



UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:)
)
High Pressure Fisheries, Inc. and)
Joao A. Oliveira,)
)
Respondents.)

Docket Number:
NE2101404A, F/V Kahuna

AND

In the Matter of:)
)
High Pressure Fisheries, Inc. and)
Beau L. Gribbin,)
)
Respondents.)

Docket Number:
NE2101404B, F/V Kahuna

INITIAL DECISION AND ORDER

Date: March 29, 2024

Before: Susan L. Biro, Chief Administrative Law Judge¹
U.S. Environmental Protection Agency

Appearances: Scott E. Sakowski, Esq.
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¹ The Administrative Law Judge 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.

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I. PROCEDURAL HISTORY

On June 15, 2022, the National Oceanic and Atmospheric Administration (“NOAA” or “Agency”), on behalf of the Secretary of Commerce, issued separate Notices of Violation and Assessment of Administrative Penalty (“NOVA”) to Respondents High Pressure Fisheries, Inc. and Joao A. Oliveira in Docket No. NE2101404A, F/V Kahuna, and to Respondents High Pressure Fisheries, Inc. and Beau L. Gribbin in Docket No. NE2101404B, F/V Kahuna. Both NOVAs allege violations of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1891d, and its implementing regulations, 50 C.F.R. pts. 600-697.² Specifically, NOAA alleges in the NOVA for Docket No. NE2101404A (“NOVA A”), that “High Pressure Fisheries, Inc. and Joao A. Oliveira, owner and operator of the *F/V Kahuna*,” violated 16 U.S.C. § 1857(1)(A) and 50 C.F.R. § 648.14(i)(4)(i)(A) on March 10, 2021, “by possessing and/or landing Atlantic Sea scallops in excess of the limited-access general category individual fishing quota possession limits[.]” In the NOVA for Docket No. NE2101404B (“NOVA B”), NOAA alleges that “High Pressure Fisheries, Inc. and Beau L. Gribbin, owner and principal/operator of the *F/V Kahuna*,” violated 16 U.S.C. §§ 1857(1)(A) and (1)(E) and 50 C.F.R. § 600.725(f) on March 10, 2021, by “resist[ing], oppos[ing], imped[ing], threaten[ing], intimidat[ing], and/or interfer[ing] with an authorized officer in the conduct of any search or inspection[.]” The Agency proposes imposition of a \$5,005.20 penalty in Docket No. NE2101404A, and \$36,000.00 in Docket No. NE2101404B.

Respondents jointly requested a hearing on the alleged violations in a letter dated August 14, 2022. Pursuant to the applicable procedural rules, 15 C.F.R. pt. 904 (“Rules”), on August 31, 2022, I assigned myself as the Administrative Law Judge to preside over both cases. Concomitantly, I issued an Order on NOAA’s Assented to Motion to Consolidate Related Cases, allowing the matters to be heard together, as well as a Prehearing Order.

The parties’ Initial Disclosures were filed, and subsequently supplemented. By Order dated March 13, 2023, I granted the parties’ separate requests to take additional discovery. On May 16, 2023, the parties filed a Joint Stipulation on Effective Charging Statute & Regulations and a Joint Stipulation on Facts and Exhibits. On May 17, 2023, I granted the Respondents’ Motion to Sequester witnesses at the hearing.

A consolidated hearing in these matters was held May 23-24, 2023, in Providence, Rhode Island.³ Three witnesses testified for the Agency: Enforcement Officer Jed A. Fiske and

² All references herein to statutes and regulations are to those in effect at the time of the alleged violations on March 10, 2021, unless otherwise indicated.

³ A transcript of the hearing was produced in two volumes with the pages in the volumes numbered sequentially. Volume I, transcript pages 1-275, contains the testimony of the Agency’s witnesses. Volume II, pages 276-501, contains the testimony of Respondents’ witnesses. Citations to the hearing transcript appear as follows: “Tr. [page number].”

Supervisory Enforcement Officer Lieutenant David B. Testaverde, both from the National Marine Fisheries Service’s Office of Law Enforcement, and Mr. Travis Ford, a fishery policy analyst with NOAA’s Greater Atlantic Regional Fisheries Office. Tr. 9, 175-76, 210-11. Messrs. Beau L. Gribbin and Joao (“John”) A. Oliveira testified for Respondents. Tr. 282, 434. Also admitted into the record were sixteen exhibits, nine of which were Agency exhibits (“AX”), nos. 1-9, and seven were Respondents’ exhibits (“RX”), nos. 1-7.⁴ Tr. 497-98.

On June 12, 2023, this Tribunal emailed digital copies of the hearing transcript to the parties and issued a Post-Hearing Scheduling Order. The Agency filed its Post-Hearing Brief on July 28, 2023, and the Respondents filed their Post-Hearing Brief on August 27, 2023. On September 8, 2023, the Agency’s Reply Brief was filed, and Respondents’ Reply Brief was filed on September 14, 2023. With that last filing, the record closed.

II. LAW AND REGULATIONS APPLICABLE TO LIABILITY

A. Relevant Statutory Provisions

In 1976, Congress enacted the Magnuson-Stevens Fishery Conservation Management Act (“MSA” or “Act”) to establish “[a] national program for the conservation and management of the fishery resources of the United States . . . to prevent overfishing, to rebuild overfished stocks, to insure [sic] conservation, and to realize the full potential of the Nation’s fishery resources.” Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 2(a)(6), 90 Stat. 331, 332 (1976). The Act, codified as amended at 16 U.S.C. §§ 1801-1891d, aims to “promote domestic commercial and recreational fishing under sound conservation and management principles” and “provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery[.]” 16 U.S.C. § 1801(b)(3)-(4). Congress authorized the Secretary of the Department of Commerce, of which NOAA is a part, to implement and enforce the MSA. 16 U.S.C. §§ 1802(39), 1855(d), 1861(a); 5 U.S.C.A. § App. 1 Reorg. Plan 4 1970, §2(a) (West).

At the time of the violations alleged here, the Act provided in relevant part that—

It is unlawful—

(1) for any person—

(A) to violate any provision of this chapter or any regulation or permit issued pursuant to this chapter;

* * *

(D) to refuse to permit any officer authorized to enforce the provisions of this chapter . . . to board a fishing vessel

⁴ NOAA’s Case Report (AX 1 at 1-13) was admitted into the record in full, except for the final three lines appearing on page six, the last of which concludes on page seven. Tr. 54-56. RX 7 is a video.

subject to such person’s control for purposes of conducting any search or inspection in connection with the enforcement of this chapter or any regulation . . . ;

(E) to forcibly assault, resist, oppose, impede, intimidate, or interfere with any such authorized officer in the conduct of any search or inspection described in subparagraph (D);

. . . .

16 U.S.C. § 1857(1)(A), (D)-(E); *see also* Joint Stipulation on Effective Charging Statute & Regulations (“Jt. Stip. Law”), Ex. JX 1 (identifying charging statute and regulations in effect on Mar. 10, 2021).

B. Relevant Regulatory Provisions

The MSA creates eight Regional Fishery Management Councils and authorizes them to prepare fishery management plans for the Commerce Secretary’s approval.⁵ 16 U.S.C. §§ 1852(a)(1), (h)(1), 1854(a). The New England Fishery Management Council (“NEFMC”), consisting of the states of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut, has authority over the fisheries in the Atlantic Ocean seaward of such states. *Id.* § 1852(a)(1)(A). In 1982, the NEFMC and NOAA’s National Marine Fisheries Service (“NMFS” or “NOAA Fisheries”) implemented a Fishery Management Plan for Atlantic Sea Scallops, through promulgated regulations.⁶ Atlantic Sea Scallop Fishery, 47 Fed. Reg. 35,990 (Aug. 18, 1982) (to be codified at 50 C.F.R. pt. 650) (subsequently recodified at 50 C.F.R. pt. 648 by Fisheries of the Northeastern United States, 61 Fed. Reg. 34,966 (July 3, 1996)).

At the time of the alleged violations, those regulations provided in relevant part that—

(i) Atlantic sea scallops—

* * *

(4) IFQ scallop permit. It is unlawful for any person owning or operating a vessel issued an IFQ [Individual Fishing Quota] scallop permit to do any of the following:

(i) Possession and landing.

⁵ A “fishery” is defined as “[o]ne or more stocks of fish that can be treated as a unit for purposes of conservation and management and that are identified on the basis of geographic, scientific, technical, recreational, or economic characteristics, or method of catch,” or “any fishing for such stocks.” 50 C.F.R. § 600.10.

⁶ The “Atlantic sea scallop” is defined as the species “*Placopecten magellanicus*, throughout its range.” 50 C.F.R. § 648.2.

(A) Fish for or land per trip, or possess at any time, in excess of 600 lb (272.2 kg) of shucked, or 75 bu[shels] (26.4 hL) of in-shell scallops per trip⁷

50 C.F.R. § 648.14(i)(4)(i)(A); Jt. Stip. Law, Ex. JX 1.

In addition, regulations generally implementing the Act at the relevant time, provided in pertinent part that—

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

* * *

(f) Assault, resist, oppose, impede, intimidate, threaten, or interfere with any authorized officer in the conduct of any search, inspection, or seizure in connection with enforcement of the Magnuson-Stevens Act or any other statute administered by NOAA.⁸

50 C.F.R. § 600.725(f); Jt. Stip. Law, Ex. JX 1; *see also* 50 C.F.R. § 648.14(e)(1) (prohibiting similar conduct as 50 C.F.R. § 600.725(f)).

C. Relevant Guidance Documents

On April 30, 2019, NOAA Fisheries issued a Greater Atlantic Region Bulletin on the Atlantic Sea Scallop Fishery to all scallop vessels. AX 7 at 1; Joint Stipulation on Facts and Exhibits (“Jt. Stip. Facts”) ¶ 13. The Bulletin distributed the Agency’s two-page Compliance Guide for Landing and Possessing In-Shell Scallops (“Compliance Guide”). AX 7 at 2-3; RX 2. The Compliance Guide states in pertinent part that—

Permit holders may possess or land a limited number of shucked scallops or in-shell scallops, per trip, as prescribed in 50 CFR § 648.52.⁹ If you are landing both scallop meats and in-shell

⁷ “Shucking or to shuck means opening or to open a scallop . . . and removing the meat or the adductor muscle from the shell.” 50 C.F.R. § 648.2. A “[b]ushel (bu) means a standard unit of *volumetric* measurement deemed to hold . . . 1.24 ft³ (35.24 L) of in-shell Atlantic sea scallops.” *Id.* § 648.2 (emphasis added). Units of volume, such as a “bushel,” reflect the amount of space a substance occupies, the weight of which varies depending upon the density of the contents, for example, feathers versus lead, whereas a unit of weight or mass, such as a “pound” or “kilogram,” is related to the amount of material in an object. *Mass*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/mass> (last visited Mar. 26, 2024); *Volume*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/volume> (last visited Mar. 26, 2024).

⁸ The language of the regulation largely duplicates the statutory language, although it omits the term “forcibly” as a descriptor and adds the term “threaten” to the list of prohibited conduct. *Compare* 16 U.S.C. § 1857(1)(E), *with* 50 C.F.R. § 600.725(f). None of the parties have raised an issue regarding these terms or differences.

⁹ This provision establishes the daily possession and landing limits for IFQ scallop permit holders which at the time of the violation was 600 pounds of shucked scallops or 75 bushels of in-shell scallops. 50 C.F.R. § 648.52(a).

scallops, law enforcement will convert the product to one unit of measure to determine the applicable possession limit.

AX 7 at 2.

The Compliance Guide indicated that volume, specifically bushels, rather than weight, is the “one unit of measure” it would use to determine compliance. AX 7 at 2-3. Specifically, it provides that a “Standard Fish Basket” is equivalent to 1.2 bushels, a “Standard Fish Tote” equals 2.1 bushels, and that eight pounds of scallop meats equals one bushel. AX 7 at 3. Based upon this formula, NOAA calculated that the regulatory limit of 75 bushels of in-shell scallops equal 62.5 baskets or 35.7 totes. AX 7 at 2. For the purposes of this calculation, the Compliance Guide identified the volume of a “Standard Fish Basket” as 1.47ft³ and a “Standard Fish Tote” as 2.65ft³, stating that—

These Standard fish baskets and totes are the most commonly used containers and are used in the examples. If your fish baskets or totes differ from above standard sizes, the conversions in the examples will not apply. Check the manufacturers label for volume or review the appropriate volumetric measurement for each non-standard container. Containers must be flush to the top and not rounded over.

AX 7 at 3; RX 2 at 2.

D. Burden of Proof

“To establish civil liability under the Magnuson-Stevens Act, the burden is on the Agency to prove an alleged violation by a preponderance of ‘reliable, probative and substantial evidence.’” *Cloud*, No. AK1202525, 2017 WL 10845065, at *5 (NOAA App. Oct. 16, 2017) (citing 5 U.S.C. § 556(d)); *see also Vo*, No. SE010091FM, 2001 WL 1085351, at *6 (NOAA Aug. 17, 2001) (noting preponderance of the evidence standard); *Bui*, No. SE1603549, 2019 WL 7579972, at *5 (NOAA Mar. 25, 2019) (same). This standard requires the Agency to establish that the facts it relies upon “are more likely than not to be true.” *Bui*, 2019 WL 7579972, at *5 (citing *Fernandez*, No. NE970052FM/V, 1999 WL 1417462, at *3 (NOAA Aug. 23, 1999)). “To satisfy this burden of proof, the Agency may rely upon either direct or circumstantial evidence.” *Id.* (citing *Vo*, 2001 WL 1085351, at *6). Once the Agency “has established the allegations . . . by a preponderance of the evidence, the burden of producing evidence then shifts to the Respondents to rebut or discredit the Agency’s evidence.” *Roque*, No. NE970229FM/V, 1999 WL 1417458, at *27 (NOAA Apr. 30, 1999) (citing *Steadman v. Sec. & Exch. Comm’n*, 450 U.S. 91, 101 (1981)), *aff’d*, *Roque v. Evans*, No. CIV.A. 01-CV-10709-R, 2003 WL 131725, at *1 (D. Mass. Jan. 16, 2003).

Under the Rules, all evidence that is “relevant, material, reliable, and probative” is admissible at the hearing. 15 C.F.R. § 904.251(a)(2). “Formal rules of evidence do not necessarily apply . . . and hearsay evidence is not inadmissible as such.” *Id.* “The test for

admitting hearsay evidence in an administrative proceeding requires that the hearsay must be probative, it's [sic] use must be fundamentally fair, and it must bear satisfactory indicia of reliability." *Swanson*, No. AK022198, 2005 WL 705422, at *11 (NOAA Jan. 27, 2005) (citing *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980); *Roque*, 1999 WL 1417458, at *8). When assessing the reliability of hearsay, tribunals should consider that:

[T]here is not a bright line test to determine if there is an indicia [sic] of reliability, but there are several factors to consider: (1) independence or possible bias of the declarant; (2) whether the statements are signed and sworn as opposed to anonymous, oral, or unsworn; (3) whether the statements are contradicted by direct testimony; (4) whether declarant is available to testify; (5) whether the declarant is unavailable and no other evidence is available; (6) the credibility of the declarant if a witness; and (7) whether the hearsay is corroborated.

Id. (citing *Bailar*, 626 F.2d at 149; *Roque*, 1999 WL 1417458, at *9). "While certain evidence admissible in an administrative hearing may be inadmissible under the [Federal] Rules of Evidence, the weight attached to such evidence must be considered in light of its deficiencies." *Id.* (citing *Roque*, 1999 WL 1417458, at *8).

Violations of the Act are strict liability offenses, and, therefore, state of mind is irrelevant in determining whether a violation occurred. *Alba*, 2 O.R.W. 425, 1982 WL 42985, at *4 (NOAA App. Mar. 15, 1982) ("Scienter is not an element of a civil offense under [the MSA.]" (citing 16 U.S.C. § 1857)); *see also N. 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 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." (internal citations omitted)).

III. FACTUAL BACKGROUND

Respondent Beau L. Gribbin is a Massachusetts resident and a commercial fisherman, hailing from a New England family of professional fisherman. Tr. 282-83, 388, 415; AX 2 at 7. Around 1990, he began purchasing fishing vessels and "cobbling together a solid platform" of fishing permits, allowing him to legally acquire regulated catch in federal and state waters. Tr. 288, 295-302; *see* AX 2 at 1-5. Since then, he has been very successfully engaged in the commercial fishing business. Tr. 283, 388. Presently, he is the largest independent in-shell sea scallop supplier in Massachusetts, and the second largest supplier overall.¹⁰ Tr. 332, 384, 390-91. In addition, Mr. Gribbin supplements his commercial fishing revenue by participating in oceanographic research activities conducted by entities such as the Woods Hole Institute, the

¹⁰ Mr. Gribbin testified that he used the descriptive term "independent" here to mean that he does not own a "fish house," i.e., a waterside fish purchaser or processor, in addition to owning fishing vessels. Tr. 332-33, 384.

University of Massachusetts at Dartmouth's School for Marine Science and Technology (SMAST) and the Commercial Fisheries Research Foundation (CFRF). Tr. 291-94, 307-08, 411-12.

Mr. Gribbin has also engaged himself in public advocacy on behalf of his business interests and those of his trade. Tr. 306, 411-12. In 1998, he founded, and has since run, the Provincetown Fishermen's Association, which successfully pursued representation and protection of the small boat commercial fishing fleet in the development and operation of MacMillan Pier in Provincetown, Massachusetts. Tr. 305-06. He presently sits on the town's pier court as a fisheries advisor. Tr. 306. Beginning in 2009 or 2010, Mr. Gribbin also began actively participating in the Cape Cod Commercial Hook Fishermen's Association on behalf of the scallop fishery. Tr. 304. As part of that Association's working group, he participated in presentations made to the NMFS, including its Greater Atlantic Regional Fisheries Office. Tr. 304. These activities led to his ascension to the board of the Cape Cod Commercial Fishermen's Alliance in Chatham, Massachusetts, as a small boat "scallop specialist." Tr. 305. Mr. Gribbin testified that as such, he has also spoken "many times" before the NEFMC, lobbied for the scallop industry in Washington, and worked with federal government science and policy personnel on reopening fishery access areas and increasing the trip limit for scallops from 400 to 600 pounds. Tr. 306-07, 411-12, 415. Pertinent here, Mr. Gribbin testified that in 2018, he strongly and publicly expressed to the NEFMC and NOAA his opposition to imposing a "volumetric equivalency" catch limit on in-shell scallops, such as that set out in the Compliance Guide, on the basis that it would restrict his effective catch to 450 pounds of meat, rather than 600 pounds per day, resulting in a loss to him of approximately \$3,000 per trip. Tr. 386-88, 398.

Mr. Gribbin is the sole owner of the Respondent corporation, High Pressure Fisheries, Inc. ("HPF"), which in turn is the sole owner of the 55-foot steel Fishing Vessel ("F/V"), the Kahuna. Jt. Stip. Facts ¶¶ 3, 5; Tr. 301, 389-90; AX 2 at 3-4. Mr. Gribbin's company purchased the Kahuna in 2018. Tr. 301, 314. Around that same time, due to certain maladies, Mr. Gribbin found himself unable to continue to personally engage in the strenuous work of commercial fishing. Tr. 314-16. As a result, in 2018, Mr. Gribbin hired Respondent Joao ("John") Oliveira to captain the Kahuna, a position which Capt. Oliveira still holds today. Tr. 316, 435.

Like Mr. Gribbin, Capt. Oliveira is a Massachusetts resident, veteran commercial fisherman, and descendant of a "[b]ig, big fishing family." Tr. 434-35, 439. Capt. Oliveira has been harvesting groundfish since 1985 and scallops since 2001, and he has served as the captain of fishing vessels since 1998. Tr. 435-38; AX 2 at 9. From 1998 until 2018, he captained a fishing vessel out of New Bedford, Massachusetts, which was initially owned by his father, and then sold in 2008 to Carlos Rafael. Tr. 439-41. In 2018, Capt. Oliveira ceased working for Mr. Rafael¹¹ and then began working for Mr. Gribbin, captaining the Kahuna and engaging in

¹¹ In 2018, NOAA commenced an administrative action against Mr. Rafael, his companies, and his operators, including Capt. Oliveira, alleging, among other things, the falsification of catch reports to evade quota limits. AX 9 at 1-51. The respondents in that administrative action entered a Settlement Agreement with NOAA pursuant to which Mr. Rafael's fishing vessels were sold. Tr. 64-65, 456-58; AX 9. As part of the settlement, Capt. Oliveira admitted to two counts of misreporting catch, in exchange for a 40-day suspension of his operator's permit and a
(footnote continued on following page)

“general category day scalloping.” Tr. 441-42.

Capt. Oliveira described day scalloping as fishing continuously for 24 hours, or until reaching the daily catch limit of 600 pounds, returning to port to offload for about 20 minutes, and then immediately heading back out to sea. Tr. 442-43, 445. This pattern of strenuous work is repeated for seven to ten days in a row, then the crew takes four days off, before heading out on another sequence of trips, spending in total about 20 days a month at sea. Tr. 442-43, 458. To facilitate such a fast turnaround in port, Capt. Oliveira explained that the crew packs up the catch while still at sea. Tr. 443-44. That way, when the vessel lands at the dock, the catch can be directly off loaded into a truck and sent off to be weighed out and sold at a fish processor/wholesaler. Tr. 196, 443, 449.

Per Mr. Gribbin’s instructions, at the time relevant here, Capt. Oliveira measured his scallop catch, both the shucked meat and live or in-shell scallops, by weight, not volume, although he could only estimate the weight of the catch while at sea as there is no scale on the Kahuna. Tr. 447, 450; *see also* Tr. 330, 417-19. Still, Capt. Oliveira testified that he felt confident as to his weight estimations because “guys that have been doing this for a long time, like me and others, . . . could tell just by eye.” Tr. 447. In addition, to aid his estimations, he has the shucking crew utilize “a big bucket, [knowing] that if you fill it to the rim with scallop[] [meat], it will weigh out . . . exactly 50 pounds.” Tr. 447. Once the bucket is filled, the 50 pounds of scallop meat is transferred into a 60-pound cloth scallop bag, leaving “enough cloth to close the top.” Tr. 448; AX 1 at 19-26 (photographs of scallop bags and their scale weight); RX 6 at 5-12 (same). When weighed upon landing, these cloth bags have consistently been found to be within one pound of the 50-pound estimate Capt. Oliveira asserted. Tr. 449-50; AX 1 at 19-26.

As to scallops retained live in-shell, Capt. Oliveira explained that the shells brought onboard are initially placed in baskets. Tr. 470. Based upon experience, he estimates that three full baskets weigh about “150, 200 pounds” in total, “depend[ing] if we had a little bit leftover,” and that “four baskets of live scallops would equal 250 pounds.” Tr. 470. Before landing, the shells in the baskets are poured or packed into boxes, also known as “totes,” but he claimed the totes are not filled up “all the way;” rather, they are filled only up to the indented edge manufactured into the four sides of the totes, three inches below the top rim. Tr. 444; *see also* Tr. 419-20; AX 1 at 15-18 (photographs of scallop shells in totes and baskets); RX 6 at 1-4 (same). Capt. Oliveira explained that the edge allows the totes to be “click[ed] into each other” “like Tupperware” and stably stacked, three high on the vessel while at sea, and

16-month probationary period. Tr. 64, 456; AX 9 at 7-8, 20, 56, 61,73. Upon successfully completing his sentence, Mr. Oliveira sincerely believed that his record was “almost supposed to be like expunged,” “not supposed to exist,” based upon the advice of his counsel. Tr. 456. The Settlement Agreement, however, provides otherwise, indicating that the violations to which Capt. Oliveira pled in that case “will be considered by NOAA in any penalty that NOAA may assess against a Respondent for any violation charged in the future.” AX 9 at 52.

not “teeter totter.”¹² Tr. 444; *see also* Tr. 419-20 (Mr. Gribbin describing the totes as having sides that angle out as they rise “so they nest inside of each other,” with the widest part at the top); AX 1 at 15-18 (photographs of stacked totes).

Additionally, as background to the March 10, 2021, events at issue here, at hearing Capt. Oliveira described an encounter which occurred previously, on January 21, 2021. Specifically, he recalled that upon returning to port that day, his vessel was boarded and inspected by Officer Jed Fiske and another NOAA enforcement officer. Tr. 446; *see also* Tr. 19-21. The officers first inquired about the weight of his catch, to which Capt. Oliveira responded that it was 598 pounds of scallop meats, characterizing the amount as “perfect,” in that it was just two pounds under the 600-pound daily scallop limit. Tr. 446-47. Next, with his consent, the officers searched the vessel, and in doing so, discovered two Ziploc bags of scallop meats hidden in a crewmember’s duffle bag. Tr. 446, 451-52; *see also* Tr. 19, 62-63, 394-95. The bags weighed eight pounds in total, placing the vessel’s total catch at six pounds over the legal limit. Tr. 395, 451. Capt. Oliveira responded to the revelation by asking Ofc. Fiske for leniency, explaining that he was unaware of the concealed catch, his record was clean, and he was only slightly over the limit. Tr. 453; *see also* Tr. 63. Further, Capt. Oliveira pointed out that it would have been lawful for the crew to retain an additional 10-15 pounds of catch for “home consumption,” if it had been reported to NMFS before the vessel returned to the dock. Tr. 453; *see also* Tr. 430. Ofc. Fiske responded to Capt. Oliveira’s leniency request with a non-committal “we’ll see,” although he implied to Capt. Oliveira that if he found his record was, in fact, “clean,” he would only be issued a warning. Tr. 453.

The following day, Capt. Oliveira testified, Ofc. Fiske telephoned and accused him of lying about having a clean record, as he had a prior violation relating to his previous employment with Mr. Rafael. Tr. 454-56; *see also* Tr. 63-65. Capt. Oliveira answered the accusation by asserting that Ofc. Fiske was “not supposed to be looking at that,” according to the “contract” with NOAA and suggesting he (Capt. Oliveira) needed “to go see an attorney.” Tr. 455; *see also* Tr. 65. In response, Ofc. Fiske “blew up,” and “started yelling and screaming, don’t tell me what I can look at and what I can’t look at,” and threatening to charge Capt. Oliveira with “interference,” the captain stated. Tr. 455-56. “[S]cared” by the potential interference charge, Capt. Oliveira said he immediately “deescalate[d]” the conversation, and then he and Ofc. Fiske both calmed down, talked it out, and he ended up with only a warning for the slight overage. Tr. 456; *see also* Tr. 21, 62, 395. However, since this incident occurred, Capt. Oliveira said the Kahuna has been inspected two to three times a week at the Provincetown pier by the Coast Guard or Massachusetts Environmental Police (MEP), whereas

¹² Mr. Gribbin testified that the in-shell catch is not packed on the vessel to maximize the volume (i.e., the number of shells) each tote contains, but rather for weight, specifically in increments of 100 pounds per tote, because the wholesalers “run the scales at 100 pounds when we unload,” and “they put 10 [totes] in each tub or vat usually.” Tr. 330, 420-21. He suggested that by filling them in this manner, “you’re always going to be under the volumetric equivalency.” Tr. 330; *see* Tr. 420.

prior to receiving the warning, it was rarely inspected, maybe only once a month or once every three months.¹³ Tr. 459.

As to the events surrounding the alleged violations at issue here, Capt. Oliveira explained that on March 9, 2021, at 3:55 p.m., the Kahuna left port to fish in Federal waters. Tr. 464-65; *see also* AX 4; Tr. 376-77. He and the crew conducted a series of dredges from 6:20 p.m. to 10:26 p.m., acquiring about three and a half (3.5) bags (or approximately 175 pounds) of shucked scallop meat. Tr. 377-78, 467; AX 4; *see* 449-51. The vessel then changed locations and fished for larger, live scallops. Tr. 468; AX 4. Through the night, the vessel conducted 15 drags for live scallops, catching a total of about 33.5 totes or 3,350 pounds of in-shell scallops, according to Capt. Oliveira's contemporaneously maintained records. Tr. 460; 470; AX 1 at 28. At that point, the vessel ceased fishing "[b]ecause I figured we had reached pretty close to our limit" of "3400 pounds" of live in-shell scallops, the captain stated. Tr. 470-71. Capt. Oliveira explained that he had calculated that amount as the limit of live scallops he could acquire by utilizing a weight conversion as instructed by Mr. Gribbin, not a volumetric equivalency. Tr. 470-71. Specifically, they assumed that 8.33 pounds of live in-shell scallops equal one pound of meat, so 3400 pounds of shellstock would equal about 400 pounds of meat, which is approximately the remaining portion of the 600-pound daily catch limit less the 175 pounds of shucked meat previously acquired. Tr. 470-71. Around 4:45 p.m. on March 10, 2021, the Kahuna headed back to MacMillan Pier in Provincetown. Tr. 471. As he navigated in, Capt. Oliveira provided NOAA with notice of his catch estimate and anticipated landing time. Tr. 459-60.

Ofc. Fiske was waiting for the Kahuna at the pier when it landed at approximately 7:30 p.m. on March 10, 2021, to conduct a "standard" fisheries inspection. Tr. 24-25, 69, 460; Jt. Stip. Facts ¶ 9; AX 1 at 1. From the pier, he observed and photographed in-shell scallops in black and gray totes "stacked on each other three high," as well as in orange, blue, and green baskets "all over" the 25-30 ft. open, rear deck of the vessel. Tr. 26-27, 70-71, 73; AX 1 at 2, 15-18. The totes and all but one of the baskets, appeared "full" to him. Tr. 73-76; AX 1 at 2. After landing, Capt. Oliveira joined the Officer up on the pier and described his catch and calculations, indicating with certainty that he was under the possession limit. Tr. 27, 29, 77; AX 1 at 2. Ofc. Fiske acknowledged at hearing that he "wasn't confident" at that moment that he understood Capt. Oliveira's conversion calculations, since he had previously conducted very few inspections involving in-shell scallops and had never previously utilized NOAA's Compliance Guide on volumetric conversion.¹⁴ Tr. 27-28, 59-60, 81-85; AX 1 at 2.

¹³ NOAA has a joint enforcement agreement with MEP allowing state authorities to conduct inspections for federal violations. Tr. 61.

¹⁴ Ofc. Fiske testified that he had previously conducted only one in-shell scallop inspection, and not having any guidance on adjudging the catch in the volumetric units of bushels, he had allowed the crew to shuck the in-shell scallops to determine the weight of the meat for compliance purposes. Tr. 59-60.

Ofc. Fiske tallied the containerized catch, determining the Kahuna had 27 totes, 10.5 baskets of in-shell scallops, and 3.5 bags of shucked scallop meat. Tr. 29-31; AX 1 at 2, 15-18. As the vessel was quickly offloading, he observed the crew “dumping” and “shaking” the baskets of scallop shells into additional empty totes prior to moving and restacking the totes three-high into a truck waiting on the pier. Tr. 29, 31-32, 78-79, 88-89; AX 1 at 2-3. After the baskets were emptied, Ofc. Fiske counted an additional 7 totes, bringing the total number of totes to 34.¹⁵ Tr. 29, 32; AX 1 at 3. He also weighed the 3.5 bags of shucked scallop meats using his digital scale set up in the truck, finding their net weight to be 175.1 pounds; he did not weigh the in-shell scallops. AX 1 at 3, 19-26; Tr. 30-31, 33, 461-62.

Next, to determine whether the catch was within the 600 lbs./75-bushel limit, Ofc. Fiske consulted NOAA’s Compliance Guide (AX 7). Tr. 33, 462; AX 1 at 4. Noting that the Guidance dictates that a standard fish tote of in-shell scallops equals 2.1 bushels, and each bushel is equivalent to 8 pounds of meat, he calculated that the 34 totes equated to 71.4 bushels or 571.2 pounds of meat. AX 1 at 4; Tr. 33; *see also* AX 7 at 3. Adding this sum to the 175.1 pounds of shucked scallop meats onboard, Ofc. Fiske calculated that the Kahuna’s total catch was approximately 746.3 pounds of scallop meat, or 146.3 pounds over the 600-pound possession limit, and conveyed this finding to Capt. Oliveira on board the vessel. AX 1 at 4. 27; Tr. 33-34.

Capt. Oliveira neither understood nor agreed with the Officer’s volumetric conversion calculations and conclusion as to overage, and so led him to the vessel’s wheelhouse and showed him his detailed contemporaneously hand-written tally of catch weight he used to determine compliance with the possession limits (AX 1 at 28). Tr. 34-36, 82-83, 463, 469-72; AX 1 at 4. He explained to the Officer that he had calculated that each filled tote weighed about 100 pounds, and 8.33 pounds of scallop shells equals 1 pound of meat, so 33.5 totes (3,350 lbs.) divided by 8.33 equaled approximately 404 pounds of shucked scallop meat. Tr. 469-71; *see* 82-83; AX 1 at 4, 28. *Cf.* AX 3 (handwritten Fish Vessel Trip Report indicating the Kahuna landed 3500 lbs. of in-shell scallops); RX 1 (same). Ofc. Fiske countered, asserting that NOAA does not use a weight conversion methodology, rather it uses the volumetric measure laid out in its Compliance Guide. AX 1 at 5; *see* Tr. 85. After some further civil discussion back and forth, Capt. Oliveira called the vessel owner, Mr. Gribbin, and informed him of Ofc. Fiske’s findings. Tr. 36, 85, 472-73; AX 1 at 5. After doing so, he handed the telephone over to Ofc. Fiske to speak

¹⁵ The extent to which the totes were “full” or “flush to the top and not rounded over” as stated in the Compliance Guide, is a matter of dispute. Respondents testified that generally their totes are not filled up “all the way;” rather, they are filled only up to a ledge three inches below the top rim, so they nest inside each other. Tr. 419-20, 444. As to the totes at issue here, Ofc. Fiske testified that “visually, they appeared full to me;” a couple of totes were “overly full,” some may have been “under full,” “[b]ut generically they were full to me.” Tr. 31-32; *see also* AX 1 at 3. To the Tribunal, the photographs of the totes at issue here neither appear consistently filled flush to the top edge with shells, nor do they appear to have been uniformly and intentionally filled to a point three-inches below the rim, so they could be and/or were securely nested one inside the other when stacked. AX 1 at 15-18; RX 4.

directly with Mr. Gribbin. Tr. 36, 85, 473; AX 1 at 5. What exactly happened thereafter, is the subject of some contention and the basis for the alleged violation of interference.

According to Ofc. Fiske, over the phone, he explained to Mr. Gribbin NOAA's volumetric to weight conversion methodology and advised him that it showed an overage. Tr. 85; AX 1 at 5. In a bit of an "irritated" tone, Mr. Gribbin replied that the Officer's conversion methodology was "wrong," and he (Mr. Gribbin) knew that it was wrong because he had been involved in creating the regulations with NOAA. Tr. 36-37, 85; AX 1 at 5. Further, Mr. Gribbin asserted that he was sure that his totes would average out to be 100 pounds each when weighed at the wholesaler, assuming a 10-pound tare for the box. Tr. 80; *see* Tr. 357-58. An unexpected break in the telephone conversation then occurred, due either to a "lost signal" according to Ofc. Fiske, or the Officer intentionally hanging up, according to Respondents.¹⁶ Tr. 37; AX 1 at 5; *see* Tr. 86. When the two reconnected on the phone, Mr. Gribbin angrily stated something like "fuck this, I'm coming down there." Tr. 37-38, 86; AX 1 at 5.

The Officer then moved to the vessel's rear deck to await Mr. Gribbin's arrival. AX 1 at 5. While waiting, he telephoned and spoke to Enforcement Officer Wilmarth, a colleague then also on duty, apprising him of his "location and situation." Tr. 38; AX 1 at 5. Ofc. Fiske also telephoned for his supervisor, Lt. David Testaverde, but was unable to reach him. Tr. 39; AX 1 at 5-6; *see also* Tr. 179 (Testaverde confirming missed call). When asked why he placed the calls, Ofc. Fiske testified, "I felt like it was intelligent for me to like let somebody know what's going on, especially given the way that phone call ended, that someone should know where I'm at in case something goes wrong." Tr. 38-39. He also activated an application on his phone ("10-21 App") that broadcasts live video, sharing a link with Officer Wilmarth and Lt. Testaverde, hoping they would view what he was seeing. Tr. 39-40, 87; AX 1 at 6.

Approximately ten minutes after he last spoke with Mr. Gribbin, Ofc. Fiske said he heard "the sound of a revving engine coming down the pier," and "the squealing of tires," followed by the sight of Mr. Gribbin's truck, and then the sound of "the collision of metal on metal." Tr. 40, 86-87; AX 1 at 6. Exiting his vehicle, Mr. Gribbin appeared to the Officer "visually upset," "very mad," "angry," and "hostile," in that his "eyes were wide," he had a "puffed chest," his "fists were clenched," and he was "yelling and swearing," repeatedly commenting "fucking bullshit." Tr. 41, 89; AX 1 at 6. Mr. Gribbin then proceeded to board the boat "quite quickly," despite wearing a cast or boot on his foot, the Officer recalled. Tr. 41, 90; AX 1 at 6; *see also* Tr. 185. Once onboard, Mr. Gribbin continued to yell profanities such as "fuck" and "bullshit" as he approached the Officer. AX 1 at 6. "[H]e was walking toward me very quickly in a way that I thought for sure I was going to be assaulted," Ofc. Fiske testified, and Mr. Gribbin continued to exhibit threatening body language, known in enforcement as "pre-assault indicators," he explained. Tr. 41-42; *see* AX 1 at 6. When Mr. Gribbin was about ten feet away from him, Ofc. Fiske instructed Mr. Gribbin "multiple times," to "get back" and "get away." Tr. 42-43; AX 1 at 7. Nevertheless, Mr. Gribbin continued to make periodic "short advancements" towards him,

¹⁶ Capt. Oliveira testified that Ofc. Fiske admitted to him that he had hung up on Mr. Gribbin because Mr. Gribbin had raised his voice to him. Tr. 474.

each separated by a “pause,” finally stopping four to five feet away from him, the Officer recalled. Tr. 43. At this point, “preparing for a fight,” Ofc. Fiske said he began to “blade,” that is turn his body to the side, and then he recounted—

I put my hand on my firearm. I don't disengage my locking mechanism on the firearm. And as mentioned, I also said get back, get away from me. He sees, he observes my hand on my firearm, and he stops and asks [sic] me what are you going to do, shoot me.

* * *

I'm thinking the threat of me having my hand on my firearm doesn't seem to discourage him from wanting to continue coming closer to me and, and continuing this, this frame of mind that he's in.

* * *

At this point, right there and then I do not feel like I'm in . . . a position to safely leave the boat.

* * *

Because I'm legitimately in fear like I'm about to be assaulted or just in a fight.

Tr. 43-44, 92, 94; AX 1 at 7 (“Mr. GRIBBIN was not listening to me, and continued to erupt in angry and hostile behavior, yelling and swearing.”). At the time this interaction occurred, the Officer recalled that Capt. Oliveira was near the wheelhouse and the remaining vessel crew were standing in or near the shucking house. Tr. 43-44.

Despite the Officer’s fear, no physical altercation then took place. AX 1 at 7. Instead, Mr. Gribbin turned around and walked to the wheelhouse to speak to Capt. Oliveira, continuing to curse as he went, stating words such as “fucker” and “bullshit.” Tr. 44-45, 97-98. Once in the wheelhouse, Ofc. Fiske witnessed Mr. Gribbin “continuing to yell loudly and throwing items.” AX 1 at 7; Tr. 45.

Alone now on the rear deck, Ofc. Fiske attempted to use his radio to call C-100, or “dispatch,” which is in the U.S. Customs and Border Protection Office in Florida, for help, but discovered his radio battery was dead. Tr. 46-47; AX 1 at 7. “Moments later,” however, he received a phone call from his supervisor, Lt. Testaverde. Tr. 45, 97; AX 1 at 7. He informed the Lieutenant that he was still on the vessel, with a “hostile individual,” and was ending the inspection “right now” based upon the “safety risk,” deciding “it's not worth the inspection.” Tr. at 45; AX 1 at 7. Having received Lt. Testaverde’s backing to terminate the inspection, Ofc.

Fiske proceeded to disembark the vessel onto the pier. Tr. 45-46; AX 1 at 7; RX 7; *see also* Tr. 179-81 (Testaverde confirming Fiske's testimony as to the call).

Mr. Gribbin followed Ofc. Fiske off the vessel onto the pier. Tr. 47, 98; AX 1 at 7. The Officer described the scene as follows:

He's still upset. He's still angry. He's still showing me pre-assault indicators. I again tell him a few times get away from me, get back. And he's still not complying. He's still making way towards me. And in which case, at which time I unholster my baton, expandable baton, but I don't expand it. And I put it behind my -- I had my body so that my firearm is away from Mr. Gribbin and my weak shoulder is facing him, and I placed my baton that's in my hand behind my right leg.

Tr. 47-48; *see also* 98-99; AX 1 at 7-8 (Mr. Gribbin was "expressing a hostile rage" and "hostile behavior," that is, "quick movements, clenched fists, puffed chest, and the loud yelling of profanities," as he was advancing). At hearing, Ofc. Fiske generally recalled that Mr. Gribbin wanted the vessel to be able to leave the pier but testified that he could not remember exactly what Mr. Gribbin was saying at the time. Tr. 48, 100-01. He explained –

At that point, things were moving a little differently. In my mind, I do believe I got into a little bit of tunnel vision as far as focusing on one thing, focusing on Mr. Gribbin. So I wasn't entirely sure what he was saying, I just – my, my brain perceived another threat.

* * *

I still feel in fear. I still feel overwhelmed and anxious and scared, but I do feel better that I am off the boat because now I have like more, more area to run around, to walk, if I have to run, run away or just more space. I felt more comfortable on the pier.

Tr. 48; *see also* AX 1 at 8 (Mr. Gribbin was yelling "about how he was being targeted and his understanding of the regulations"). The Officer admitted that, at this point, he was likely yelling and swearing because he was scared. Tr. 99.

In response to the situation then presented, Ofc. Fiske testified that he employed some "de-escalation body language," lowering his voice, changing his position, and showing his palms. Tr. 49. The technique worked, the Officer recalled, stating "[e]ventually, me and Mr. Gribbin were speaking to each other much less aggressively" "like regular civil men," in the way they had always interacted previously. Tr. 49-52. Ofc. Fiske averred that during this interaction he advised Mr. Gribbin simply that, "I've got this sheet. This is what it's telling me. I'm not terribly familiar with it, but this is what it says. I'm not trying to accuse you formally of having an overage. I'm just going by what I have right here, which is new to me." Tr. 50. In reply, Mr.

Gribbin continued to claim that “this is not the [w]ay you do it,” the Officer remembered, stating further, that he “was so passionate about it . . . , I just said you’re probably right and I’m sorry.” Tr. 50-51; see AX 1 at 8. Despite the amicable tone, Ofc. Fiske testified that at that point he still felt it would be “very dangerous” for him to finish the inspection because he did not want to “reincite” or make Mr. Gribbin “mad again.” Tr. 51-52; see AX 1 at 8. Therefore, he approved the vessel leaving the pier, with the inspection incomplete.¹⁷ Tr. 52; AX 1 at 8. At some point after that, Mr. Gribbin apologized to Ofc. Fiske for his behavior, explaining that he had just broken his foot that day and his family was experiencing some financial problems. Tr. 51; AX 1 at 9. The two men shared a handshake, and the conversation ended.¹⁸ Tr. 51; AX 1 at 9.

The next day, March 11, 2021, Mr. Gribbin telephoned him and again apologized for his behavior, Ofc. Fiske testified. Tr. 52-53; AX 1 at 10. In reply, the Officer told Mr. Gribbin that he could give his forgiveness “as a person,” but not “as a law enforcement officer,” and advised Mr. Gribbin that he was proceeding on violations based upon the overage and intimidation/interference. Tr. 53; AX 1 at 10. Ofc. Fiske then proceeded to draft his case report on the inspection (AX 1 at 1-13) and issue the Enforcement Violation Reports to Respondents (AX 1 at 32-33). Tr. 54; AX 1 at 10.

IV. POSSESSION OR LANDING IN EXCESS OF THE CATCH LIMIT

As indicated above, in Docket No. NE2101404A, NOAA alleges that on March 10, 2021, Respondents High Pressure Fisheries, Inc. and Joao Oliveira violated the MSA by failing to comply with the following regulatory provision:

It is unlawful for any person owning or operating a vessel issued an IFQ [Individual Fishing Quota] scallop permit to do any of the following:

(i) Possession and landing.

(A) Fish for or land per trip, or possess at any time, in excess of 600 lb (272.2 kg) of shucked, or 75 bu[shels] (26.4 hL) of in-shell scallops per trip.

¹⁷ Ofc. Fiske testified that the parts of his inspection he was unable to complete included his review of the vessel’s paperwork, including the Fishing Vessel Trip Report, fishing permit, Operator’s Permit, all of which he generally photographs, as well as his search of the vessel for unreported catch. Tr. 52; AX 1 at 4; see AX 2 (fishing permit and Operator’s Permit); AX 3 (Fishing Vessel Trip Report); RX 1 (same).

¹⁸ During the initial confrontational part of this conversation, Ofc. Fiske said Lt. Testaverde was repeatedly telephoning him but, because he was so “busy focused on Mr. Gribbin,” he “just kept hitting end on [the] phone, end, end, end. I didn’t answer it.” Tr. 49; AX 1 at 9. Eventually, as the conversation wound down, he became more comfortable and accepted the call from his supervisor, telling Mr. Gribbin he needed to reassure the caller “that I’m not dead.” Tr. 49-50; AX 1 at 9. Lt. Testaverde also testified that after several attempts Ofc. Fiske accepted his second call back, but recalled that he did not respond to him directly, rather the Lieutenant said he overheard Ofc. Fiske speaking in a calm tone to someone about formulas and overage. Tr. 182-83; see also AX 1 at 9 (indicating the Officer and Lieutenant had a conversation about the situation after Mr. Gribbin left).

50 C.F.R. § 648.14(i)(4)(i)(A); *see* 50 C.F.R. § 648.2 (“Land means to begin offloading fish, to offload fish, or to enter port with fish.”); *see also* NOVA A at 1.

The parties have stipulated that:

- (1) Respondents are “persons” within the meaning of 16 U.S.C. § 1802(36) [(defining a “person” as including “any individual” and “any corporation”)] and are subject to the jurisdiction of the United States.
- (2) The fishing vessel Kahuna is a “vessel” under 16 U.S.C. § 1802(18) [(defining a “fishing vessel” as “any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for . . . fishing.”)].
- (3) On March 9-10, 2021, Respondent High Pressure Fisheries, Inc. owned F/V Kahuna.
- (4) On March 9-10, 2021, F/V Kahuna held a federal Limited Access General Category Individual Fishing Quota (“IFQ”) Atlantic sea scallop permit issued by the NOAA Greater Atlantic Regional Fisheries Office (“GARFO”).
- (6) On March 9-10, 2021, Respondent John Oliveira operated F/V Kahuna.
- (7) On March 9-10, 2021, F/V Kahuna fished and landed Atlantic sea scallops under its Federal IFQ Atlantic sea scallop permit in Provincetown Wharf, Massachusetts.
- (11) The possession limit applicable to the F/V Kahuna as it relates to the March 9-10, 2021, fishing trip [was]: 600 lbs. of shucked scallop meat or 75 bushels of in-shell scallops.
- (12) IFQ-permitted vessels are allowed to land a mix of shucked and in-shell scallops.

Jt. Stip. Facts ¶¶ 1-4, 6-7, 11-12. Additionally, NOAA accepts that the Kahuna landed 175 lbs., but no more, of shucked scallop meat on March 10, 2021. Agency’s Post-Hr’g Br. (“Compl.’t’s Br.”) at 10 (citing Tr. 391).

Therefore, the only disputed issue remaining is whether NOAA has proven by a preponderance of the evidence, that the additional catch landed by the Kahuna on March 10, 2021, consisting of in-shell scallops, caused the vessel to exceed the regulatory landing limit of

600 pounds of shucked scallop meat or 75 bushels of in-shell scallops set out in 50 C.F.R. § 648.14(i)(4)(i)(A).

A. NOAA's Arguments

In its Brief, NOAA takes the position that, regardless of the methodology chosen by the Tribunal, all calculations lead to the conclusion that the vessel's catch exceeded the landing limit. Compl.'t's Br. at 10. It explains that, having landed 175 pounds of shucked scallop meat, to remain within the 600-pound possession limit, "Respondents could land the equivalent of an additional 425 lbs of shucked meats" in in-shell scallops, but no more. Compl.'t's Br. at 10 (citing Tr. 391). Then citing its Compliance Guide to the effect that eight pounds of shucked meat equals one bushel of in-shell scallops, and that "every standard fish tote equals 2.1 bushels," the Agency concludes that "the vessel could possess about 53 bushels of in-shell scallops," or "25 totes," without exceeding the possession limit. Compl.'t's Br. at 10-11 (citing AX 1 at 31).

Respondents had more than 25 totes, the Agency advises, relying primarily upon the testimony of Ofc. Fiske who photographed 27 totes and 11 baskets of in-shell scallops onboard the vessel. Compl.'t's Br. at 11 (citing Tr. 30; AX 1 at 2, 15-18). Specifically, it states –

Those pictures show nine rows of fish totes, each stacked three high, all of which Fiske observed and testified were full. Each top tote is full with scallops. Even Gribbin admitted that some of these were overfull. And, contrary to the testimony stating otherwise, the totes are not seated deep within each other. They are balanced on top of one another, basically flush, even considering the weight placed on the bottom and middle totes. Therefore, evidence shows that the vessel exceeded 25 additional totes, before accounting for the additional 11 baskets of in-shell scallops also on board.

Compl.'t's Br. at 11 (internal citations omitted) (citing AX 1 at 15-18; Tr. 31, 420). As to the "additional 11 baskets," NOAA recalls that they were consolidated into seven (7) more totes upon offloading, evidencing to it that the contents of the baskets could not have all fit within the original 27 totes. Compl.'t's Br. at 11.

NOAA suggests further that Respondents have admitted exceeding the possession limit. Compl.'t's Br. at 12. It points out that while Mr. Gribbin claims that if he had been allowed to repack the 34 totes he would be within the limit, he estimated that by doing so he could have reduced them down "to 27 or 28 totes," which would still be an overage, the Agency observes. Compl.'t's Br. at 12 (citing Tr. 393, 421-24). Further, it characterizes as "not credible" the premise of Mr. Gribbin's calculation—that the totes were not full, noting that the scallop-filled totes were in the truck when he arrived, and he admitted to never having looked in the truck, so he "had no first-hand knowledge of what the vessel landed." Compl.'t's Br. at 12 (citing Tr. 429).

Likewise, NOAA asserts Capt. Oliveira admitted that the vessel exceeded the possession limits during the trip. Compl.'t's Br. at 12. It recalls that at hearing, the Captain acknowledged that the Kahuna uses a "standard fish basket, as shown on AX 7 [the Compliance Guide]," and that he fills each basket "to the brim" except for, potentially, the last basket of each haul. Compl.'t's Br. 12 (citing Tr. 489-91). Capt. Oliveira described how he kept track of the catch in his personal logbook and asserted that he "was very accurate with [his] numbers." Compl.'t's Br. at 12 (citing Tr. 378, 460; AX 1 at 28). On this trip, his logbook documented landing 3.5 muslin bags, or 175 pounds, of shucked scallop meats, and 51.5 baskets of in-shell scallops, NOAA notes.¹⁹ Compl.'t's Br. at 12 (citing AX 1 at 28; Tr. 380, 470). According to its Compliance Guide, "51.5 baskets of shellstock amounts to 61.8 bushels of shellstock." Compl.'t's Br. at 12 (citing AX 7). "Adding the 21.9 bushels from the conversion of 175 pounds of scallop meats [at 8 lbs./bu] to 61.8 bushels amounts to a total of 83.7 bushels, or an overage of 8.7 bushels," NOAA concludes, stating that Capt. Oliveira was not using the correct conversion method in his calculations as he had never seen NOAA's Compliance Guide before Ofc. Fiske showed it to him during the inspection. Compl.'t's Br. at 12-13 (citing Tr. 492).

"Respondents' attempts to cast doubt on the overage calculation are unpersuasive," the Agency maintains. Compl.'t's Br. at 13. It observes that Respondents point to no demonstrable evidence that the totes were not full, noting they took no photographs of the totes and Mr. Gribbin did not look at the totes in question. Compl.'t's Br. at 13.

Additionally, in response to an anticipated defensive argument that the "containers must have no gaps or empty spaces" the Agency observes that –

The possession limits were volumetric. No solid, irregularly shaped object—including shellstock—would fill a box precisely. There would always be gaps, as there were in this case. Everyone knew this, including the Agency, the Council, and law enforcement, when the compliance guide was adopted. Vessels could make a business decision on how they wanted to pack the totes and decide whether it was in their best interest to precisely stack each shell inside the tote, or move quickly and get the vessel back out on the water to continue fishing. Respondents' decision to move quickly and continue fishing in no way undermines [Ofc.] Fiske's observations and photographic evidence supporting the conclusion that the totes were full, even if they theoretically could have been more tightly packed. Therefore, this Tribunal should reject the Respondents' overly technical application of the conversion sheet.

¹⁹ The Agency explained that it calculated the sum of 51.5 by adding the number of baskets associated with tows 6 through 20 in the Captain's notebook. Compl.'t's Br. at 12 (citing AX 1 at 28).

Compl.'t's Br. at 13 (citing Tr. 31, 235, 349, 429).

Finally, as to Respondents' "attempt to cast doubt on whether the fish totes used onboard the F/V Kahuna were industry standard totes for scallops," NOAA observes that Respondents "only made this argument after questioning by this Tribunal." Compl.'t's Br. at 13. Prior to that, in their depositions, Messrs. Gribbin and Oliveira admitted or believed that the vessel used the same totes as depicted in the Compliance Guide. Compl.'t's Br. at 13-14 (citing Tr. 392-93, 489). Further, they "offer no measurements or photographs of their allegedly different-sized totes," the Agency proclaims. Compl.'t's Br. at 14. "The compliance guide—foreseeing this exact argument—cautions vessel owners and operators that it is their 'responsibility to know the volume of the containers [they] are using and to ensure that [they] do not exceed the possession limits,'" NOAA declares. Compl.'t's Br. at 14 (citing AX 7).

B. Respondents' Arguments

Respondents do not offer an alternative calculation as to the volume of in-shell scallops landed in their Post-Hearing Brief ("Resp'ts' Br."). Rather, they assert that the Agency has not met its burden of proof that the Kahuna exceeded the regulatory limit. In support, they observe the following –

- Prior to the instant inspection, Ofc. Fiske had never previously used the Agency's volumetric equivalency formula set forth in its Compliance Guide to measure in-shell live scallops. Resp'ts' Br. at 22 (citing Tr. 28, 68, 85; AX 1 at 2);
- At the time of the inspection, Ofc. Fiske was unaware of the Compliance Guide's definition of "full" ("containers (totes) must be flush to the top and not rounded over"). Resp'ts' Br. at 22 (citing Tr. 76; AX 7 at 3);
- Ofc. Fiske did not inspect every tote to ensure each was "full," that is filled at least flush to the top. Resp'ts' Br. at 22 (citing AX 1 at 2);
- No photographs were taken of all 34 totes, and the photographs taken of the original twenty-seven totes onboard the Kahuna show that they were not full. Resp'ts' Br. at 22, 24 (citing AX 1 at 15-18);
- Ofc. Fiske acknowledged that the totes he relied upon to use the volumetric formula were not full. Resp'ts' Br. at 22 (citing Tr. 31, 74);
- Ofc. Fiske never measured the size of the totes being used onboard the Kahuna. Resp'ts' Br. at 22 (citing Tr. 164, 179, 272);
- Neither Travis Ford nor Lt. Testaverde ever saw or measured the totes on the Kahuna. Resp'ts' Br. at 22 (citing Tr. 164, 179, 272);

- The record contains no measurement as to the size of the totes used on the Kahuna at the time of the alleged violation. Resp'ts' Br. at 22;
- Capt. Oliveira's contemporaneous log showed an estimated seventy baskets (70) baskets harvested on the trip and supports that the Kahuna's catch was under the limit (using the vessel's weight methodology). Resp'ts' Br. at 22 (citing AX 1 at 28);
- Mr. Gribbin testified that the packing of the baskets was not done with the intent to maximize the volumetric equivalency, rather as an estimate to fill the totes. Resp'ts' Br. at 23 (Tr. 344);
- Capt. Oliveira testified that the totes were packaged for the convenience of transportation to the wholesaler, not in anticipation that a volumetric equivalency formula would be based upon them to determine the catch amount. Resp'ts' Br. at 24 (citing Tr. 420);
- Ofc. Fiske refused to allow the crew to repack the harvest. Resp'ts' Br. at 24 (citing Tr. 366-367); and
- Ofc. Fiske did not obtain the wholesaler's receipt and/or determine the weight of the in-shell scallop meat obtained by the wholesaler. Resp'ts' Br. at 19, 24-25 (citing Tr. 155, RX 3, AX 1 at 34).

C. Discussion

As noted above, the pertinent regulation in effect at the time, provided that it was unlawful to land in excess of 600 pounds of shucked scallop meat or 75 bushels of in-shell scallops. 50 C.F.R. § 648.14(i)(4)(i)(A). NOAA interpreted this regulatory provision to allow for the concurrent landing of *both* shucked and in-shell scallops, so long as the aggregate amount of the catch, converted to either one or the other unit of measure (pounds of shucked meat or bushels of in-shell scallops), did not exceed the applicable limit. AX 7 at 2. To facilitate enforcement of its interpretation, in 2019, the Agency distributed a Compliance Guide for scallops setting forth its mathematical formulas for converting *among units of volumes* (totes/baskets to bushels), and *between a unit of volume and a unit of weight* (bushels and pounds). It offered no formula for converting *between weights*, that is from the weight of in-shell scallops to the weight of scallop meat, which is the methodology Respondents were utilizing to determine regulatory compliance; specifically, the equation that 8.33 pounds of in-shell scallops equal 1 pound of scallop meat. I find that use of such alternative methodology is permissible and that its application to the evidence here demonstrates compliance with the regulatory limit.

Neither the MSA nor the Agency’s regulations designate a specific mathematical formula to be used to determine compliance with the landing limit set out in 50 C.F.R. § 648.14(i)(4)(i)(A). A formula is only offered in the Agency’s Compliance Guide. AX 3 at 2-3. However, such guidance documents, more formally known as “interpretative rules,” issued without notice and comment, do not have the force and effect of law and can never form the basis for an enforcement action; “An enforcement action must instead rely on a legislative rule, which (to be valid) must go through notice and comment.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (citing *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96–97 (2015) (interpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process)). Guidance documents “simply state what the administrative agency thinks a statute means, and only remind affected parties of existing duties.” *Chai v. Carroll*, 48 F.3d 1331, 1340-41 (4th Cir. 1995). If an agency wishes to adopt a new regulatory requirement or effect a substantive change in an existing regulation, the agency must comply with the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 551, et seq. *Int’l Internship Programs v. Napolitano*, 853 F. Supp. 2d 86, 94 (D.D.C. 2012), *aff’d*, 718 F.3d 986 (D.C. Cir. 2013); *Humane Soc’y of the United States v. U.S. Dep’t of Agric.*, 41 F.4th 564, 569 (D.C. Cir.) (“[O]nce an agency makes a rule—that is, once it makes a statement prescribing law with future effect—the APA requires the agency to provide notice and an opportunity for comment before repealing it.” (citing 5 U.S.C. § 553)).

A corollary to this principle is that agency guidance inconsistent with agency regulations, it is *a priori* invalid. *Am. Sec. Ass’n v. U.S. Dep’t of Lab.*, No. 8:22-CV-330-VMC-CPT, 2023 WL 1967573, at *14, 17 (M.D. Fla. Feb. 13, 2023) (citing *Nat’l Env’t Dev. Ass’n.’s Clean Air Project v. E.P.A.*, 752 F.3d 999, 1003 (D.C. Cir. 2014) (finding agency guidance invalid when in conflict with existing regulations)); *Mercy Cath. Med. Ctr. v. Thompson*, 380 F.3d 142, 152-53 (3d Cir. 2004) (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (finding agency action arbitrary and capricious when it conflicts with the agency’s regulations)).

This corollary is significant here because, as this Tribunal observed at hearing, the Compliance Guide appears to be directly inconsistent with the Agency’s formally promulgated regulations implementing the Act, which were then in effect. For example, the Compliance Guide’s definition of the volume of a “standard fish tote” as being 2.65 cubic ft (AX 7 at 3), directly conflicts with the following regulatory definition –

Standard tote means a box typically constructed of plastic, designed to hold 100 lb (45.3 kg) of fish plus ice, and that has a liquid capacity of 70 L, or a volume of not more than 4,320 cubic in (2.5 cubic ft or 70.79 cubic cm).

50 C.F.R. § 648.2 (emphasis added).²⁰

²⁰ Mr. Ford suggested in his hearing testimony that this definition was inapplicable to scallops, applying only to other species of catch in Northeastern fisheries. Tr. 270-71. However, the definition’s regulatory history evidences that at the time of its promulgation it was explicitly used in reference to scallops, and it has remained unchanged since that time. See Fisheries of the Northeastern United States, 61 Fed. Reg. 34,966, 35,000 (Jul. 3, 1996) (footnote continued on following page)

Further, the Compliance Guide’s assertion that eight (8.0) pounds of scallop meat equals or converts to one bushel of in-shell scallops (AX 7 at 3) is inconsistent with 50 C.F.R. § 648.53(h)(2)(ii)(A). That MSA regulation, providing for charging catch against an IFQ permit holder’s yearly allocation, states, in relevant part, that “[f]or dealer reports that indicate clearly that the landings were bushels of in-shell scallops, a conversion of 8.33 lb (3.78 kg) of scallop meats per bushel shall be used to calculate meat-weight, up to a maximum of 400 lb (181.4 kg) per trip.” 50 C.F.R. § 648.53(h)(2)(ii)(A) (emphasis added).²¹ While there may be justifications for the equational differences, such variance nevertheless reflects an unexplained inconsistency between the Compliance Guide and a published regulation.

For all these reasons, I find the Compliance Guide does not lawfully restrict the methods of establishing compliance with the landing limits to those stated therein. A weight conversion methodology may be lawfully used to determine compliance with the 600-pound landing limit.

Moreover, I find NOAA cannot challenge the validity of Respondents’ assumption used in its weight methodology, that 8.33 pounds of in-shell scallops equal one pound of scallop meats. First, as noted above, NOAA utilizes that same assumption in its regulation pertaining to charging catches of in-shell scallops against an IFQ permit’s annual landing limit stated in pounds. 50 C.F.R. § 648.53(h)(2)(ii)(A). Second, evidence adduced at hearing revealed that as of 2023, in regard to determining compliance with landing limits, the issue here, NOAA had formally abandoned its volumetric conversion formulas set out in the Compliance Guide, and adopted instead the weight-to-weight conversion formula of 8.33 pounds of in-shell scallops to 1 pound of meat, used by Respondents, state enforcement officials, and dealers/wholesalers at the time relevant here. Fisheries of the Northeastern United States; Framework Adjustment 36 to the Atlantic Sea Scallop Fishery Management Plan, 88 Fed. Reg. 19,559, 19,563 (Apr. 3, 2023); Tr. 256, 264, 357, 423, 430; AX 1 at 34. In doing so, NMFS explained that it was “making this adjustment to provide more uniformity among the possession limit measurements by revising the in-shell possession limit to a *widely accepted poundage conversion*.” 88 Fed. Reg. at 19566 (emphasis added); see also Daniel R. Hennen & Deborah R. Hart, *Shell Height to Weight Relationships for Atlantic Sea Scallops (Placopecten magellanicus) in Offshore U.S. Waters*, 31 J. Shellfish Rsch. 1133, 1142 (2012) (“Relationships between whole and meat weights allow for conversions between these 2 units to set catch quotas or trip limits for both scallopers that land whole scallops and those that land only the meats. The traditional ratio between whole and meat weight is 8.33.”).

(“Scallop vessels. (1) . . . a scallop vessel . . . fishing under a scallop DAS allocated under §648.53, may possess and land up to 300 lb (136.1 kg) of regulated species, provided it has at least *one standard tote* on board”) (emphasis added).

²¹ This provision appears to have been in effect before the Compliance Guide was issued and has remained unchanged until today. 50 C.F.R. § 648.53(h)(2)(ii)(A) (eff. Apr. 19, 2018 to Mar. 31, 2019); 50 C.F.R. § 648.53(h)(2)(ii)(A) (eff. Apr. 1, 2019 to June 1, 2020 to May 18, 2021); 50 C.F.R. § 648.53(h)(2)(ii)(A) (eff. Mar. 31, 2023 to present).

Applying that assumption here, the record evidences that Respondents' catch on March 10, 2021, did not exceed the landing limit of 600 pounds. Lt. Testaverde testified at hearing that the most accurate measure of what a vessel landed are the dealer's "weigh out slips," noting that the slips are what NOAA relies upon when it intends to seize the catch or the proceeds of it. Tr. 207-08. The relevant dealer's weigh out slip indicates that on March 11, 2021, the dealer, Red's Best, purchased the Kahuna's catch consisting of 176 pounds of shucked scallop meat and 3,259 pounds of in-shell scallops. RX 3; *see also* AX 1 at 34 (NOAA's Dealer Reports for Red's Best/Kahuna); AX 3/RX 1 (Trip Report). Applying the weight-to-weight conversion formula (8.33 lbs. shells/1 lb. meat) to the catch, Red's Best's weigh out slip calculated the 3,259 pounds of live shells to be equivalent to 391 pounds of meat. RX 3; *see also* AX1 at 34. Adding that amount to the 176 pounds of shucked meat, brings the total pounds landed to 567 pounds, proving that the Kahuna's catch landed on March 10, 2021, did not exceed the regulatory weight limit of 600 pounds for shucked meat.

Even if that were not the case, this Tribunal would find that the evidence the Agency produced here to support its case for overage is not sufficient to meet its burden of proof. The Agency's methodologies for determining the amount Respondents landed require the conversion of totes to bushels using the formula set out in the Compliance Guide (1 standard tote = 2.1 bushel). AX 7 at 3. This formula's validity is explicitly premised upon the volume of the totes being of the size defined in the Guidance (2.65ft³). However, NOAA did not, and could not, offer its own evidence as to the volume or size of Respondents' totes to show they matched (or exceed) those described in the Guide. *See* Tr. 164, 194, 272 (Fiske, Testaverde, and Ford all acknowledging having no knowledge as to the size of Respondents' totes). Further, its reliance on the statements of Respondents as proof of tote volume/size is unconvincing. While Mr. Gribbin did testify that Respondents "use the totes that are used in the industry," he also stated "[t]here's a lot of different sized totes," that he did not know if there was an industry "standard anymore," or if the Kahuna used the "standard fish tote" of the size defined in the Compliance Guide, as he had never measured them.²² Tr. 353, 392, 413. Further, although Mr. Gribbin acknowledged that during his deposition that he had identified the "fish totes" used on the Kahuna as those "pictured" in the Compliance Guide (AX 7 at 3), he testified

²² The Agency's own Compliance Guide further undermines the idea there is a standard-sized tote ubiquitously used in the industry in that, after defining what it means by a "standard" tote, it added the following caveat –

Note: These Standard fish baskets and totes are the most commonly used containers and are used in the examples. *If your fish baskets or totes differ from above standard sizes, the conversions in the examples will not apply.* Check the manufacturers label for volume or review the appropriate volumetric measurement for each non-standard container.

(AX 7 at 3) (emphasis added). Mr. Ford also testified that NOAA recognized the potential variation in the use of totes in another section of the Compliance Guide, specifically where it stated that "[i]f you are landing both scallop meats and in-shell scallops, law enforcement will convert the product to one unit of measure to determine the applicable possession limit. You may be delayed by law enforcement." AX 7 at 2. He explained that this statement was "alerting vessels that you may be delayed while they are enforcing this [the volumetric limit]" because "[t]here may be different size containers, and so on and so forth." Tr. 234; *see also* Tr. 271-72.

at hearing that he did so before he realized there was “a cubic foot conversion,” which the Tribunal takes to mean, an issue as to the totes being of a particular size, rather than merely similar in appearance. Tr. 392-93. Likewise, while Capt. Oliveira responded “I think so” when asked if the “standard fish tote” pictured in the Compliance Guide was what was used on the Kahuna, he also testified that the actual size of the totes was immaterial to him as he estimated catch solely by weight, suggesting he had no personal knowledge as to the volume of Respondents’ totes. Tr. 418, 489. Thus, the preponderance of the evidence in the record does not establish that there was a standard tote size used in the industry and/or that Respondents’ totes were, at least, of the volume set forth in the Compliance Guide, such that the formula for converting them to bushels would be accurate. *See, e.g., N. Wind Constr. Servs., LLC v. Campos EPC, LLC*, No. 4:21-CV-00096-DCN, 2023 WL 4628176, at *3-4 (D. Idaho July 18, 2023) (factfinder could not rely upon industry guidelines establishing a uniform standard when companies could depart from guidelines); *Dickey v. Advanced Micro Devices, Inc.*, No. 15-CV-04922-RMW, 2016 WL 6427852, at *8 (N.D. Cal. Oct. 31, 2016) (complaint alleging product did not meet industry standards dismissed in part because complaint otherwise suggested such standard did not exist).

Based upon all the foregoing, after reviewing the totality of the circumstances, I find NOAA has failed to establish by a preponderance of the evidence the overage violation alleged in Docket No. NE2101404A.

V. OFFICER INTIMIDATION

In Docket No. NE2101404B, NOAA alleges that, on March 10, 2021, Respondents High Pressure Fisheries, Inc. and Beau Gribbin did “resist, oppose, impede, threaten, intimidate, and/or interfere with an authorized officer in the conduct of any search or inspection, in violation of 16 U.S.C. § 1857(1)(E) and 50 C.F.R. § 600.725(f).” NOVA B at 1. Respondents have stipulated to Ofc. Fiske being an “enforcement officer under the NOAA regulations.” Resp’ts’ Br. at 1 n.1; *see also* 50 C.F.R. § 600.10 (“Authorized officer” defined). They have also affirmed that Ofc. Fiske boarded the F/V Kahuna on March 10, 2021, for the purpose of conducting “an inspection of the landing of scallops,” an inspection undertaken pursuant to the MSA. Resp’ts’ Br. at 1. Therefore, the only disputed issue is whether, as to that inspection, Respondents engaged in the unpermitted conduct enumerated in the MSA and/or its companion regulations.

A. NOAA’s Arguments

The Agency’s position is that, in two separate confrontations on March 10, 2021, Respondent Gribbin engaged in threatening behavior causing Ofc. Fiske “to reasonably fear for his safety and abandon his inspection,” making Respondents liable for “officer intimidation and interference.” Compl.’t’s Br. at 17. In support, NOAA argues –

Officer Fiske was in a vulnerable position. He was working alone, at night, on the pier at the outermost tip of Cape Cod. He was on a boat during low tide, unable to easily disembark due to the height

difference between the vessel and the pier above. He was surrounded by Gribbin's crew. According to the vessel captain, "if he were up to something, Officer Fiske would be in trouble."

. . . Gribbin, after yelling profanities at Officer Fiske on the phone, sped into the parking lot, engine revving, tires squealing, striking something with his truck as he parked. He opposed and resisted Officer Fiske when he—exhibiting all the outward signs of someone about to attack—ignored multiple commands to "get back" and "get away" from Officer Fiske. Moving quickly, yelling "fucking bullshit," he advanced on Officer Fiske with wide eyes, clenched fists, and a puffed chest

. . . Officer Fiske could only "prepar[e] for a fight." He placed his hand on his holstered firearm, an unequivocal display that he felt threatened. Gribbin—seeing Officer Fiske's hand on his gun and presumably aware that deadly force might be a possibility—was undeterred. At this point, Officer Fiske was "legitimately in fear . . . I'm about to be assaulted." . . .

. . . [A]fter Ofc. Fiske decided to end the encounter for his own safety, Gribbin pursued him onto the pier. Initiating a second confrontation, "[h]e's still angry," still exhibiting all the same pre-assault indicators as on the vessel, including clenched fists, wide eyes, puffed chest, and still yelling. Officer Fiske again tells him several times to get away, to get back. "And he's still not complying." Officer Fiske is compelled to draw another weapon to protect himself, this time his expandable baton. He "still feels in fear . . . still feel[s] overwhelmed and anxious and scared." Eventually, Officer Fiske is able to successfully deescalate the situation.

Compl.'t's Br. at 20-22 (internal citations omitted) (citing Tr. 40, 42-44, 47-49, 495; RX 7; *Orman*, Docket No. 214-173, 1994 WL 1246347, at *4 (NOAA Apr. 7, 1994) ("The mere fact that [the officer] had to take the time to repeatedly ask Respondent to 'back off' is evidence of interference.")).

The Agency analogizes the facts of this case to those in *Lovgren v. Byrne*, 787 F.2d 857 (3rd Cir. 1986), wherein the respondent was found liable for interference after he blocked an inspecting agent's ladder climb, yelled profanities, and ordered the agent to leave. Compl.'t's Br. at 17 (citing *Lovgren*, 787 F.2d at 860). The agent in that case "testified that he had felt physically threatened," explaining that he was in a vulnerable position on the ladder, and that he believed a physical confrontation would ensue if he attempted to proceed up it. *Lovgren*, 787 at 860. The Appeals Court found that this testimony supported the ALJ's conclusion that

respondent's "resistance to the inspection contained elements of force and implied threats of violence." *Id.* at 862. The Agency contends that Ofc. Fiske was in a similarly vulnerable position and that Mr. Gribbin's actions contained similar elements of force and implied threats of violence. Compl.'t's Br. at 20-21.

NOAA cites another case, *Daniels*, Docket No. NE0904013, 2014 WL 9866394 (NOAA Oct. 24, 2014), in support of its claim of interference. Compl.'t's Br. at 20. In that case, one of the respondents was held liable for harassment and intimidation by telling an at-sea observer, from ten feet away, that she was "f-ing pissing [him] off," before advancing to within two feet, continuing that her job was a "bunch of nonsense," and accusing her of "putting him out of business." *Daniels*, 2014 WL 9866394, at *17. According to the Agency, the behavior for which the respondent was found liable in *Daniels* was "less intimidating" than that exhibited by Mr. Gribbin here. Compl.'t's Br. at 20.

"Gribbin was the one upset" by a variety of factors, the Agency claims, and Ofc. Fiske's version of events is "inherent[ly] plausibl[e]," recalling that the Officer's prior interactions with Mr. Gribbin had been civil, as was his interactions on March 10, 2021, with Capt. Oliveira. Compl.'t's Br. at 22-23 (citing Tr. 21, 36, 52, 308). NOAA buttresses this point by citing Mr. Gribbin's admissions that he was "most likely" cursing at Ofc. Fiske, boarded the boat against the Officer's order, and mocked the Officer when he placed his hand on his weapon. Compl.'t's Br. at 23-24 (citing, inter alia, Tr. 322-23, 400; Resp'ts' Initial Disclosures at 2). The Agency avers as recognition of his guilt, that Mr. Gribbin, "[a]fter realizing what he had done, he was worried his conduct might get him arrested," and apologized multiple times. Compl.'t's Br. at 24 (citing Tr. 353, 408-09). Finally, to the extent there is any discrepancy between Ofc. Fiske's version of events and Mr. Gribbin's, NOAA suggests that Ofc. Fiske's testimony should be credited, as his is consistent with his investigatory report and his supervisor's testimony, and Respondents' have a monetary incentive to "recast facts and minimize." Compl.'t's Br. at 22.

Lastly, NOAA argues that High Pressure Fisheries, Inc. should be held jointly and severally liable with Mr. Gribbin for the latter's conduct under the legal theories that (a) Mr. Gribbin and the company are essentially one and the same as Mr. Gribbin is the company's principal and sole owner; and (b) "the equivalent of common law agency liability." Compl.'t's Br. at 25 (citing Tr. 323, 389, 404, 472; *Newell*, 2 O.R.W. 368, 371 (NOAA App. 1981); *Bogges*, 4 O.R.W. 260, 263 (NOAA 1985)).

B. Respondents' Arguments

In their Post-Trial Brief, Respondents adamantly deny that Mr. Gribbin engaged in any unlawful conduct in regard to Ofc. Fiske's inspection. Resp'ts' Br. at 2, 4. In their view, the men were mutually responsible for their contentious interaction, which grew out of their joint frustration over the application of the volumetric equivalency formula. Resp'ts' Br. at 4. In support of their view, Respondents explain that –

Throughout the fifteen (15) second ordeal on the deck, Gribbin, expressed his frustration with the policy by mocking Fiske, swearing and yelling regarding the regulation. Gribbin never assaulted or threatened Fiske. For his part, Fiske swore, yelled and screamed at Gribbin and told Gribbin he didn't give a "shit about" about state enforcement officers. The two men were in a mutual argument about the proper measurement of the harvest. This argument does not indicate interference, harassment, or intimidation but a dispute for which both Fiske and Gribbin are to blame. Fiske created the interference violation by his unilateral termination of the boarding.

Resp'ts' Br. at 4.

Respondents also claim that this Tribunal heard "two disparate versions of the events of March 10, 2021," "[o]ne from Officer Fiske who claimed he feared for his life, and the [other from] Respondent Gribbin who stated Fiske overreacted to a disagreement," and that, Ofc. Fiske's testimony is "inconsistent with the independent evidence, lacks candor, and is not plausible." Resp'ts' Br. at 6-7. They identify the following as examples of such unreliable testimony by Ofc. Fiske:

- That he inspected the Kahuna because he missed the F/V Rolex's landing. Respondents suggest the timing of events as to the Rolex in his recollection "makes no sense" and is "unbelievable" as it would have required the Rolex to have "landed, 'packed out,' and departed the M[a]cMill[an] Pier all within twenty-five (25) minutes." Resp'ts' Br. at 8-9 (citing Tr. 162-64).
- That it was mere happenstance that he boarded the Kahuna. Respondents suggest that "[t]he true purpose of Fiske's return was to deal with John Oliveira; a person he believed had previously lied to him," noting the Officer previously "blew up" at Capt. Oliveira over the non-disclosure and shared his knowledge with the MEP, who then targeted the vessel for excessive boardings. Resp'ts' at 9 (citing Tr. 65, 328, 455, 458-59). Further, Ofc. Fiske's claim that he could not determine the captains of vessels from the VTrack system is directly contradicted by the testimony of Lt. Testaverde. Resp'ts' Br. at 9 (citing Tr. at 68, 198-99).
- That he did not hang up the phone on Mr. Gribbin. Respondents note that Capt. Oliveira testified that Ofc. Fiske admitted to him that he had hung up on Mr. Gribbin, and declared "I'm Irish too and I have a temper and I don't do well with tempers." Resp'ts' Br. at 10 & nn.12-13 (citing Tr. 37, 474-75).

- That he was “considerably concerned” for his safety after Mr. Gribbin’s telephone call. Respondents observe, however, that Ofc. Fiske did not disembark the vessel or promptly call the local or state police, MEP, or Coast Guard for back-up. Resp’ts’ Br. at 10 (citing Tr. 39, 108-10, 157).
- That Mr. Gribbin sped to dock, slammed into the something metal, and cursed, and that Ofc. Fiske ordered Mr. Gribbin numerous times not to board. Respondents point out that none of this is recorded on Ofc. Fiske’s 10-21 App body-cam. Resp’ts’ Br. at 11, 13 n.20 (citing Tr. 40-41, 124, 127, 322-23, 400-01).
- That Mr. Gribbin entered the boat by jumping off the pier onto the rear deck, landing in an aggressive posture 10-12 feet from him. Respondents suggest that such an entry was “not possible” as it would require Mr. Gribbin, a 250-pound man at the time, to jump down 10 feet, with a broken casted foot, while “dodging the dredge, the fish hole, and the shucking shed.” Resp’ts’ Br. at 11-13 (citing Tr. 90-92, 121-22, 125, 411; RX 7).
- That Ofc. Fiske downplayed his use of profanities and anger at hearing, extensively responding “I don’t recall” or “I may have” when questioned about the encounter; whereas Mr. Gribbin was forthright as to his agitation, loud voice, cursing and mocking. Resp’ts’ Br. at 13-14 & n. 21 (citing Tr. 95, 340).
- That Ofc. Fiske’s 10-21 App did not record his two direct interactions with Mr. Gribbin ostensibly due to the App pausing the recording to attend to other functions, such as a telephone call. Respondents suggest that the recording failure was due to Ofc. Fiske “manipulating” the App during the encounter to shut it off at the time he was purportedly in a “dire situation” and suffering “tunnel vision,” or later altering the recording. Respondents further assert that what the App did record—Ofc. Fiske exiting the vessel, contradicts his testimony regarding being in fear, as it shows him walking closer to, and turning his back on, Mr. Gribbin. Resp’ts’ Br. at 14-16 (citing Tr. 39, 48, 95-97, 118, 124-26, 160).
- That he did not complete his inspection. Respondents state this claim by Ofc. Fiske is contraindicated by the fact that he never asked for any additional documents or items from the Kahuna before allowing the vessel and catch to leave the pier. Resp’ts’ Br. at 17 (citing Tr. 117, 349-51).

- That Mr. Gribbin was to blame for the confrontation. Respondents suggest that Ofc. Fiske’s “bizarre subsequent contact” with Mr. Gribbin, specifically his “defiant” attempts to prevent Mr. Gribbin from speaking to Caleb Gilbert, being upset by Mr. Gribbin’s efforts to reach out to NOAA’s Compliance Officer, and his instruction to Mr. Gribbin that “if he had any questions Gribbin should call him,” all signal a “consciousness of guilt,” and that Ofc. Fiske “wanted to cover his tracks and learn what Mr. Gribbin was going to say to the law enforcement liaison” and “endeavor to control the narrative.” Resp’ts’ Br. at 17-18 (citing Tr. 152, 372-74).

Respondents argue that the Agency’s reliance on *Lovgren* is misplaced as the facts in that case are “significantly different” from those here. Resp’ts’ Br. at 19. “Unlike *Lovgren*, Gribbin never threatened Fiske, never prevented his movement, never ordered him or anyone else to leave the property.” Resp’ts’ Br. at 19 (citing Tr. 102, 351-52, 337, 476). Rather, Respondents suggest “Gribbin was complaining about the formula, the situation, and the regulations. Gribbin only mocked Fiske for his overreaction. [And] [h]ere, Gribbin asked Fiske if he was done with his boarding and if he could have the vessel return to sea.” Resp’ts’ Br. at 19-20 (citing Tr. 351).

Properly analogous to the facts here are those in *Nguyen*, Docket No. PI1401544, 2016 WL 5747067 (NOAA Aug. 22, 2016), the Respondents’ claim. Resp’ts’ Br. at 20. In *Nguyen*, this Tribunal observed that it is “difficult to characterize the conduct of Respondent . . . as interference or harassment when [the observer] played a role in escalating the conflict to potential violence from what otherwise was perceived rudeness.” *Nguyen*, 2016 WL 5747067, at *25. The Respondents suggest that “Fiske’s role in escalating the argument – on several occasions – should preclude him from claiming that his inspection/boarding was interfered with.” Resp’ts’ Br. at 20. Of further note, Respondents claim, is that “[t]he decision to stop the inspection was unilaterally decided by Fiske after his yelling match with Gribbin,” was over, when the men were civil and calm. Resp’ts’ Br. at 20 (citing Tr. at 45). In that Mr. Gribbin “repeatedly asked” the Officer if the vessel could return fishing, “[o]ne can logically and reasonably infer from this inquiry that Gribbin did not interfere with Fiske or his responsibility.” Resp’ts’ Br. at 20. Respondents assert that Ofc. Fiske’s testimony that, at that point in time, “‘everyone could have gone their rightful way legally without my – any word from me’ is contrary to the entire argument of the Agency[’s] interference violation.” Resp’ts’ Br. at 20 (citing Tr. 117).

Respondents also distinguish *Daniels*, cited by the Agency, noting that that case involved a man who angrily directed profanities at a close-by smaller female observer while at sea. Resp’ts’ Br. at 21. Here, Respondents say, the confrontation occurred dockside, between an “armed, young, fit male” Officer “who had gone through extensive law enforcement training while the Respondent [Gribbin] was an overweight, physically impaired and unhealthy, middle-aged man.” Resp’ts’ Br. at 21. Additionally, unlike in *Daniels*, Mr. Gribbin anticipated the arrival of another officer, directed his profanities at the situation and not towards Ofc. Fiske,

never came physically close enough to Ofc. Fiske to “reasonably threaten him,” and offered to allow the Officer to board his other vessel coming to port. Resp’ts’ Br. at 21 (citing Tr. at 101, 351).

In sum, they assert “[l]ittle credible evidence supports the conclusion that Respondent’s behavior did in fact, delay, impede, or otherwise prevent Officer Fiske from fulfilling his lawful duties.” Resp’ts’ Br. at 21. “Fiske spoke with the captain and crew, he took pictures and [sic] of the catch . . . , he completed his calculations, took the ‘log,’ and he had the opportunity to gather other paperwork.” Resp’ts’ Br. at 21-22. Both Messrs. Oliveira and Gribbin asked Ofc. Fiske if he was “done here,” and Ofc. Fiske said he was done for the night, Respondents recall. Resp’ts’ Br. at 22 (citing Tr. 351). “The record does not suggest that Gribbin would have [not] provided Fiske with papers if he had simply asked. Fiske’s overreaction to the mutual going back and forth, is not a violation for which Gribbin should be held responsible,” Respondents argue. Resp’ts’ Br. at 22.

Additionally, they advise that Ofc. Fiske –

never sought additional information which he could not obtain from his own database. Further, he made no effort to follow-up on any portion of the investigation. Considering Fiske did not [sic] further re: the investigation except write his report and review his 10-21 video. He never sought the wholesaler’s receipt, never followed the harvest to wholesaler [sic], and did not interview the truck driver at [sic] thirty-six-thousand-dollar (\$36,000.00) penalty is excessive.

Resp’ts’ Br. at 26.

C. Mr. Gribbin’s Relevant Testimony

At hearing, Ofc. Fiske and Mr. Gribbin each provided their own recollection of their interactions on March 10, 2021. The Officer’s testimony in relevant part is set out above. Here is a summary of Mr. Gribbin’s testimony –

Mr. Gribbin recalled that he first met Ofc. Fiske in September of 2020 at MacMillan Pier, when the Officer approached him requesting to “check the vessel.” Tr. 308. At the time, Mr. Gribbin said, he was not fishing for catch covered by his federal permits, and so no inspection occurred. Tr. 309-10. Still, on that day, one of his “wise ass” crewmembers snapped a picture of him with Ofc. Fiske, both exhibiting a friendly thumbs up sign. Tr. 309-10.

He next met the Officer in January of 2021. Tr. 310. The Coast Guard had stopped the Kahuna on the water to conduct a routine safety check, and Ofc. Fiske had met the vessel at the pier for further inspection, just shortly before Mr. Gribbin arrived. Tr. 310-312. Upon discovery of the two hidden zip lock bags of scallops, the Officer advised Mr. Gribbin that he would be

receiving a warning as to the minimal overage, even though he and Capt. Oliveira were unaware of the bags. Tr. 312-13. Mr. Gribbin implied that his interaction that day with Ofc. Fiske was civil and professional, noting he had never previously been cited by NOAA for a violation. Tr. 313. Mr. Gribbin recalled no further contact with Ofc. Fiske until March 10, 2021. Tr. 313-14.

As to the events of March 10, 2021, Mr. Gribbin admitted that, even before his interactions with Ofc. Fiske, he was not having a “good day.” Tr. 317-18, 398-99. That morning, a 500-1000 pound connecting rod for a locomotive steam engine had accidentally fallen on his “left foot like a sledgehammer.” Tr. 317, 399. Against his “better judgment” he ignored the injury and went about his morning work, but by lunchtime his foot had swollen to such an extent that he had to cut his boot off to remove it. Tr. 317-18, 399. At that point, he sought medical care and was diagnosed as having suffered “marginal fractures” and tendon damage, and his foot was placed in a plastic boot for protection while healing. Tr. 318, 399. It was later that day, while he was home, icing his foot, that he received the call from Capt. Oliveira notifying him of the inspection and overage found based on volumetric equivalency. Tr. 318-19, 399. Mr. Gribbin testified that he explained to Ofc. Fiske over the phone his weight-to-weight methodology for determining compliance with the catch limit. Tr. 319, 399. He averred that as they were “bantering back and forth, the phone just goes dead.” Tr. 319; *see* Tr. 399.

Mr. Gribbin admitted that when the call reconnected, he angrily confronted Ofc. Fiske, asking, “Did you just hang up on me?” Tr. 319. He said these first words “set the tone for the conversation going downhill quickly to . . . profanities,” and that the call ended with him declaring, “Fuck this. I’m coming down.” Tr. 319, 399-400; *see also* Tr. 37-38 (Fiske’s recollection of conversation).

Arriving at the pier a few minutes later, Mr. Gribbin found the Kahuna’s catch had already been loaded into the dealer’s box truck. Tr. 320, 400, 428-29. Standing aside the vessel, he said he yelled out to Ofc. Fiske, who was standing some 15 feet away on the deck, that “this is bullshit,” and inquired if the Officer was calculating the catch by weight or volume, reasserting he was under the catch limit. Tr. 321-22, 400. *But see* Tr. 41 (Fiske’s recollection of interaction). He may have also requested that the Officer allow the vessel to leave the dock, since the catch had already been offloaded. Tr. 322.

Mr. Gribbin acknowledged that Ofc. Fiske responded to his shouts instructing, “[D]on’t come on the boat.” Tr. 322-23, 400.

And I said, well, are you coming off the boat? And he said, I’m coming off the boat when I’m done with my inspection. I said, well, then I’m coming on the boat. I’m the owner of the boat. I own the boat. I’m coming on the boat. If you’re going to cite my boat, I’m coming on the boat. And I came on the boat.

Tr. 323; *see* 400-01. *But see* Tr. 41 (Fiske’s recollection of interaction).

Mr. Gribbin recalled then boarding the boat by lowering himself down the winch, landing between the “front step for the wheelhouse door and the fish hole, while the Officer was in the “aft quadrant,” between the “net drum and . . . the aft corner of the shucking house,” with the fish well and drag between them. Tr. 323-25; *see also* RX 7; Tr. 345-47, 401-02. He testified that upon observing him boarding, Ofc. Fiske directed him to “stay back” or “stand down,” to which he responded “this is bullshit, you know what I mean? This is bullshit, Jed.” Tr. 325. Mr. Gribbin remembered the following exchange then taking place, beginning with Ofc. Fiske inquiring –

[W]hy do you say it’s bullshit? Or why are you mad? . . . He’s agitated. I’m agitated now at this point. I said, you screwed me when you wrote that citation that was supposed to be just interference. He goes, what do you mean, I screwed you? And I’m like, you wrote two bags of scallops were found, and ever since then I’ve been boarded over and over. You totally discredited me with that report that you said was going to be no big deal.

* * *

. . . I believe he said, “That’s not what they see. My report’s more detailed.” And I said, well, that’s what I see. So at this point, I am coming closer to Jed [Fiske]

Tr. 325-36. Although he admitted that during this angry exchange he advanced towards the Officer, Mr. Gribbin denied that at the time he had clenched hands, a puffed-out chest, or made any threats. Tr. 326-27. However, he acknowledged that he continued to use profanity, expressing his opinion over again that this was “bullshit,” and that he “[p]robably” used the “F word,” and suggested Ofc. Fiske did as well. Tr. 327. Specifically, Mr. Gribbin recalled that in response to a comment he made that he was following the weight calculation methodology for catch used by the MEP, who had been boarding him “non-stop,” Ofc. Fiske replied – “Fuck MEP. I don’t care what the state does.” Tr. 327, 402; *see also* Tr. 89-90, 95, 362, 427. Mr. Gribbin said after that exchange, the “tone changed” for the worse. Tr. 327.

Continuing, his recollection, he testified –

At this point, I’m like 10 feet from Jed I realize he’s got his baton out. So we’ve been in a heated exchange back and forth, and he has his baton out.

Tr. 327; *see also* Tr. 335 (Gribbin noting Ofc. Fiske had taken a “bladed stance,” with the baton “by his leg”), 402.

Mr. Gribbin remembered exclaiming at this point – “What are you fucking kidding me? You’re going to crack my head open about a bushel retention limit?” Tr. 335, 400. To which he recalled Ofc. Fiske replied something to the effect of “[N]o, I don’t.” Tr. 336. After repeating his question, to which Ofc. Fiske did not directly respond, Mr. Gribbin testified that he proceeded into the wheelhouse. Tr. 337. He acknowledged that two members of his crew had stood observing the interaction from the doorway of the shucking house, which was located between the two men, and Capt. Oliveira was “pacing around” nearby on the deck. Tr. 336.

As he proceeded into the wheelhouse, Capt. Oliveira came over to counsel and calm him, Mr. Gribbin said, advising him that Ofc. Fiske was not responding well to his anger, and handing him a small bottle of water. Tr. 403-04. Mr. Gribbin described his state of mind at that point as “upset” and in a state of “total disbelief” that “[o]ne, that this is what I’m going to be written for, and two, . . . I’ve had a baton pulled out on me over a basket count interaction.” Tr. 337-38. After remaining in the wheelhouse for what he felt was a long time, Mr. Gribbin testified that he walked back towards the rear of the vessel where Ofc. Fiske had remained. Tr. 338. “At this point, I’ve been able to process a little bit of what’s happened,” he explained, and had decided that if he was going to be cited for a volumetric violation, he wanted the catch volume to be measured. Tr. 338-39. Therefore, he asked Ofc. Fiske to allow him to repack the catch in the truck for “volumetric measure.” Tr. 339.

When I go back and Officer Fiske and I engage again, it goes from zero to 50 again with us going back and forth about volumetric equivalency. I’m telling him that we’re losing money at this point by [not] catching the scallops. Scallop prices were at a high The largest scallops were very high. We were fulfilling like obligation/contract . . . with Red’s Best. So we were getting as many live scallops as we could on the market, then we go back [out fishing].

So at this point, Officer Fiske puts his hand on his firearm

* * *

I said, so now we’ve gone from where I’m going to get my head cracked open to [where] I’m going to get shot in front of my guys over baskets?

Tr. 339-40; *see also* Tr. 404-05, 407. Mr. Gribbin recalled that Ofc. Fiske did not respond to his query. Tr. 340.

Mr. Gribbin estimated that he and Ofc. Fiske were standing about nine feet apart when this conversation began, but that when the Officer had his hand on his firearm, they were only about four and a half feet apart and that both their voices were “elevated.” Tr. 340-41, 406. As to Ofc. Fiske’s demeanor at this point, Mr. Gribbin testified “I didn’t see fear,” but the Officer

did appear “slightly confused.” Tr. 340; *see also* Tr. 47, 98-101 (Ofc. Fiske’s recollection of a similar interaction on the pier).

Mr. Gribbin admitted that, after Ofc. Fiske had disembarked the vessel and returned to the dock, he followed him and reapproached the Officer as he stood next to his vehicle, speaking on his phone. Tr. 341, 351. The men then had yet another “very, very brief” heated exchange, Mr. Gribbin said, where they raised their voices, but “it was pretty quickly that it went to a pretty mellow tone.” Tr. 350. During this third exchange, they continued to discuss the “measurements,” with Mr. Gribbin again asking Ofc. Fiske for permission to repack the totes and to allow the Kahuna to leave the dock. Tr. 349-50, 353. Mr. Gribbin also recalled advising Ofc. Fiske at that time that another of his vessels, the F/V Glutton, was coming into port, with shucked and live scallops, and inquired if the Officer wanted to inspect that vessel as well. Tr. 351, 407. He remembered Ofc. Fiske responded, “I’m done. I’m not doing any other inspections tonight.” Tr. 351. Also that the Officer said to him, “I’ve got to call my guy or I’m on the phone with my guy. I’ve got to let him know I’m not dead. I’m not checking the other thing,” and that no other Officer was coming, and the inspection was done.²³ Tr. 352-53. Toward the end of this conversation, Mr. Gribbin recalled— “I told him I’m sorry it went down like this. Like I’m a hot head. You’re a hot head.” Tr. 353, 408. He said he extended his hand to Ofc. Fiske, who shook it, and the men parted ways. Tr. 409. Mr. Gribbin said at no point did the Officer advise him that he had not completed his inspection.

The following day, March 11, 2021, Mr. Gribbin said he telephoned Ofc. Fiske, who expressed his willingness to speak to him although it was his day off. Tr. 363-64, 409. Mr. Gribbin testified that he again apologized to the Officer about the tone he had taken during their conversations the day before. Tr. 409. Both speaking civilly this time, the men once again exchanged their views on the appropriate methodology to be used to measure live scallops, with the Officer explaining he had to follow NOAA’s printed Compliance Guide providing a volumetric methodology. Tr. 365. Mr. Gribbin acknowledged to Ofc. Fiske that he was aware that NOAA used a volumetric method, but again explained that the MEP, with whom NOAA has a joint enforcement agreement, and who inspects his vessels far more frequently, uses a weight calculation. Tr. 364-65, 414. He also suggested to the Officer that assuming the volume of the totes made no sense because he could pack out in smaller baskets or larger blue totes that hold more. Tr. 366. Mr. Gribbin felt Ofc. Fiske was sympathetic to points he made and assumed that someone would check the amount of the catch, so he still did not believe “this was going to go south.” Tr. 367.

Later the same day or the following day, Mr. Gribbin also telephoned NOAA’s fishery policy analyst Travis Ford regarding the inspection. Tr. 367. During the call, Mr. Gribbin admitted that, at the time of the inspection, he was aware of the applicability of NOAA’s decision to use a volumetric equivalency methodology to measure live catch. Tr. 368. But he advised Mr. Ford that NOAA did not measure the volume of the catch during the inspection, so

²³ Mr. Gribbin testified that at some point one of the crew on the vessel had told him that Ofc. Fiske had “called for backup” and so he presumed other officers were going to arrive at “any time.” Tr. 337.

argued that it must measure the catch in pounds. Tr. 368. He also expressed to Mr. Ford his regret over what transpired between himself and Ofc. Fiske. Tr. 368. Sensing that Mr. Ford was unmoved by his arguments, Mr. Gribbin said he followed up this call by attempting to contact Caleb Gilbert, NOAA's Northeast Compliance Liaison, but was only able to leave him a voice message. Tr. 369-71; RX 5. At some point after the notices of violation were issued, Mr. Gribbin recalled, Ofc. Fiske responded to that voice message, advising him that the staffing of the liaison position was in transition and telling Mr. Gribbin that he should contact him if he has any further questions about the inspection. Tr. 373-74.

D. Discussion

As both parties observe in their post-hearing briefs, the particular words at issue here describing the prohibited acts – to “resist, oppose, impede, intimidate, or interfere,” are not defined in either the MSA or its regulations. Compl.’t’s Br. at 19-20; Resp’t’s Br. at 5.

When a word in a statute is not defined, it is given its common or ordinary meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979). The parties offer the following common definitions of the relevant terms for guidance –

- To resist is “to exert oneself so as to counteract or defeat”
- To oppose is “to place opposite or against something”
- To impede is “to interfere with or slow the progress of”
- To intimidate “is to place someone in fear”
- To interfere is “to interpose in a way that hinders or impedes: come into collision or be in opposition”

Compl.’t’s Br. at 19-20 (quoting *Hawthorne*, Docket No. SE0902348B, 2013 WL 1276030, at *7 (NOAA Feb. 27, 2013), Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/>); Resp’t’s Br. at 5 n.3; *see also Daniels*, 2014 WL 9866394, at *14 (“‘Intimidation’ is defined as ‘unlawful coercion; extortion; duress; putting in fear.’” (citing Black’s Law Dictionary (5th ed. 1979))); *Nguyen*, 2016 WL 5747067, at *20 (“‘interfere’ means ‘to interpose in a way that hinders or impedes; come into collision or be in opposition.’” (citing Merriam-Webster, <http://www.merriam-webster.com/dictionary/interfere>)).

After consideration of the record, I find that a preponderance of the evidence establishes that Mr. Gribbin did “impede, intimidate, or interfere” with Ofc. Fiske’s inspection of the F/V Kahuna on March 10, 2021, as those terms are commonly defined. In reaching this conclusion, I thoroughly considered and found the Respondents’ many arguments against their liability to be without merit.

Contrary to Respondents' characterizations, I do not find the versions of events offered by Ofc. Fiske and Mr. Gribbin at hearing to be meaningfully divergent, especially since the men were offering their memories of a series of brief interactions, on a single day, over two years before.²⁴ Their recitations agree on many of the key points and I find the testimony of both broadly credible.

I am also not persuaded by Respondents' various arguments suggesting that Ofc. Fiske's testimony was "inconsistent with the independent evidence, lacks candor, and is not plausible." Resp'ts' Br. at 6-7. Respondents contend that Ofc. Fiske's testimony that he inspected the Kahuna that day simply because he "missed" his chance to inspect the F/V Rolex, "makes no sense" and is "unbelievable," because it would have required the F/V Rolex to have "landed, 'packed out,' and departed the M[a]cMill[an] Pier all within twenty-five (25) minutes." Resp'ts' Br. at 8-9 (citing Tr. 162-64). However, I note that Capt. Oliveira testified that it took him less than that length of time to accomplish the same activities on the F/V Kahuna. Tr. at 443 ("So we're maybe at the dock for 20 minutes while we offload, and we'll go right back out."). Respondents also contend that, contrary to his testimony, Ofc. Fiske intentionally targeted the Kahuna and/or Capt. Oliveira for inspection because he was angry at the captain for previously misleading him as to his violation history. Resp'ts' Br. at 9 (citing Tr. 65, 328, 455, 458-59). However, this claim is refuted by Capt. Oliveira's testimony to the affect that Ofc. Fiske was nothing but patient, polite and respectful towards him during the inspection. Tr. 493. Respondents also imply that certain events as to which Ofc. Fiske testified did not occur because they were not recorded on his 10-21 App or posit that the Officer manipulated or altered the recording. Resp'ts' Br. at 10-11, 13 & n.20 (citing Tr. 40-41, 322-23, 325-27, 400-01). However, Respondents never offered any independent evidence to counter Ofc. Fiske's explanations of the 10-21 App's operational limitations or to prove that the recording was manipulated or altered. Moreover, Mr. Gribbin's own testimony supports much of the Officer's recollection of unrecorded events including, for example, the obvious angry emotional state at which he approached the dock. Tr. 321 (Mr. Gribbin testified that upon arrival at the dock he "had a couple of words with a clammer . . . [and] [h]e's like, I'll be right out of the way;" and observing him, the passing Harbormaster spontaneously inquired if "everything is ok?"); see also AX 1 at 14, 29 (Ofc. Fiske's photograph of a metal ramp Mr. Gribbin purportedly hit with his vehicle when arriving at the pier, taken on the day of the inspection).

I also strongly reject Respondents' characterization of the men being "mutually responsible" for their contentious interactions, due to their "joint frustration" over the application of the volumetric equivalency formula. Resp'ts' Br. at 4, 14, 17, 22. The record

²⁴ Ofc. Fiske's and Mr. Gribbin's recollections of their interactions are, in fact, remarkably similar. The only noticeable differences are that: Ofc. Fiske did not recall instructing Mr. Gribbin to not board the boat, as Mr. Gribbin did (Tr. 41, 322-23); Ofc. Fiske recalled that he placed his hand on his gun while on the vessel, and pulled out his baton on the pier, while Mr. Gribbin testified to such defensive actions occurring in the opposite order (Tr. 43, 47, 327, 340); and Ofc. Fiske did not recall having a second conversation with Mr. Gribbin on the vessel, rather he recalled that he disembarked when Mr. Gribbin went into wheelhouse (Tr. 46-47), and their next interaction occurred on the pier. Ofc. Fiske's testimony is consistent with his contemporaneously written report. AX 1 at 1-13. None of these minor factual discrepancies are material to the outcome here.

reflects that Mr. Gribbin, an admitted “hot-head,” was mendaciously attempting to bully Ofc. Fiske into not citing him for an overage violation based upon the volume of the catch, even though he knew that was the methodology NOAA applied. Tr. 36-37, 353, 386-88. Bolstering his anger at a possible citation that day was the fact that Mr. Gribbin still harbored a grudge against Ofc. Fiske for the January overage warning, to which Mr. Gribbin attributed a loss of his reputation as well as increased number of MEP boardings. Tr. 318-19, 325-26, 328, 395-397, 413-14. In addition, on the day of the inspection, Mr. Gribbin’s temper was no doubt shortened further by the pain and discomfort he was suffering as a result from his accident, Tr. 317-18, 398-99, as well as the business pressures coming from his desire to swiftly fulfill his supply contracts while scallops were still selling for a high price. Tr. 339. All these factors led Mr. Gribbin to, *repeatedly*: (1) irately and profanely, insist to Ofc. Fiske he was “wrong” in finding an overage using the volumetric formula; (2) ignore the Officer’s instructions; (3) approach the Officer in an intimidating and threatening manner; and (4) delay the completion of the inspection. Tr. 36-37, 318-19, 325-26.

On the other hand, there is no evidence that Ofc. Fiske was having a “bad day” or carried any negative feelings about Mr. Gribbin, Capt. Oliveira, or the Kahuna into the inspection. The only mention of the prior violation on March 10, 2021, was made by Mr. Gribbin, and in response, the Officer assured him that his January report did not attribute any wrongdoing to Respondent personally. Tr. 325-26. Further, there is absolutely no evidence that Ofc. Fiske escalated the conflict. Rather, the record reflects that Ofc. Fiske repeatedly attempted to engage Mr. Gribbin in a civil discussion of NOAA’s volumetric conversion methodology, only to be met with anger and denial. Tr. 41-42, 50-51. Even Mr. Gribbin admitted that Ofc. Fiske was not angered, but rather “confused,” by his hostile responses to his explanations, inquiring “why do you say it’s bullshit” and “why are you mad?” Tr. 325, 340. Further, when he mocked Ofc. Fiske for taking defensive measures, the Officer did not in turn respond aggressively, rather he reassured Respondent that he intended him no harm or was silent, Mr. Gribbin testified. Tr. 335-36, 340. In fact, contrary to escalating the engagement, the record shows that Ofc. Fiske intentionally, and effectively, employed “de-escalation” techniques, such as lowering his voice, changing his position, and showing his palms, to eventually calm the situation. Tr. 49-50, 52. The Officer even attempted to mollified Mr. Gribbin by suggesting that he could be wrong, and Mr. Gribbin could be correct. Tr. 50-51. Thus, while Ofc. Fiske may have been agitated and, at points, cursed in frustration, such as when Mr. Gribbin raised inapplicable state practices, the record shows that he consistently acted professionally despite Mr. Gribbin’s actions and the serious concerns he had for his own safety.

There is also no merit to Respondents’ claim that Mr. Gribbin’s actions either should not have caused Ofc. Fiske to experience fear or if he did, it was an “over-reaction” to an exaggerated version of events. Resp’ts’ Br. at 11-13 (citing Tr. 90-92, 121-22, 125, 323-24, 411; RX 7). There is no dispute as to the fact that Mr. Gribbin was angry at Ofc. Fiske on March 10, 2021, and engaged in a series of very provocative and threatening acts. He admitted he used aggressive expletives in all his discussions with the Officer. Tr. 322, 325, 327 (“bullshit”); Tr. 325, 327, 335, 399-400 (“F word”). He hurled accusations against the Officer, stating “you

screwed me,” and “you totally discredited me.” Tr. 325-26. He defied the Officer’s directives, by boarding the boat and advancing toward him. Tr. 322-23, 325-26, 339-40. And, he twice mocked the Officer for taking defensive measures to protect himself. Tr. 335, 339-40.

Still, Respondents suggest these actions should not have induced fear because Ofc. Fiske was “an armed, young, fit male who had gone through extensive law enforcement training while the Respondent was an overweight, physically impaired and unhealthy, middle-aged man.” Resp’ts’ Br. at 21. This Tribunal observed Mr. Gribbin at hearing to be a physically impressive figure, broad-shouldered and substantial. While he may be a bit older than the Officer, he testified that at the time of the incident he was 6’1” and 255 pounds, which is roughly the same size as Ofc. Fiske, who testified to being 6’2” and 243 pounds. Tr. 171, 411. This Tribunal also has no doubt as to Mr. Gribbin’s inherently tough nature, as evidenced by the way he responded to the significant injury he incurred on the morning of the inspection, and his lifetime of work as a commercial fisherman. Further, while he may suffer from various maladies, there was no way Ofc. Fiske would have been aware of those ailments, other than his foot. In any case, Mr. Gribbin’s physical appearance alone was not what induced the Officer’s fear. Despite the Respondents’ denials, Tr. 326-27, 479, I credit Ofc. Fiske testimony that, along with being loud and bellicose, Mr. Gribbin presented the intensity of his anger and intent through his body language. Tr. 41-42. Specifically, he exhibited what the Officer had been trained to recognize as “pre-assault indicators” – wide eyes, closed fists, and puffed out chest. Tr. 41-42, 47-48, 98-99; *see also* Tr. 184 (Testaverde describing pre-assault indicators). I assign such credit to Ofc. Fiske’s testimony because, among other facts, it is undisputed that Ofc. Fiske instructed Mr. Gribbin to stay on the pier and stay back, which are the types of directives only uttered when you anticipate a physical assault. *See* Tr. 400, 480-81.

Moreover, I find Ofc. Fiske’s background and training gives greater credence to his testimony as to experiencing a justifiable sense of fear, rather than undermining it. Ofc. Fiske testified that prior to his employment with NOAA, he was a Veterans Administration police officer and a park ranger. Tr. 57-58. He joined NOAA as an enforcement officer in 2015, and estimated he has conducted hundreds of vessel inspections since that time. Tr. 9, 11, 58. Ofc. Fiske testified that only once prior to this incident had he ever put his hand on his firearm, and that was in response to a dog on a pier he thought was going to bite him. “But I don’t recall ever putting my hand on my firearm on a boat for, for in a defensive manner,” he averred. Tr. 94. This reticence to resort to his weapons suggests that Ofc. Fiske is generally steady, and not someone who easily “overreacts,” and that he was sincerely in fear in this instance, as he alleged. Further, the Officer’s testimony as to his fear is buttressed by that of his supervisor, Lt. Testaverde, who confirmed that this was the first time he heard “fear in [Ofc. Fiske’s] voice,” and that Ofc. Fiske told him “I’m being threatened. I’ve got to get off this boat.” Tr. 179-81, 200-01. Lt. Testaverde said after the call he felt a “sense of hopelessness,” because he did not know where the Officer was in order to call to get him help. Tr. 181. Lt. Testaverde testified, “I was very worried,” and “I lost years of my life based on that call.” Tr. 181, 193.

On the other hand, I find no merit to Respondents’ claim that Ofc. Fiske engaged in “bizarre” contact with Mr. Gribbin after the inspection, which evidences a “consciousness of

guilt.” Resp’ts’ Br. at 17-18 (citing Tr. 152, 372-74). It was Mr. Gribbin who initiated all the subsequent conduct with NOAA staff, and he did so out of awareness that he had not interacted with the Officer appropriately, fearing at one point that he might be arrested. Tr. 408.

Finally, as to the disputed issue of whether Ofc. Fiske completed his inspection, I note neither the statute nor the regulation requires proof that the inspection was not completed for there to be a violation. 16 U.S.C. § 1857(1)(E); 50 C.F.R. § 600.725(f). To the contrary, the laws only require Respondent to “impede, intimidate, or interfere” with an officer “in the conduct of any search or inspection.” 16 U.S.C. § 1857(1)(E); *see also*, 50 C.F.R. § 600.725(f). Thus, whether Ofc. Fiske did or did not complete his inspection of the Kahuna is immaterial to the outcome of this proceeding. In any case, I credit the testimony of Ofc. Fiske that he did not complete his inspection of the Kahuna on March 10, 2021, because of Mr. Gribbin’s actions. Tr. 52, AX 1 at 1, 8. Mr. Gribbin testified that when he first arrived at the pier, he asked Ofc. Fiske if he was coming off the boat, to which the Officer replied “I’m coming off the boat *when I’m done with my inspection.*” Tr. 323 (emphasis added). This statement indicates that the Officer’s inspection was not complete at that time. Mr. Gribbin then proceeded to board the vessel, and kept the Officer engaged and on edge, and not proceeding with his inspection, until he disembarked. In addition, Ofc. Fiske testified that while Mr. Gribbin was in the wheelhouse he spoke to his supervisor, Lt. Testaverde, notifying him that he intended to immediately disembark, and due to the “safety risk,” he was not going to complete his inspection. Tr. at 45; AX 1 at 7. Lt. Testaverde confirmed Ofc. Fiske’s recollection of the call. Tr. 179-81. Ofc. Fiske testified that as a result of cutting his inspection short, he never reviewed the vessel’s paperwork, including the Fishing Vessel Trip Report, fishing permit, Operator’s Permit, all of which he generally photographs, as well as his search of the vessel for unreported catch. Tr. 52. Whether those efforts would have turned up a violation is immaterial. It has been held that an officer’s investigation is not complete “until all aspects are complete.” *Diehl*, 6 O.R.W. 451, 455 (NOAA 1991), *remanded on other grounds by Diehl v. Franklin*, 826 F. Supp. 874 (D.N.J. 1993). Clearly here, Ofc. Fiske did not have an opportunity to complete all aspects of the inspection. The fact that NOAA may have not requested any further data from Respondents after March 10, 2021, in effort to complete the inspection, does not show that the inspection Ofc. Fiske initiated that day was “completed.”

In sum, the evidence in this case shows that Mr. Gribbin became angry upon being informed of the Officer’s overage determination by telephone, and he chose to go to the pier and confront Ofc. Fiske in person as he was in the midst of performing his inspection. In a series of personal interactions, all of which he initiated, Mr. Gribbin was belligerent and antagonistic towards Ofc. Fiske. In loud and profane language, he repeatedly told the Officer that the methodology he was applying to determine the overage was incorrect, although he knew that to be untrue. He ignored the Officer’s instructions to wait on the pier until the inspection was completed, and then ignored the Officer’s instructions to stay back, as he approached him on the deck in a menacing manner. These actions unjustifiably slowed the progress of the Officer’s work, and so “impeded” and/or “interfered” with the inspection. While he did not explicitly threaten to hurt him, Mr. Gribbin’s words, actions, and bearing

“intimidated” the inspecting Officer causing him to fear for his safety, and take defensive measures including pulling out his baton and putting his hand on his gun. For these reasons, Respondents Beau Gribbin and High Pressure Fisheries, Inc. are found liable, jointly and severally, for violating 16 U.S.C. §§ 1857(1)(A), (1)(E) and 50 C.F.R. § 600.725(f) as alleged in NOAA Docket No. NE2101404B.²⁵ See *Orman*, 1994 WL 1246347, at *4 (“The mere fact that [the officer] had to take the time to repeatedly ask Respondent to ‘back off’ is evidence of interference. . . . Respondent’s outrageous behavior delayed and impeded completion of the investigation.”); *Lovgren*, 787 F.2d at 862 (finding that 50 C.F.R. § 651.7(m), now codified, with slight modification, as 50 C.F.R. § 600.725(f), “does not require fisticuffs. Forceful resistance, intimidation or interference suffices.”); *Silva*, 6 O.R.W. 404, at 410-11 (NOAA 1991) (Respondent’s false statements to NMFS Officers interfered with the completion of their lawful investigation in violation 50 C.F.R. § 620.7(f), now codified with slight modification as 50 C.F.R. § 600.725(f)).²⁶

VI. PENALTY

A. Principles of Law Regarding Civil Penalty

The MSA states that any person who violates any of its provisions or implementing regulations may be assessed a civil penalty of up to \$100,000 for each violation. 16 U.S.C. § 1858(a). However, such statutory penalty maximums are subject to increase due to inflation. See The Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note (as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134 § 31001 (Apr. 26, 1996) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74 § 701 (Nov. 2, 2015)). Thus, currently the maximum civil penalty which may lawfully be imposed is \$230,464, per MSA violation. 15 C.F.R. § 6.3(f)(15) (eff. Jan. 15, 2024) (adjusting the maximum penalty to account for inflation); see also 15 C.F.R. § 6.4 (eff. Jan. 15, 2024) (adjusted amount applies to penalties assessed after Jan. 15, 2024). In addition to, or in

²⁵ Respondents do not challenge the Agency’s request for Mr. Gribbin and High Pressure Fisheries, Inc. to be held “jointly and severally” liable on the interference charge and such a holding here is justified. This Tribunal has consistently held that knowledge and acts of corporate officers are imputable to corporations. *McDonald*, 7 O.R.W. 66, 73-74 (NOAA 1993); *Newell*, 2 O.R.W. 368, 371 (NOAA 1981); *Bogges*, 4 O.R.W. 260, 264 (NOAA 1985). Corporations do not act upon their own initiative. They proceed, within or outside of the boundaries of the law, upon the direction of their officers and employees. Mr. Gribbin is the sole officer and shareholder of High Pressure Fisheries, Inc., which is the sole owner of the Kahuna. Jt. Stip. Facts ¶¶ 3, 5; Tr. 389-90; AX 2 at 3, 4. As such, High Pressure Fisheries, Inc. is jointly and severally liable for the violations committed by Respondent Gribbin.

²⁶ In reaching its decision here, the Tribunal has not relied upon either *Daniels*, cited by the Agency, or *Nguyen*, cited by Respondents, as those cases involved observers, not NOAA officers, and the language of the statute and regulations applying to observers differs from that applying to officers. Specifically, the observer provisions make it unlawful to “harass” an observer, and the respondents were found liable for harassment in those cases. See *Daniels*, 2014 WL 9866394, at *9-10, *14-15, *17 (interpreting 16 U.S.C. § 1857(1)(L) and 50 C.F.R. §648.14(e)(1)); *Nguyen*, 2016 WL 5747067, at *3, *26 (interpreting 16 U.S.C. § 1857(1)(L) and 50 C.F.R. §§ 600.10, 600.725(o), (t)). To “harass” is not a prohibited action in the statute and regulation at issue here in regard to officers. 16 U.S.C. § 1857(1)(E); 50 C.F.R. § 600.725(f).

lieu of, monetary penalties, the Act also allows for the imposition of sanctions on permits issued under the Act. 16 U.S.C. § 1858(g) (providing the power to revoke, suspend, deny, or impose additional conditions and restrictions to any MSA-issued permit).

As to assessing a penalty, the Act provides that —

In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require. In assessing such penalty the Secretary may also consider any information provided by the violator relating to the ability of the violator to pay, *Provided*, That the information is served on the Secretary at least 30 days prior to an administrative hearing.

16 U.S.C. § 1858(a) (emphasis in original) (eff. Jan. 13, 2022). Correspondingly, the Rules applicable to this proceeding also provide that the factors to be considered 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) (eff. Aug. 1, 2022).

In NOAA Docket No. NE2101404B, the Agency proposed in the NOVA imposition of a \$36,000 penalty upon High Pressure Fisheries, Inc. and Beau L. Gribbin, jointly and severally, for violating 16 U.S.C. § 1857(1)(E), 16 U.S.C. § 1857(1)(A), and 50 C.F.R. § 600.725(f). AX 5 at 4-6. In its post-hearing briefs, NOAA does not argue for a specific penalty amount as to Docket No. NE2101404B. In any case, there is no presumption in favor of the penalties 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) (eff. Aug. 1, 2022). 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) (eff. Aug. 1, 2022); *see also* 15 C.F.R. § 904.108 (eff. Aug. 1, 2022) (enumerating factors to be considered in assessing a penalty).

B. Complainant’s Penalty Arguments

The Agency position is that “interfering with an authorized officer by making him fear for his own safety is a serious violation that Gribbin carried out deliberately, and the penalty should reflect it.” Compl.’t’s Br. at 25. As to the specific nature of the violation, it states that “vessel inspections are critical to fisheries management;” “fishery managers rely on law enforcement to ensure compliance with the regulations they implement, and it is ‘critical’ that industry cooperates with law enforcement.” Compl.’t’s Br. at 26 (citing Tr. 12, 246-47, 178). “Without the ability to board vessels in port safely and without the cooperation of the regulated

community, the ability to manage the nation's marine resources is at risk," NOAA declares. Compl.'t's Br. at 26-27.

Further, as the circumstances and extent, it asserts –

[T]his was not a minor temporary obstruction that eventually allowed the inspection to continue unabated. Gribbin was belligerent, uncooperative, and profane. He caused Officer Fiske to fear for his own personal safety, and ultimately caused the end of a lawful fisheries inspection. He accosted Officer Fiske, not just once, but multiple times.

Compl.'t's Br. at 27 (internal citation omitted) (citing *Silva*, 6 O.R.W. at 410 ("It is unnecessary and inappropriate for individuals to behave in [an] insulting and obstructive [] manner to an authorized officer, particularly when reasonable and legitimate inquiries are made, and the penalty amount should reflect that such behavior will not be countenanced.")).

NOAA next decries that "it is hard to overstate the gravity of the violation On the continuum of the seriousness of interference offenses, . . . interference through deliberate intimidation is among the worst." Compl.'t's Br. at 27. In support, it advises that Mr. Gribbin's actions were not inadvertent or negligent, stating –

He chose to aggressively drive to the pier. He chose to ignore Officer Fiske's command that he not board the vessel. He chose to ignore multiple commands from Officer Fiske that he stay back. He chose to continue to advance, continue to yell, continue to curse. That he was angry about all manner of perceived grievances does not lessen this culpability.

Compl.'t's Br. at 27-28 (internal citation omitted) (citing *Cf. Tiber*, 6 O.R.W. 556, 565 (NOAA 1991) (finding that Respondent ignoring a Coast Guard order to bring fish aboard from a longline was "intentional and deliberate"))).

Under the factor of "other matters as justice may require," NOAA notes that this Tribunal has previously held that civil penalties are "assessed with the goal of achieving deterrence" and "should be 'significant enough to alter the economic calculus that might lead the violator and other participants in the fishery to simply account for any possible sanction as the cost of doing business.'" Compl.'t's Br. at 28 (quoting *F/V Princess Elena, Inc.*, Docket No. NE1305018, 2017 WL 2481023, at *25 (NOAA May 24, 2017)). It observes that "[u]nlike an officer during a traffic stop, Gribbin has since and will continue to encounter Officer Fiske," and suggests that "[t]o truly effect specific deterrence, the penalty must be sufficient to make Gribbin think about this case, and how he must treat law enforcement, every time he is boarded in the future." Compl.'t's Br. at 28-29 (citing Tr. 178, 410).

Further, the Agency suggests that significant penalties serve the purpose of general deterrence as well, stating, “[T]he penalty must equally deter the industry from considering officer intimidation as a viable alternative to getting caught violating some other regulation.” Compl.’t’s Br. at 29. It notes that interference could be used strategically to prevent other violations from being discovered and documented. Compl.’t’s Br. at 29. NOAA points out that Mr. Gribbin testified that “his entire fleet is aware of this incident,” and it therefore suggests “a strong deterrent message is warranted.” Compl.’t’s Br. at 29 (citing Tr. 410-11).

C. Respondents’ Penalty Arguments

As to penalty, Respondents take the position that “at worst the facts only support a de minimus” or “nominal” amount. Resp’ts’ Br. at 25-26. Their arguments in support of this position as to the interference charge are terse. They distinguish the circumstances here from *Daniels*, noting that this case involved a docked vessel and, they claim, “an armed law enforcement officer who did not require any further information than what he already obtained during the boarding.” Resp’ts’ Br. at 26.

D. Analysis of Civil Penalty and Assessment

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

I find the Agency’s arguments as to the nature, circumstances, extent, and gravity of the violation, and Respondents’ culpability, persuasive.

The nature of the violation involves resisting, opposing, impeding, intimidating, and/or interfering of a NOAA fisheries officer, which prevented him from completing his inspection. This is a very serious violation of the law and regulations. Lt. Testaverde testified that NOAA fisheries officers enforce laws on “33½ million miles of ocean” and “95,000 miles of coastline.” Tr. 177-78. Their positions require that they spend a large majority of their time boarding fishing vessels, working alone, and often at night, and industry cooperation is very important to them being capable of successfully performing their work. Tr. 177-78; *see also* Tr. 12-13.

Further, the record indicates that NOAA invests significant resources into training its officers. Ofc. Fiske testified that, although he had years of prior experience as a police officer, to become a NOAA Officer, he had to attend a twelve-week academy at the Federal Law Enforcement Training Center in Georgia, then four weeks of “law enforcement boat school,” followed by twelve weeks of field training, and ending with an additional two to three weeks of training on fish and gear identification on Cape Cod. Tr. at 10.

The circumstances, extent and gravity of the violation are stated in great detail above. In sum, they reflect that Mr. Gribbin initiated two or three separate interactions with Ofc. Fiske wherein he resisted, opposed, impeded, intimidated, or interfered with his inspection by engaging in egregious behavior, involving profane language, taunting, and advancing on the Officer making him fear for his safety. Tr. 400-01, 402, 405-06.

As to culpability, Mr. Gribbin's acts were clearly intentional, not negligent or unintended. He is a very experienced member of the commercial fishing industry. Tr. 283. He knew he was prohibited from interfering with Ofc. Fiske's inspection. Nevertheless, he confronted the Officer on the pier and on the vessel, intimidating him and preventing completion of the inspection. Worse yet, during those confrontations, he falsely represented to the Officer that utilization of the federal volumetric methodology to determine overage of catch of live scallops was "wrong," although he full well knew that NOAA had formally adopted that methodology in that he had personally and publicly argued against its adoption in 2019, and failing that, tried to obtain an exemption from it, on the basis that it would handicap his business and he would loss hundreds of thousands of dollars as a result. Tr. 397-98, 428.

2. History of Prior Offenses

NOAA has represented to this Tribunal that Respondents have no prior adjudicated violations.

3. Inability to Pay

Respondents have not claimed an inability to pay the proposed penalty.

4. Such Other Matters as Justice May Require

Mr. Gribbin suggested at hearing that he has already suffered for his violation. He explained that the fishing community in Massachusetts is relatively small and that everyone in the fleet in Provincetown is aware of the events that occurred on March 10, 2021. Tr. 411. His reputation has been negatively impacted, he claimed, "It's like being accused of a heinous crime." Tr. 416. Consequently, he has stopped participating in a variety of industry meetings. Tr. 416. However, he also acknowledged that the overage violation which occurred in January of 2021, and is not at issue here, had a greater negative impact on his reputation than the interference charge. Tr. 431.

Further, during his testimony, Mr. Gribbin suggested that a finding of violation here will cause him to suffer the loss of the income he derives from participating in research activities, as a criterion to participate in those activities is "a clean record with no violations." Tr. 294. However, he offered no documentation in support of this allegation. As such, I do not find this issue to be a basis upon which to mitigate the penalty.

On the other hand, I was greatly impressed by the fact that Mr. Gribbin recognized he had acted inappropriately and apologized to Ofc. Fiske by the end of their interactions on March 10, 2021, and made the effort to reach out to him and repeat his apology the next day. Tr. 51, 53, 409. He also acknowledged his wrongful acts regarding Ofc. Fiske and expressed his regret to Travis Ford the following day. Tr. 243. While Mr. Gribbin may have undertaken these acts of contrition in the hope of avoiding a violation, they also represent an acceptance of responsibility and an effort at remediation, especially as they were not likely instigated on

advice of counsel at that point. The cases where this Tribunal has seen a Respondent engage in such thoughtful and mature conduct are far and few between. Such actions should be lauded and encouraged and as such, a reduction in the penalty is warranted on this basis.

Finally, NOAA has argued that a substantial penalty should be imposed in this case to deter others in the fishing industry from engaging in officer interference. Compl.'t's Br. at 29. The record suggests that, overall, incidents of officer interference are infrequent. Tr. 186-, 193. Further, the confluence of factors that led to Mr. Gribbin to engage in interference are unlikely to reoccur. Still, I agree with the Agency that a significant penalty is appropriate to make it abundantly clear to Mr. Gribbin and others in the commercial fishing community that officer harassment is deplorable and will be severely punished in every instance. *Silva*, 6 O.R.W. at 410 ("It is unnecessary and inappropriate for individuals to behave in [an] insulting and obstructive [] manner to an authorized officer, particularly when reasonable and legitimate inquiries are made, and the penalty amount should reflect that such behavior will not be countenanced."); *Butz v. Glover Livestock Commission, Co.*, 411 U.S. 182, 188-89 (1973) (finding sanctions imposed under the Packers and Stockyards Act meant to best serve to deter violations and achieve the objective of the statute were appropriate); see also *Lovgren*, 3 O.R.W. 431, 437 (NOAA 1984), *aff'd*, 3 O.R.W. 564 (NOAA App. 1984), *aff'd*, 787 F.2d 857 (3d Cir. 1986) ("The policeman's lot may not be a happy one, but it may not be made more miserable by hysterical and threatening outbursts, particularly when reasonable and legitimate inquiries are made."); *Hedger*, 5 O.R.W. 478, 485 (NOAA 1989) ("[I]t is not appropriate for citizens to harass, threaten, or intimidate those who enforce the law.").

Regulation of the commercial fishing industry is essential for many reasons, not the least of which is that it allows generations of fisherman like Mr. Gribbin's family with the opportunity to earn a good living, doing good for the world, by providing crucial sustenance.²⁷ Likewise, NOAA officers, like all persons, deserve as safe a working environment as possible. *Diehl*, 826 F. Supp. at 880 (D.N.J. 1993) ("The USCG and fisheries personnel have important, often difficult, and sometimes dangerous duties to perform in the national interest. Masters of vessels cannot be allowed to interfere with inspections with threats and intimidation."). Armed officers, made unnecessarily more anxious about their safety, will undoubtedly lead to tragedy. An experienced industry leader such as Mr. Gribbin should be setting an example of appropriate conduct, not being an example of what not to do. Hopefully, Mr. Gribbin has observed the irony of the fact that, had he simply accepted the Officer's findings of overage on the day of the inspection and not engaged in harassment, he would have likely avoided any violation or penalty, and the attendant legal expenses.

²⁷ "The Atlantic Sea Scallop FMP was implemented in 1982 to restore adult scallop stocks The dramatic [resulting] increase in scallop abundance has resulted in the development of a highly profitable commercial fishery in which Atlantic sea scallops are neither overfished, nor is overfishing occurring." *Sea Scallop Plan Overview*, NEFMC, www.nefmc.org/management-plans/scallops#:~:text=Sea%20Scallop%20Plan%20Overview&text=The%20dramatic%20increase%20in%20scallop,overfished%2C%20nor%20is%20overfishing%20occurring (last visited Mar. 26, 2024).

Based upon all of the foregoing facts of this case, I determine that imposition of a penalty in the amount of \$30,000 is appropriate in NOAA Docket No. NE2101404B.

ORDER

IT IS HEREBY ORDERED,

That, NOAA Docket No. NE2101404A is **DISMISSED**;

That, a civil penalty in the total amount of \$30,000, is **IMPOSED** upon Respondents, High Pressure Fisheries, Inc. and Beau Gribbin, who are found jointly and severally liable in NOAA Docket No. NE2101404B;

Once this Initial Decision becomes final under the provisions of 15 C.F.R. § 904.271(d), you will be contacted by NOAA with instructions as to how to pay the civil penalty imposed herein.

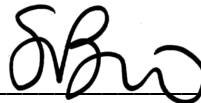
PLEASE TAKE NOTICE, that any petition for reconsideration of this Initial Decision must be filed with the undersigned within **20 days** after the Initial Decision is served. 15 C.F.R. § 904.272. Such petition must state the matter claimed to have been erroneously decided, and the alleged errors and 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.



Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency

Dated: March 29, 2024
Washington, D.C.