INITIAL DECISION AND ORDER**

**Date:** July 6, 2022

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

**Appearances:** For the Agency:  
Joseph Heckwolf  
U.S. Department of Commerce  
National Oceanic and Atmospheric Administration  
Office of General Counsel, Enforcement Section  
Silver Spring, MD

Jamal Ingram  
U.S. Department of Commerce  
National Oceanic and Atmospheric Administration  
Office of General Counsel, Enforcement Section  
St. Petersburg, FL

For Respondent:  
William C. McLaughlin, III, *pro se*  
Portsmouth, RI

<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 February 23, 2021, to William C. McLaughlin, III (“Respondent”). The NOVA charges Respondent, as the owner and operator of F/V Just for the Haters, with fishing for, harvesting, and possessing Atlantic striped bass in the Exclusive Economic Zone (“EEZ”) off the coast of Block Island, Rhode Island, outside the area described in 50 C.F.R. § 697.7(b)(2), on June 30, 2020, in violation of the Atlantic Striped Bass Conservation Act, 16 U.S.C. § 5158(c), and implementing regulations at 50 C.F.R. § 697.7(b). On December 9, 2021, the Agency filed a First Amendment to the Notice of Violation and Assessment of Administrative Penalty, in which the Agency amended the regulatory citation in the NOVA from 50 C.F.R. § 697.7(b)(2) to 50 C.F.R. § 697.7(b)(3).<sup>2</sup> The Agency seeks a penalty of \$10,000 for the alleged violation.

In response to the NOVA, Respondent requested a hearing on the alleged violation, and the matter was forwarded to this Tribunal. By Order dated July 8, 2021, I was designated to preside over the litigation of this matter. On that date, 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 a Preliminary Statement and Preliminary Position on Issues and Procedures (“PPIP”). Thereafter, the Agency timely filed its Preliminary Statement and its PPIP, which it later supplemented. Respondent did not file a Preliminary Statement or PPIP. On October 7, 2021, I ordered Respondent to show cause for this failure and show cause why an order adverse to his interests should not be issued. Respondent did not respond to this order. On November 9, 2021, I issued an Order that barred Respondent from introducing any documentary and testimonial evidence at an evidentiary hearing, apart from his own testimony, and granted the Agency’s Motion for Additional Discovery, in which it had requested leave to depose Respondent by oral examination.

On November 18, 2021, I issued the Notice of Hearing Order scheduling the evidentiary hearing to be held by videoconference on February 10, 2022. The hearing

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<sup>2</sup> The regulatory text states as follows:

It is unlawful for any person to do **any** of the following:

- (1) Fish for Atlantic striped bass in the EEZ.
- (2) Harvest any Atlantic striped bass from the EEZ.
- (3) Possess any Atlantic striped bass in or from the EEZ, except in the following area: The EEZ within Block Island Sound, north of a line connecting Montauk Light, Montauk Point, NY, and Block Island Southeast Light, Block Island, RI; and west of a line connecting Point Judith Light, Point Judith, RI, and Block Island Southeast Light, Block Island, RI. Within this area, possession of Atlantic striped bass is permitted, provided no fishing takes place from the vessel while in the EEZ and the vessel is in continuous transit.
- (4) Retain any Atlantic striped bass taken in or from the EEZ.

50 C.F.R. § 697.7(b) (emphasis added).

was later rescheduled to commence by videoconference on March 14, 2022, based on the parties' joint request.

I then conducted the hearing in this matter on March 14, 2022. At that hearing, the Agency presented the following witnesses: Max Appelman ("Mr. Appelman"), a fisheries management specialist with NOAA's National Marine Fishery Service ("NMFS"), who was qualified as an expert in the field of striped bass fisheries management; Kevin Swiechowicz ("Officer Swiechowicz"), an enforcement officer with NOAA Office of Law Enforcement ("OLE"); Samantha Tolken ("Ms. Tolken"), an enforcement technician with NOAA OLE; Harold Guise ("Officer Guise"), an officer with the Rhode Island Department of Environmental Management ("RIDEM"); Joshua Beuth ("Officer Beuth"), also an officer with RIDEM; and Kyle Murray ("Officer Murray"), another officer with RIDEM. Respondent testified on his own behalf. Agency Exhibits AX 1 through 3 and AX 6 through 12 were admitted into evidence at the hearing. By Order dated March 3, 2022,<sup>3</sup> I took Official Notice of Agency Exhibits AX 4, AX 5, and AX 13 through 15.

On April 4, 2022, the parties were provided with a certified transcript of the hearing, and I simultaneously issued an Order Scheduling Post-Hearing Submissions, in which various post-hearing filing deadlines were established. On April 15, 2022, the Agency timely filed its Motion to Conform Transcript, which was granted by Order dated May 19, 2022. Consistent with the established filing deadlines, the Agency timely filed its Initial Post-Hearing Brief. 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 fished for, harvested, possessed, or retained Atlantic striped bass in or from the EEZ on June 30, 2020, in violation of the Atlantic Striped Conservation Act, 16 U.S.C. § 5158(c), and implementing regulation at 50 C.F.R. § 697.7(b).

### **b. Civil Penalty**

If liability for the charged violation is established, I then must determine the amount of an 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).

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<sup>3</sup> See Order Shortening Time for Respondent to Respond to Agency's Motion to File a Third Supplement to its Preliminary Position on Issues and Procedures and Order Granting Agency's Motion to File a Second Supplement to its Preliminary Position on Issues and Procedures and Take Official Notice of Public Documents (Mar. 3, 2022).

### III. FACTUAL SUMMARY

Respondent is a resident of Rhode Island. Tr. 126. He has fished recreationally since he was a child, and he began fishing commercially about seven years ago. Tr. 126; AX 10 at 38. Respondent holds a commercial fishing license in the state of Massachusetts. Tr. 156, 160, 168. According to Respondent, while he currently retains this commercial fishing license, he did not engage in commercial fishing in 2020 or 2021 because he began new employment. Tr. 171; AX 10 at 16, 34-35. He owns a fishing vessel named *Just for the Haters* (“Vessel” or “F/V JFTH”). Tr. 126–27. The F/V JFTH is a “26 foot center console” vessel. AX 10 at 10. According to Respondent, his Vessel is boarded at least weekly by the United States Coast Guard (“USCG”), NOAA, or the RIDEM. Tr. 140. He has no prior history of fishing violations. Tr. 132, 136; AX 9 at 11.

On the evening of June 30, 2020, Officers Swiechowicz, Guise, Murray, and Beuth (collectively referred to as the “Officers”) were conducting “a uniformed fisheries enforcement patrol at sea,” the focus of which was to “enforce the prohibition on fishing for, possession, or retention of striped bass in the EEZ.”<sup>4</sup> AX 1 at 2. The specific area of focus was an “area known on nautical charts as the ‘Southwest Ledge,’” which is considered to be a premier spot to fish for striped bass. AX 1 at 2; *see also* Tr. 150. The Southwest Ledge is “a submerged geographic feature consisting of rocky structures forming a ridge to the Southwest of Block Island, [Rhode Island,] extending from within state waters and out to about a mile into the EEZ.” AX 1 at 2. According to law enforcement, it is “well known that a significant portion of this ledge extends into federal waters,” where it is unlawful to fish for, possess, or retain striped bass. AX 1 at 2. Thus, the focus of the Officers’ enforcement patrol was “to target vessels that were gaining a competitive advantage by fishing for, targeting, or possessing striped bass” in the portion of the Southwest Ledge within the EEZ. AX 1 at 2.

Upon exiting the harbor to begin their patrol, Officer Swiechowicz “conducted a verification of the accuracy of [their] GPS [Global Positioning System] system by pulling alongside a United States Coast Guard (USCG) buoy located at the mouth of the harbor, identified as Red ‘2’ Gong on nautical charts,” and comparing the published coordinates of that buoy to the coordinates displayed on their GPS unit. AX 1 at 2-3; *see also* Tr. 55-56. His comparison of the two sets of coordinates showed a difference of 10.05 meters, or 32.9 feet, which confirmed that the GPS unit on the patrol vessel was functioning properly. AX 1 at 3, 13-18; Tr. 55-56.

At the time of this incident, Respondent was operating his Vessel in the Southwest Ledge area within the EEZ and was accompanied by Adam Cabral, a minor and passenger on board the Vessel. Tr. 128, 131-32; AX 1 at 3, 7–8. Respondent maintains that he was fishing recreationally at the time, and he does not have a Rhode Island commercial striped bass permit. Tr. 156–57, 164; AX 1 at 3-4, 7. He does, however, as noted earlier, possess an active Massachusetts commercial permit to fish for

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<sup>4</sup> The EEZ, or exclusive economic zone, is 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.

striped bass in Massachusetts state waters. Tr. 156, 160, 168. Respondent frequently fishes in the Block Island area, including on the Southwest Ledge. Tr. 127. He described it as an area with which he is “very familiar.” Tr. 127.

At approximately 10:18 p.m., while patrolling the portion of the Southwest Ledge that is within the EEZ, the Officers observed two vessels, approximately 150 feet apart and seemingly within earshot of each other, within federal waters. Tr. 56, 58, 108, 116; AX 1 at 3, 5. They made contact with the first vessel that was closest to their location but determined that enforcement action was not necessary. Tr. 57–58, 108–09. During that encounter, the occupants of the first vessel indicated that they could not hear or understand what the Officers were attempting to communicate, and Officer Guise subsequently raised his voice to instruct the occupants of the first vessel that they needed to return to state waters to legally fish for striped bass. Tr. 58–59, 109. The Officers had been trying to conduct their patrol in a covert manner up to that point, and they believed that, as a consequence of Officer Guise having to raise his voice to be heard by the first vessel, other vessels in the vicinity were alerted to the presence of law enforcement, including the F/V JFTH.<sup>5</sup> Tr. 58–60, 109, 116.

Immediately thereafter, Officer Swiechowicz focused his attention on the second vessel that had been engaged in fishing activities, later identified as the F/V JFTH. Tr. 57–58; AX 1 at 4. He observed “the silhouette of a person move to the center console or the control area of the vessel and immediately apply [a] significant amount of throttle to the engine,” as evidenced by the sounds of the engine and the movement of the vessel. Tr. 59; *see also* Tr. 71; AX 1 at 5. Officer Swiechowicz then observed the F/V JFTH move away rapidly in a northwesterly direction. Tr. 71; AX 1 at 5; *see also* Tr. 139. Prior to that time, the F/V JFTH had simply “been drifting and making no way while fishing.” AX 1 at 5. Officer Beuth, too, “observed a nearby vessel throttle up and begin to move away from the patrol boat.” AX 1 at 44. Similarly, Officer Guise recounted his observation that the F/V JFTH “began to throttle up in a manner that drew [the Officers’] attention,” after which, he explained, Officer Murray, as the operator of the patrol vessel, began to follow the F/V JFTH. AX 1 at 47. Officer Murray “immediately began to attempt to close the distance so [the Officers] could make contact with the [F/V JFTH].” Tr. 60.

By way of explanation, Respondent noted that a common practice when fishing in that area is to “drift with the current” and then once “you get to the end of the drift” to power up and head back to the other end [referring to the beginning of the drift line].” Tr. 131; *see also* Tr. 138 (“We drift to an end. You find a good structure and you drift to that end, and you turn around and head back, and you drift again.”). He explained that he was doing just that on the night in question, namely, that he had “start[ed] in legal waters” and then drifted with the current across the line demarcating state and federal waters until the Vessel was “probably a half mile or so” into the EEZ. Tr. 131–32.

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<sup>5</sup> Notably, however, Officer Beuth described the silhouette of the patrol vessel as recognizable from a distance and as not resembling a typical fishing vessel due to certain features, including a large tower on the back of the vessel, a radar dome, and flying flags. Tr. 124. He also pointed out that the patrol vessel has large decals on its side that read “Environmental Police.” *Id.* Thus, Officer Beuth explained, it is not a vessel that “one would expect to fish off of or [to] be used while engaged in fishing.” *Id.*

According to Respondent, he typically does not “run superfast” in the Vessel, but when he began operating the Vessel back to the beginning of his drift line on that particular night, he needed to “get the boat up on plane”<sup>6</sup> in order to avoid taking “a lot [of] water over the bow” thanks to the two-to-three-foot wave conditions at the time. Tr. 141. Respondent maintained that he never attempted to run from law enforcement and that such an insinuation is untrue. AX 10 at 19, 23-24, 27. Nevertheless, at the evidentiary hearing, Officer Swiechowicz stated that “[b]ased on the amount of power the engine was receiving” and the movement of the F/V JFTH directly away from the patrol vessel, he believed that the Vessel “was trying not be contacted.” Tr. 60; *see also* Tr. 71. He also recorded in his handwritten notes, which he took soon after the incident, that the F/V JFTH “[t]hrottled up and ran.” Tr. 70; AX 1 at 31.

While pursuing the F/V JFTH, the Officers attempted to signal to the Vessel by shouting commands for the Vessel to stop and “heave to”<sup>7</sup> and engaging a powerful flashlight with a strobe function. Tr. 60, 118. The flashlight emitted “an LED-produced white light.” Tr. 191-92. Officer Guise recounted that at one point during the pursuit, he turned the flashlight’s strobe feature off momentarily “in an attempt to not have other vessels in the area see that strobe,” after which he turned only the flashlight back on. Tr. 110. At that point, Officer Guise “could clearly see an operator driving the boat, looking over his shoulder at us occasionally.” *Id.* According to Respondent, he never heard or saw the Officers until the F/V JFTH was already underway, when he noticed blue strobe lights flashing behind him. Tr. 131–33, 138-39, 141; AX 10 at 22-24. In particular, Respondent asserted:

100 percent never knew they were there. And for that gentleman or that officer to say you can hear on the ocean when you have 3-foot waves crashing against boats is -- he's got supersonic hearing. If he thinks I could hear him -- I wasn't paying attention. There was multiple other boats out there. I never heard him or saw them until I was moving and we seen blue strobe lights behind us.

Tr. 132-33. According to the Officers, although the patrol vessel is equipped with standard issue blue emergency police lights, they were not engaged during the incident. Tr. 192, 200.

During the pursuit, the moonlight and flashlight illuminated the Vessel, thus enabling Officer Swiechowicz to observe one person operating the Vessel at the center console and another kneeling on the Vessel’s aft deck. Tr. 61; AX 1 at 5-6. According to Officer Swiechowicz, he was able to see “the tail-end half of a striped bass entering the water immediately behind the [V]essel” and “an open door, known as a tuna door or a transom door[,] in the back of the [V]essel.” Tr. 61; *see also* AX 1 at 6. Officer

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<sup>6</sup> Officer Swiechowicz explained that in order for a vessel to be “on plane,” it must travel at a high enough speed to “overpower the resistance of the water,” such that “the majority of the bow [is] out of the water” and “it rides hydrodynamically along the surface” of the water, which is considered optimum positioning. Tr. 82-83.

<sup>7</sup> Officer Beuth explained that the command to “heave to” is “a common term used in marine law enforcement that should signal a vessel to both stop and not throw anything from their vessel.” Tr. 118.

Swiechowicz then observed the individual kneeling on the Vessel's aft deck, later identified as Mr. Cabral, turn left to grab another fish, which Officer Swiechowicz could "clearly identify" as a large striped bass, and push it head-first out of the transom door and into the water. Tr. 61; AX 1 at 6. Officer Swiechowicz noted these observations in the incident report he prepared following the incident. Tr. 52-53, 70; AX 1 at 5-6, 31. Officer Beuth also observed a striped bass being slid out of the Vessel's transom door. Tr. 118; AX 1 at 44. He, too, noted his observations in a report following the incident. AX 1 at 44. Respondent disputes this account and maintains that no fish were dumped from his Vessel, that he never admitted to dumping fish as law enforcement claimed, and that he never directed Mr. Cabral to throw fish overboard. Tr. 129, 133-34; AX 10 at 27. Respondent argues that if he had thrown any fish into the water from his Vessel, he would have included the two Atlantic striped bass found on board when law enforcement stopped him. Tr. 133; AX 10 at 28.

While the precise speed at which the patrol vessel and the F/V JFTH were traveling is unknown, the Officers' pursuit of the F/V JFTH lasted approximately one minute. Tr. 82-83, 84, 93-94; AX 1 at 5, 39-40. Once the F/V JFTH came to a stop, the Officers conducted a boarding of the Vessel, during which Officer Swiechowicz documented their position and that of the Vessel as being located 0.46 nautical miles inside the EEZ. AX 1 at 7, 10. While aboard the Vessel, the Officers identified and documented the presence of two large Atlantic striped bass, which Respondent later agreed, in writing, to abandon to the government when Officer Swiechowicz advised him that the government would be seizing the fish.<sup>8</sup> Tr. 65, 69; AX 1 at 7, 9, 25, 28-29. Respondent does not dispute that he drifted with his Vessel into the EEZ and that he was unlawfully in possession of two Atlantic striped bass. Tr. 131, 154, 165, 172; AX 10 at 18-19. Respondent maintained that the two Atlantic striped bass he had on board his Vessel had been "gut-hooked" by Mr. Cabral — an inexperienced saltwater fisherman — who, because of that lack of experience, had allowed these fish to swallow too much line with the bait, causing the hook to catch the gut of the fish, thus compromising the fish to the point of near death and limiting the chance for survival through a release back into the open water. Tr. 128-29, 152-53; AX 10 at 11, 15. According to Respondent, although he does not personally eat fish, he planned to save these two dying striped bass to give them away to someone who would eat them, such as people at the marina or mothers of his Portuguese friends. Tr. 154-56. Respondent asserted that additional Atlantic striped bass had been caught during this trip but were able to be released back into the water. Tr. 134; AX 10 at 14.

According to Officer Swiechowicz, while aboard the Vessel, he raised the subject of items being discarded from the back of the Vessel during the Officers' pursuit, and Respondent admitted to directing Mr. Cabral to dispose of two striped bass because he knew it was illegal to possess them. Tr. 61-62, 66, 68; AX 1 at 8-9. Officer Beuth

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<sup>8</sup> At the hearing, Respondent asserted his belief that by surrendering these striped bass to the government, he would not be responsible for any further enforcement action. Tr. 129-30. Officer Swiechowicz explained, however, that the seizure process is a separate administrative process (under the Civil Assets and Forfeiture Reform Act) focused on ownership of the property that the government seized, as opposed to a separate administrative civil enforcement process focused on liability for any alleged violative conduct. Tr. 85-89.

recounted that he overheard this conversation and admission by Respondent. Tr. 120; AX 1 at 44. As mentioned previously, Respondent disputes these allegations and contends that the Officers are “blatantly lying.” Tr. 136. He notes, in support of his position, that when he was accused of dumping fish, he “put [his] 680,000 watt candlelight power spotlight onto the water for them, which my light is way brighter than theirs, and illuminated the water, because fish float when they're dead. And there was zero fish. They looked around in the water and there was zero fish in the water.” Tr. 135.

At the conclusion of the boarding, Officer Swiechowicz informed Respondent that he would be receiving a copy of the seizure and abandonment form [relating to the two Atlantic striped bass aboard the F/V JFTH that Respondent agreed to abandon] “in the next few weeks along with an enforcement violation report.” Tr. 69-70; AX 1 at 9, 28-29. Thereafter, this enforcement action was initiated.

Mr. Appelman, a fishery management specialist with NMFS who was qualified as an expert witness in striped bass fisheries management, offered testimony at the hearing about the Atlantic striped bass species and fishery. Tr. 16, 44-45; AX 11. By way of background, he explained that striped bass is a “migratory species that spans from Maine all the way down to Florida on the Atlantic Coast,” with a migration pattern that includes the EEZ, and for which there is a “large commercial sector” and an “even larger recreational sector.” Tr. 14. Mr. Appelman described the value that the Atlantic striped bass fishery offers, both economically and culturally. Tr. 32-33. Specifically, he testified that, from an economic standpoint, the commercial sector “averages around \$12 to \$15 million a year.” Tr. 32. Meanwhile, he testified, “on the recreational side, there's a lot more anglers out there and so the economic value or impact of the recreational sector is much larger than the commercial,” and while difficult to assess, “hundreds of millions of dollars would be a rough guess.” *Id.* Aside from economic value, Mr. Appelman spoke to the cultural benefits of Atlantic striped bass, noting “how important this fish is to the American culture on the Atlantic Coast,” as “it has been for centuries.” Tr. 33; *see also* AX 12.

With regard to fisheries management, Mr. Appelman explained that one of the control measures deals with sustainability — that is, “ensuring that a population of fish is not declining or diminishing because of fishing activities” — and establishing rules and regulations with respect to the amount of fish harvested because that is “the mechanism that can cause over fishing, and deplete and jeopardize . . . sustainability goals.” Tr. 13. Such management occurs “through an interstate body,” namely, “the Atlantic States Marine Fisheries Commission,” that, with state engagement, determines the appropriate regulatory measures to be approved and implemented. Tr. 15.

The EEZ, in particular, is an offshore area in which the larger striped bass tend to migrate, including seasonally, and those larger individuals “are generally females” that “contribute most to future generations of fish in the population.” Tr. 18-19. While removing “a couple of fish” from the EEZ is “probably not going to make a big dent in the population,” problems arise “if it's happening a lot” or if there are “a lot of anglers that are doing that” because it can then “add up to a concerning number and could cause



challenges to maintaining [the striped bass] fishery [and] maintaining a healthy population.” Tr. 19. Speaking with striped bass anglers, Mr. Appelman learned that fishing for striped bass in the EEZ is “happening a lot” and such prohibited activity was described as “prolific.” Tr. 20. Mr. Appelman explained that even “catch and release fishing” causes concern because of the “very large amount of the fish that die every year . . . from that activity.” Tr. 18; *see also* Tr. 31; AX 13.

The most recent striped bass stock assessment<sup>9</sup> produced in 2018 by the Atlantic States Marine Fisheries Commission represents the most current and “best available science on the stock.” Tr. 27, 29; *see also* AX 13. This latest assessment reveals that the “stock is experiencing overfishing” and has been experiencing overfishing “for quite some time” in most years over the last 10 to 15 years. Tr. 25-26, 29-30; *see also* AX 13. Mr. Appelman explained that “overfishing refers to the level of fishing being above a certain target or threshold that we, as managers, set as a sustainability target” and that “overfished refers to the population biomass or individuals in this case biomass falling below the sustainability target or threshold and, thus, not allowing the population to replenish itself and provide the benefits that we want from it.” Tr. 26. At present “there is a complete moratorium on fishing, possession, harvest of striped bass in the EEZ.” Tr. 17. The intent behind the rules and regulations that have been established is to “maintain a sustainable population, a sustainable fishery” to ensure that the Atlantic striped bass “population remains forever, for generations to come, and that fishing activities aren't the reason for its decline, if it ever were to decline.” Tr. 33-34.

#### **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 its implementing regulation at 50 C.F.R. § 697.7(b), 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)).

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<sup>9</sup> Mr. Appelman described a “stock assessment for striped bass” as one that “paints a picture of the health of the population over time” and includes “a lot of biological information to show a trajectory of the size of the population, as well as fishing mortality, so the level of fishing, the fishing rate on the population as well.” Tr. 28-29; *see also* AX 13.

ii. *Atlantic Striped Bass Conservation Act, Magnuson-Stevens Fishery Conservation and Management 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. § 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 chapter or any regulation or permit issued pursuant to this chapter[.]” 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*, “[f]ish for Atlantic striped bass in the EEZ,” “[h]arvest any Atlantic striped bass from the EEZ,” or “[p]ossess 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 mean:

that area adjacent to the United States which, except where modified to accommodate international boundaries, encompasses all waters from the seaward boundary of each of the coastal states to a line on which each point is 200 nautical miles (370.40 km) from the baseline from which the territorial sea of the United States is measured.

50 C.F.R. § 600.10.

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*, Docket No. 914-027, 1982 WL 42985, at \*4 (NOAA App. Mar. 15, 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.”).

### **b. Arguments Regarding Liability**

In its Initial Post-Hearing Brief (“In. Br.”), the Agency argues that the documented boarding location of the F/V JFTH shows that the Vessel was within the EEZ, but not within the transit zone, when it was boarded by law enforcement and found to be in possession of two Atlantic striped bass. In. Br. at 9. The Agency notes that “Respondent does not dispute that he unlawfully possessed striped bass in the EEZ on June 30, 2020.” *Id.* Thus, the Agency urges, the Tribunal should “find Respondent liable for violating 50 C.F.R. § 697.7(b).” *Id.*

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

The evidence presented in this matter is uncontroverted and establishes that Respondent violated 50 C.F.R. § 697.7(b)(3) by possessing two Atlantic striped bass while in the EEZ on June 30, 2020. Documentary evidence and witness testimony from the Agency, and Respondent’s own testimony, confirm that the position of Respondent’s Vessel at the time of boarding by the Officers was within federal waters, namely the EEZ, and that evidence also confirms that Respondent unlawfully possessed two Atlantic striped bass. At the hearing, Respondent candidly admitted to illegally possessing the two fish. Tr. 129. He also admitted to drifting over the line – that is, crossing from state waters into the EEZ – while in possession of the Atlantic striped bass. Tr. 131–32. And the evidentiary record is clear that Respondent’s Vessel was outside the transit zone when he was in possession of the two striped bass and boarded by law enforcement. Tr. 19, 81-82, 170; AX 3, AX 5-6. As noted above, whether Respondent intended to enter federal waters while in possession of the striped bass is immaterial to liability. Consequently, I must conclude that the substantial and undisputed evidence presented establishes that, on June 30, 2020, Respondent violated 50 C.F.R. § 697.7(b)(3), and thereby the Atlantic Striped Bass Conservation Act, under the provision in 16 U.S.C. § 5158(c).

## **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 amount of a civil monetary penalty to be imposed, if any, for the violation. The Agency's Penalty Policy for Assessment of Civil Administrative Penalties and Permit Sanctions ("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. Therefore, I have not considered the Penalty Policy in my evaluation. Rather, I have considered only the factors set forth in the applicable statutory and regulatory provisions. *See* 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(a). I note, however, that a document entitled "Preliminary Worksheet – Recommended Assessment of Penalty and/or Permit Sanction," which sets forth the framework for the Agency's proposed penalty calculation in conjunction with its Penalty Policy, was admitted into evidence at AX 9 at 10.

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 \$207,183 for each violation. *See* 16 U.S.C. § 1858(a) (establishing the maximum statutory penalty amount); 15 C.F.R. § 6.3(f)(15), (24) (adjusting the penalty amount in 16 U.S.C. § 1858(a) for inflation effective January 15, 2022); *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. § 554. 16 U.S.C. § 1858(a).

To determine the appropriate amount of a 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 Brief, the Agency argues that the civil penalty of \$10,000 that it seeks to be imposed for Respondent's violative conduct extends beyond the possession of two striped bass, and is appropriate given Respondent's "evasive and intentional misconduct" and given "the strong commercial incentive Respondent had to violate the law." In. Br. at 9. The Agency contends that the circumstances of this violation are "quite serious" and "warrant a significant penalty." In. Br. at 10.

First, the Agency represents that Respondent engaged in "evasive misconduct" by trying to flee from the area once he realized law enforcement was present. *Id.* In support, the Agency recounts the evidence presented by Officers Swiechowicz, Beuth, and Guise in which each Officer took note of Respondent's behavior upon Officer Guise raising his voice to be heard by another vessel, namely, that Respondent immediately thereafter engaged the engine of his Vessel, or "throttled-up," and attempted to leave the area, heading directly away from the Officers in their patrol vessel. *Id.* The Agency asserts that, contrary to Respondent's representations at the hearing that he was merely leaving the area in order to return to the starting point of his drift, "Respondent would have headed in a different direction" and not in the northwesterly direction away from the Officers if he were, in fact, doing as he claimed. In. Br. at 10-11. The Agency explains that by heading in a northwesterly direction, Respondent would not have returned to state waters where he purportedly began his drift but instead would have headed toward the "striped bass transit zone inside the EEZ where it is legal for vessels that are in continuous transit to possess striped bass taken from state waters." In. Br. at 11-12 (citing Tr. 71, 82; AX 6 at 1-3). The Agency concludes that "it is simply implausible that Respondent was merely returning to the start of his drift at the precise moment that law enforcement officers alerted their presence in the area." In. Br. at 11. Further, the Agency contends, "the speed of the pursuit undercuts Respondent's claim that he was not fleeing," and in support, the Agency recounts Officer Beuth's testimony in which he states that Respondent "took off at a speed that was faster than normal." In. Br. at 13

(citing Tr. 117). The Agency asserts that attempting to flee law enforcement gave Respondent “the opportunity to get rid of some of the evidence of his violation, which is what he did.” In. Br. at 12. The Agency also counters Respondent’s contention that he would have dumped the two striped bass that the Officers found on his Vessel if he had been discarding fish as alleged by arguing that the reason more striped bass were not discarded was “because law enforcement officers apprehended them.” In. Br. at 12-13.

Next, the Agency asserts that Respondent directed a juvenile [Mr. Cabral] to discard striped bass, an admission he made at the time of the incident to Officer Swiechowicz that was also overheard by Officer Beuth, and now denies making such an admission “after realizing this type of misconduct can carry a hefty penalty.” In. Br. at 13 (citing Tr. 68; AX 1 at 8-9, 44). The Agency points out that there is no corroboration for Respondent’s new denial and argues that it is “at odds with his previous statement and the sworn testimony of well-trained law enforcement officers who have no incentive to misreport what they saw.” *Id.* To that end, the Agency highlights Officer Swiechowicz’s testimony, and that it is corroborated by notes he took “shortly after the incident which state: ‘[d]umped two SB [an abbreviated reference to Striped Bass] upon seeing us approach. Throttled up and ran. Mate was throwing SB through tuna door on aft.’” In. Br. at 14 (citing Tr. 70-71; AX 1 at 31). The Agency also points out that “Officers Guise and Beuth both note in their reports that Officer Swiechowicz said the occupants of the F/V Just for the Haters were dumping fish during the brief pursuit.” In. Br. at 14 (citing AX 1 at 44, 47). Further, the Agency recounts that Officer Beuth also observed Mr. Cabral “slide a fish that appeared to be a [s]triped [b]ass out the open door in the port side transom of the vessel,” which he noted in his report following the incident. In. Br. at 14 (citing AX 1 at 44). The Agency argues that “these circumstances surrounding the Respondent’s prohibited conduct warrant a significant penalty.” In. Br. at 14.

The Agency also argues that Respondent was fishing commercially on June 30, 2020, not recreationally. In. Br. at 14. It asserts that “the striped bass Respondent unlawfully possessed were more consistent with state commercial regulations, not recreational regulations,” and it notes that at the time of the incident “Respondent held a commercial license in Massachusetts that allowed him to sell striped bass during the period in question.” In. Br. at 14-15 (citing Tr. 160 to support Respondent’s retention of a Massachusetts commercial license). In addition to the allowable size differences of striped bass between the commercial sector and state recreational sectors, the Agency notes that “Respondent did not remove the right pectoral fins from the striped bass that he unlawfully possessed in the EEZ,” which were “at least 40 inches long.” In. Br. at 15 (citing Tr. 167-68; AX 1 at 44, 46). The significance of this, the Agency explains, is that Rhode Island recreational fishing codes require that the right pectoral fin be removed on any striped bass that exceeds 34 inches, whereas Massachusetts commercial fishing codes make it “unlawful for a fish dealer to purchase a striped bass in Massachusetts with its right pectoral fin removed.” In. Br. at 15 (citing 250-90-00 R.I. Code R. § 3.9(E) (April 17, 2020), and 322 Mass. Code. Regs. 6.07(7)(II) (May 1, 2020)). The Agency then argues:

Because the striped bass Respondent unlawfully possessed in the EEZ were over 35 inches and had their right pectoral fins attached, he could not have legally landed them as a recreational angler in Rhode Island or Massachusetts. Tr. 66:3-11, 122:1-8. He could, however, have sold them in Massachusetts a few hours after officers apprehended him without raising suspicions. Law enforcement officers apprehended Respondent on June 30, 2020 at 10:21 p.m. The next day, July 1, 2020, was a Wednesday. At that time, Wednesdays and Mondays were generally “open commercial fishing days” for striped bass, and commercial anglers in Massachusetts could only sell striped bass on those days. 322 CMR 6.07(2), (7)(n) (May 1, 2020).

In. Br. at 16.

The Agency takes issue with Respondent’s claim that he was fishing recreationally on this occasion and was planning to give the striped bass on board to someone else because he does not personally eat fish, arguing that it is “more plausible that the Respondent kept the large striped bass he caught so he could sell them in the neighboring state where he holds a commercial license.” In. Br. at 16 (citing Tr. 155-56, 73; AX 10 at 16). The Agency notes that even if Respondent had been engaged in recreational fishing at the time of this incident, he would have “violated state recreational striped bass regulations in conjunction with his federal violation” had he not directed Mr. Cabral to discard two striped bass because he would have “exceeded the recreational possession and slot limits (1 fish per angler between 28 and 35 inches) imposed by Massachusetts and Rhode Island upon returning to state waters.” In. Br. at 17 (citing Tr. 66; CMR 6.07(5)(a),(b) (May 1, 2020); 250-90-00 R.I. Code R. § 3.11(A),(B),(D) (April 17, 2020)). Consequently, the Agency argues, even if Respondent had not been fishing commercially, “a significant penalty is warranted because the violation undermined protections in place to help rebuild an unhealthy stock.” In. Br. at 17 (citing Tr. 21, 26; AX 13).

With regard to the gravity of Respondent’s violation, the Agency highlights that “the striped bass fishery is currently overfished and overfishing is occurring,” which, the Agency urges, is especially concerning given that “the fishery collapsed in the 1980s, leading to severe restrictions that harmed fishing communities.” In. Br. at 17 (citing Tr. 21-23, 26; AX 13). It also emphasizes that “it can be difficult to determine where an angler actually harvested a striped bass when they are fishing close to the boundary line,” which is why strict prohibitions on possession exist. In. Br. at 17. While the Agency acknowledges that taking a few fish may not significantly impact the stock, it recounts the testimony presented by Mr. Appelman, qualified as an expert in striped bass fisheries management, who explained that in his interactions with anglers as part of his professional duties, the anglers have characterized the extent of unlawful fishing for striped bass in the EEZ as “prolific,” giving “reason to believe these violations are widespread.” In. Br. at 17-18 (citing Tr. 20). Additionally, the striped bass typically found further offshore in the EEZ tend to be larger females, which the Agency’s striped bass regulations were largely designed to protect, as these females “contribute most to future generations of the fish population.” In. Br. at 17 (citing Tr. 18-19). The Agency

maintains that “[p]ossessing striped bass in the EEZ on the Southwest Ledge is a problem,” with such unlawful activity “undermin[ing] the effective enforcement of the Agency’s striped bass regulations,” regulations that were implemented to protect that species in the EEZ. In. Br. at 18. As such, the Agency urges that I “assess a penalty that achieves both specific and general deterrence to protect the large female striped bass, which are critical to the population.” *Id.*

As to the factor regarding Respondent’s level of culpability, the Agency contends that his evasive actions “demand a serious penalty.” *Id.* In support, the Agency points to the evidence it presented to establish that Respondent fled from law enforcement and directed Mr. Cabral to “discard evidence of his unlawful activity.” In. Br. at 18. The Agency also points to evidence that “Respondent is an experienced angler with a chart plotter on his vessel” as showing that he knew his Vessel’s location at the time of the incident, In. Br. at 18 (citing AX 10 at 14; Tr. 147-48), which, the Agency contends, Respondent confirmed when he told the Officers that night that he knew where he was, In. Br. at 18-19 (citing AX 1 at 7; Tr. 66). Notwithstanding Respondent’s lack of any prior violations, the Agency contends, “justice still demands a significant penalty” given that “Respondent perpetrated his violation with an uncharged juvenile” and rather than exemplifying “respect for conservation regulations . . . he did exactly the opposite.” In. Br. at 19 (citing AX 1 at 8, 44).

The Agency also argues that Respondent is mistaken in his representations at the hearing that he was offered the opportunity to “pay \$250 per fish penalty or forfeit the fish he had onboard.” In. Br. at 19 (citing Tr. 129, 174). Noting various inconsistencies in Respondent’s account of this allegation (for example, Respondent’s deposition testimony that the officer who made such an offer was either from the USCG or NOAA and had boarded his Vessel previously, despite the fact that no USCG officers were present during the June 30, 2022 boarding and the only NOAA officer present for the boarding, Officer Swiechowicz, had never before boarded the F/V JFTH (citing Tr. 186-87, 193; AX 10 at 19, 21), and Respondent’s hearing testimony in which he initially identified Officer Swiechowicz as the officer who made him the offer and later acknowledged that he could not “remember 100 percent who it was” and could not “pick him by face” (citing Tr. 173-76, 183)), the Agency asserts that his account is unreliable and may be referring to “a completely different boarding than the one that is the subject of this case.” In. Br. at 19-22.

Lastly, the Agency asserts that the “striped bass regulations are strict” and devoid of any exception “allowing anglers to possess striped bass in the EEZ that they suspect may die.” In. Br. at 23. Such an exception, the Agency urges, would “render enforcement nearly impossible” and “tend to encourage angling techniques with an increased risk of mortality.” In. Br. at 23. It also notes that Respondent acknowledged that the two striped bass he claimed were gut-hooked were not dead when they were brought aboard his Vessel and he could have released them into the open water to give them a chance to survive but chose not to do so. *Id.* Thus, the Agency concludes, “gut-hooking” is neither a defense nor a basis for penalty reduction. *Id.* It urges that “because of all the aggravating circumstances surrounding this violation, . . . the Tribunal assess a \$10,000 penalty upon the Respondent.” In. Br. at 24.



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

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

With regard to these factors and their impact upon my penalty assessment, I must examine the evidence presented concerning the regulatory program at issue, namely the Atlantic striped bass fishery. To that end, I have considered the expert testimony of Mr. Appelman, and while Respondent challenged that testimony during the hearing as “hearsay and guesswork,” Tr. 141-42, I found it to be instructive and compelling. Mr. Appelman’s testimony highlighted the history of a once depleted striped bass fishery and the measures implemented in an attempt to preserve the fishery and maintain its economic and cultural benefits. Particularly relevant to the issues in this case, Mr. Appelman spoke to the concerning activity — characterized as “prolific” — of unlawful fishing for striped bass in the EEZ. In. Br. at 18. Mr. Appelman explained that when such an activity is happening with some frequency, as it apparently is based on feedback he receives from striped bass anglers, the removal of just one or two striped bass by an angler can “add up to a concerning number” and cause potential challenges to maintaining the fishery. Aside from the cumulative effect and resulting harm from such activity, he noted that the EEZ in particular, being an offshore area, tends to attract larger striped bass that are generally migratory females and that are relied upon the most to contribute to future generations of striped bass. Not surprisingly, the most recent striped bass stock assessment from 2018 revealed that the striped bass stock is currently facing overfishing, and has faced overfishing in the last 10-15 years, thereby compromising the ability for the striped bass population to replenish itself.

Given this context, the substantial evidence presented as to the nature, circumstances, and gravity of Respondent’s violation reveals the significance of such violative conduct. While unlawful possession of one or two fish may not seem to be of consequence to Respondent when considered in a purely individual context, when it is considered amidst the backdrop of an already struggling fishery and a seemingly rampant disregard for its conservation by “prolific” unlawful fishing activity, such behavior, even individually, is especially grave. I am also persuaded that this evidence supports the Agency’s argument that the possession of striped bass on the Southwest Ledge of the EEZ is an ongoing problem and that this type of unlawful activity undermines the Agency’s effective enforcement of the regulations designed to protect the striped bass species in the EEZ. To that end, I agree with the Agency that any penalty assessment serve as both a specific and general deterrent to this widespread unlawful activity and aid in the protection of the species and its ability to replenish the population. Accordingly, these factors have weighed significantly in my assessment of a penalty in this matter.

*ii. Degree of Culpability and Related Considerations*

Turning to Respondent’s degree of culpability, Respondent candidly acknowledged his wrongdoing with regard to allowing his Vessel to cross from state waters into the federal waters of the EEZ, where he knew it was impermissible to fish for, harvest, or possess Atlantic striped bass. The record is undisputed that Respondent

is an experienced fisherman and is “very familiar” with the Block Island fishing area and the Southwest Ledge in particular. Thus, it was incumbent upon Respondent to take appropriate measures to ensure he did not unlawfully possess striped bass in the EEZ. The evidence presented establishes that he did not take such measures and, in fact, was fully aware of his location within the EEZ when he was boarded by law enforcement.

The Agency urges that I impose a significant penalty based on the circumstances surrounding Respondent’s violative conduct. In support, the Agency points to the direct and corroborated evidence it presented at the hearing as demonstrating that Respondent at first attempted to evade detection by fleeing law enforcement and directing a juvenile passenger to discard striped bass from his Vessel during the pursuit. Respondent, meanwhile, disputed the foregoing evidence and accused the law enforcement officers of lying.

Specifically, the Agency recounted the sworn testimony of three of the law enforcement officers present during this incident, namely, Officers Swiechowicz, Beuth, and Guise, all of whom testified that Respondent engaged the engine on his Vessel with enough power so as to “throttle-up” the engine and quickly move away from the patrol vessel after Officer Guise elevated his voice to be heard by the occupants of another vessel. Officer Guise noted that when Respondent “throttled up” his Vessel’s engine, it drew the Officers’ attention to the Vessel. He testified that Respondent “took off at a speed that was faster than normal” and quickly “achieved plane,” meaning that the speed was fast enough to lift the vessel so that it was gliding across the top of the water. Tr. 117. Officer Sweichowicz concluded from Respondent’s actions that he was trying not to be contacted by the Officers and recorded in his written notes immediately following the incident that Respondent “throttled up and ran.” AX 1 at 31.

In addition to his representations that he did not hear the “heave to” commands shouted by law enforcement during the pursuit, which seem plausible,<sup>10</sup> Respondent contended during the hearing that he was not trying to evade law enforcement but, rather, was simply returning to the start of his drift line and that he “throttled up” the engine to get his Vessel on plane in order to move through the water more easily. He also challenged the notion of trying to outrun law enforcement, testifying, “[W]here are you running from these officers in the ocean. You’re not going anywhere.” Tr. 140.

While I do not consider Respondent’s assertions on this issue to be entirely implausible, the record does not contain any evidence other than his own testimony to substantiate his version of events. Moreover, his account is undermined, as the Agency argued, by the chart evidence showing that Respondent did not head in a direction that would have returned him to state waters where he began his drift, and presumably back in the direction of his home port of Portsmouth. Rather, he traveled away from law enforcement in a northwesterly direction, such that he was moving further into the EEZ and toward a continuous transit area within federal waters (which, as the Agency notes,

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<sup>10</sup> In particular, Respondent testified that he never heard the commands by law enforcement because of the competing sounds of the waves hitting his Vessel, his Vessel’s engine running, and his Vessel’s stereo playing, compounded by the distance between his Vessel and that of the patrol vessel. Tr. 132, 139.

is a zone in which it is lawful to possess striped bass from state waters while the vessel is in continuous transit). See AX 1 at 26, AX 4, AX 6 at 1-3. Officer Swiechowicz elaborated as follows: “Where we were positioned, the vessel would be technically closer to state waters. Had it headed to the east or northeast that would get it to -- it was only approximately a half a mile from the state waters line of Rhode Island. However, the vessel would have to take a hard 90 degree turn and head directly in front of us. So it would actually be traveling closer to the patrol vessel. So by direction of it, it was heading away from us. It was somewhat getting further into the EEZ.” Tr. 82. This evidence, coupled with the corroborated evidence of the three unbiased law enforcement officers, persuades me that Respondent was indeed attempting to avoid contact with law enforcement.

The Agency also pointed to ample evidence concerning the discarding of striped bass from the F/V JFTH during the pursuit. In particular, while the evidence shows that the duration of the Officers’ pursuit took no longer than one minute, it provided sufficient time for both Officers Beuth and Swiechowicz to observe the discard of striped bass from the transom door of the F/V JFTH. Both officers testified credibly about their observations and had documented their observations with detail and specificity in writing following the incident. See AX 1 at 1-2, 44-45. They were unequivocal in their identification of striped bass as the fish that were discarded from the Vessel. Additionally, Officer Guise, who also documented his observations with particularity in writing following the incident, recalled hearing Officer Swiechowicz announce that fish were being dumped from the Vessel during the pursuit. See AX 1 at 47. Further, the Enforcement Violation Report that Officer Swiechowicz prepared in connection with this incident cited Respondent with disposal of fish in addition to unlawful possession of striped bass. AX 1 at 49. Respondent has claimed that no fish were discarded and testified that he illuminated the water with his own flashlight to show the Officers that there weren’t any dead fish floating in order to demonstrate that no fish had been discarded from the Vessel. However, I found these uncorroborated claims unpersuasive and outweighed by the evidence presented by the Agency.

In sum, while Respondent came across at the hearing as sincere on certain points, his account of what happened was nevertheless unsubstantiated by any evidence in the record other than his own testimony. The account presented by the Agency, on the other hand, was supported by credible, substantial, and corroborated evidence proffered by multiple law enforcement officers. Thus, in weighing the evidence before me, I am compelled to find in favor of the Agency that Respondent attempted to avoid detection by law enforcement. Such evasive conduct warrants a commensurate penalty. Accordingly, I have considered Respondent’s actions in both fleeing law enforcement and discarding of striped bass during the pursuit as aggravating factors to Respondent’s degree of culpability in my penalty assessment.

*iii. History of Prior Violations and Ability to Pay*

Respondent has no history of prior violations. This point is undisputed. He has engaged in fishing from the time he was a youngster, and as of the date of the evidentiary hearing, Respondent was 46 years of age. Tr. 126, 144. He testified that he

has predominantly fished recreationally but that he began fishing commercially in the last seven years and holds a Massachusetts commercial license. Tr. 126. He has owned the F/V JFTH for the last eight to nine years and aims to go fishing as often as possible, weather permitting. Tr. 127. He frequently fishes the Block Island area and is “very familiar” with it. *Id.* Respondent testified that he is “boarded [by law enforcement] pretty much every time [he] go[es] out” and is aware of their presence patrolling the area. Tr. 137-38. He estimated that he is boarded by law enforcement on “at least a weekly basis.” Tr. 140. I considered Respondent’s extensive history of fishing and the lack of any prior violations as a mitigating factor in my penalty evaluation, and accordingly, downwardly adjusted the amount of the assessed penalty to account for this factor.

Arguments regarding an ability to pay a civil penalty were not properly raised before this Tribunal. While Respondent has challenged the amount of the monetary penalty proposed by the Agency, no evidence was submitted to establish an inability to pay a civil monetary penalty. In Respondent’s deposition prior to hearing, he made representations at that time that he could not afford to pay the penalty the Agency had proposed but also expressed an unwillingness to provide the financial information required to support an “inability to pay” claim because he believed that the Agency’s request in this regard was “asking a little bit too much information” and that his representations to NOAA “telling [them] I have inability to pay” should be sufficient support. AX 10 at 40-41. In the absence of any evidence to substantiate Respondent’s bald assertions, however, this factor has not impacted my penalty assessment.

*iv. Other Matters as Justice May Require*

Challenging the plausibility of Respondent’s claims – that he was fishing recreationally at the time of this incident and that he planned to give away any fish he retained, as was his past practice – the Agency argues that “strong circumstantial evidence to the contrary” supports the imposition of a significant penalty. In. Br. at 16 (citing Tr. 155-56; AX 10 at 15-16). In support, the Agency reiterates that Respondent holds a Massachusetts commercial fishing license, “which is not far from his home in Portsmouth, Rhode Island.” In. Br. at 15. Further, the striped bass that he unlawfully possessed in the EEZ “were compliant with Massachusetts’ commercial striped bass regulations, but not Rhode Island’s recreational requirements,” based on their length and retention of the right pectoral fin (for which removal is required under Rhode Island recreational fishing rules). *Id.* Given the late hour of this incident on Tuesday, June 30, 2020, the Agency argues that Respondent “could have . . . sold [the fish] in Massachusetts a few hours after officers apprehended him without raising suspicions” because Wednesday, July 1, 2020, was one of the “open commercial fishing days” for the sale of striped bass in Massachusetts by commercial anglers. In. Br. at 16.

The Agency’s argument, while not without some merit, largely amounts to conjecture and lacks sufficient and substantial evidentiary support to be convincing. Respondent has consistently represented through sworn testimony offered at hearing and earlier under deposition that he ceased fishing commercially in or around 2020 to pursue other employment and an alternate career path. AX 10 at 34-35. Respondent

also represented that he renewed his Massachusetts commercial license only so he would not risk losing it altogether. AX 10 at 34. In his deposition, Respondent was questioned about the dealers to whom he sold fish when he was still fishing commercially and he answered those questions in detail. Yet to support its claims of ongoing commercial fishing activity, the Agency has not produced, for example, any sales records from the fish dealers at the New Bedford's fish markets that Respondent identified in his deposition as the dealers to whom he previously sold fish when he was engaged in commercial fishing activity, or records from any other fish dealers who may have purchased fish from Respondent during the period in question. See AX 10 at 35-37. Further, despite Respondent informing the Agency that he kept "a pretty tight record" of his commercial fishing activity and offering to examine his records, as well as his representations that any financial information from his past commercial activity was submitted to his accountant for tax purposes, the Agency did not seek additional information about these commercial records or subpoena such information. AX 10 at 37, 39. For these reasons, I am not persuaded by the Agency's claims, and I have not considered its allegations regarding Respondent's intent to sell the striped bass in my penalty assessment.

Based on the foregoing, it is my assessment that a civil monetary penalty in the amount of \$9,000 is appropriate.

## **VI. DECISION AND ORDER**

Respondent is liable for the charged violation in this case. A civil monetary penalty of \$9,000 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. *Id.* 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: July 6, 2022  
Washington, D.C.