



UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:)
)
)
James K. Gharst, Deborah K. Gharst,)
and James E. Gharst,)
)
 Respondents.)

Docket Number: **SE2001004**
F/V Miss Debbie

INITIAL DECISION AND ORDER

Date: May 22, 2024

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

Appearances: For the Agency:
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¹ The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011. See 5 U.S.C. § 3344; 5 C.F.R. § 930.208.

I. PROCEDURAL BACKGROUND

The National Oceanic and Atmospheric Administration (“NOAA” or “Agency”) initiated this proceeding when it issued a Notice of Violation and Assessment of Administrative Penalty (“NOVA”), dated January 18, 2022, to James Kurk Gharst (an owner/operator), Deborah Kay Gharst (an owner), and James Eric Gharst (a crewmember), collectively referred to as “Respondents.” The NOVA charges Respondents, jointly and severally², of the fishing vessel (“F/V”) Miss Debbie with four counts of alleged violations of the Magnuson-Stevens Fishery Conservation Act (the “Act”), 16 U.S.C. § 1857(1)(A). In Counts 1 and 3, Respondents are charged with “dispos[ing] of fish, parts thereof, or other matter, after a communication or signal from an authorized officer, or after the approach by an authorized officer or an enforcement vessel,” in violation of the Act and 50 C.F.R. § 600.725(e). Count 1 is alleged to have occurred on or about March 11, 2019, and Count 3 is alleged to have occurred on or about September 26, 2019. In Counts 2 and 4, Respondents are charged with “us[ing] Gulf reef fish as bait, a prohibited fishing method under 50 C.F.R. 622.9(e),” in violation of the Act and 50 C.F.R. § 622.13(l). Count 2 is alleged to have occurred on or about March 11, 2019, and Count 4 is alleged to have occurred on or about September 26, 2019. The Agency seeks a penalty of \$51,500 for the alleged violations (Count 1: \$18,000; Count 2: \$7,000; Count 3: \$18,000; Count 4: \$8,500).

In response to the NOVA, Respondents, through counsel, requested a hearing on the alleged violations, and the matter was forwarded to this Tribunal. By Order dated April 29, 2022, I was designated to preside over the litigation of this matter. On that same date, I issued an Order to Submit Preliminary Positions on Issues and Procedures to the parties, setting forth various prehearing filing deadlines and procedures, including filing deadlines for each party to submit a Preliminary Statement and Preliminary Position on Issues and Procedures (“PPIP”).³ Thereafter, the Agency timely filed its Preliminary Statement and its PPIP, which it later supplemented. Respondents did not file a PPIP, which led to an Order to Show Cause, dated July 6, 2022, for failing to do so and a deadline by which to respond. Respondents timely responded and submitted their PPIP, which they later supplemented.

On November 30, 2022, I issued the Notice of Hearing Order scheduling the evidentiary hearing to be held in Panama City, Florida on June 13, 2023 and continuing, as necessary, through June 14, 2023. Thereafter, on January 4, 2023, a Notice of Hearing Location was issued setting forth further details regarding the hearing location and venue. I conducted the hearing in this matter on June 13, 2023, as scheduled, and the hearing concluded the same day.

² NOAA’s civil procedural rules provide that “a NOVA may assess a civil penalty against two or more respondents jointly and severally. Each joint and several respondent is liable for the entire penalty but, in total, no more than the amount finally assessed may be collected from the respondents.” 15 C.F.R. § 904.107(a).

³ Preliminary Positions on Issues and Procedures are now referred to as “Initial Disclosures.” See Civil Procedures in Civil Administrative Enforcement Proceedings, 87 Fed. Reg. 38,938 (June 30, 2022) (Final Rule); 15 C.F.R. § 904.240.

At that hearing, the Agency presented the following witnesses: Peter Hood (“Mr. Hood”), the Gulf Branch Chief in the Sustainable Fisheries Division in the Southeast Regional Office of NOAA’s National Marine Fishery Service (“NMFS”), who was qualified as an expert in the field of federal management of Gulf reef fish; Dr. Jessica Stephen (“Dr. Stephen”), the Branch Chief of the Limited Access Privilege Program, Data Management Branch, within the regional office of the Sustainable Fisheries Division, who was qualified as an expert in NOAA’s Individual Fishing Quota (“IFQ”) program and valuation of shares allocation; Kevin McIntosh (“Mr. McIntosh”), the Branch Chief of the Permits Office within the Southeast Regional Office of NMFS, who was qualified as an expert in the commercial Gulf reef fish permitting process and secondary market for commercial Gulf reef fish permits; Thomas Nelson (“Officer Nelson”), a law enforcement officer with the Florida Fish and Wildlife Conservation Commission (“FWC”), and deputized to enforce federal fisheries laws on behalf of NOAA; Jason Marlow a now-retired Lieutenant with the FWC (“Lt. Marlow”); and Mitchell Robb, a former law enforcement officer with FWC and currently with NMFS (“Officer Robb”). Respondents testified on their own behalf. Agency Exhibits AX 1 through AX 12 and AX 14 through AX 20⁴ were admitted into evidence. Respondents’ Exhibits RX 1 through RX 4 were admitted into evidence. The parties entered joint stipulations of facts, exhibits, and testimony, JX 1, that was also admitted into evidence.

On July 6, 2023, the parties were provided with a certified transcript of the hearing, and I simultaneously issued an Order Scheduling Post-Hearing Submissions, in which various post-hearing filing deadlines were established. On July 21, 2023, the Agency timely filed its Motion to Conform Transcript, which was granted by Order dated July 25, 2023. Consistent with the established filing deadlines, the parties timely filed their Initial Post-Hearing Briefs and Reply Post-Hearing Briefs.

II. STATEMENT OF THE ISSUES

a. Liability

The NOVA charges four different violations. For counts 1 and 3, I must determine whether on March 11, 2019, and September 26, 2019, Respondents unlawfully disposed of fish, fish parts, or other matter after (1) a communication from an authorized officer, (2) a signal from an authorized officer, (3) the approach by an authorized officer, or (4) the approach by an enforcement vessel, in violation of 16 U.S.C. § 1857(1)(A) and 50 C.F.R. § 600.725(e). For counts 2 and 4, I must determine whether on March 11, 2019, and September 26, 2019, Respondents unlawfully used Gulf reef fish as bait, in violation of 16 U.S.C. § 1857(1)(A), 50 C.F.R. § 622.9(e), and 50 C.F.R. § 622.13(l).

⁴ AX 19 and AX 20 were jointly stipulated to by the parties during the hearing and admitted into evidence. See Tr. 13-14, 393-95.

b. Civil Penalty

If liability for the charged violations is established, I must then determine an appropriate civil penalty to impose for the violations. To do so I will evaluate certain factors, including the nature, circumstances, extent, and gravity of the violation; Respondents' degree of culpability; any history of prior violations; Respondents' ability to pay; and such other matters as justice may require. See 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(a) (enumerating factors to be taken into account in assessing a penalty).

III. FACTUAL SUMMARY

a. Joint Stipulations

Prior to hearing, the parties stipulated to the following facts: (1) Respondents James K. Gharst ("Gharst Senior"), Deborah K. Gharst ("Mrs. Gharst"), and James E. Gharst ("Gharst Junior") are persons subject to the jurisdiction of the United States for purposes of the MSFCMA. JX 1 ¶1. (2) The fishing vessel Miss Debbie is a United States Coast Guard documented vessel subject to the jurisdiction of the United States. JX 1 ¶2; AX 4. (3) Gharst Senior and Mrs. Gharst are now and were at all relevant times the owners of the Miss Debbie. JX 1 ¶3. (4) On March 11 and September 26, 2019, Gharst Senior was the operator of the Miss Debbie. JX 1 ¶4. (5) On March 11, 2019, Miss Debbie was actively fishing for Gulf reef fish in federal waters when approached by uniformed law enforcement personnel from FWC aboard a marked FWC law enforcement vessel. JX 1 ¶5. (6) On September 26, 2019, Miss Debbie was actively fishing for Gulf reef fish in federal waters when approached by uniformed law enforcement personnel from FWC aboard an *unmarked* FWC law enforcement vessel. JX 1 ¶6. (7) Gharst Senior and Mrs. Gharst are the holders of a transferable limited access Gulf of Mexico Reef Fish Commercial permit, RR-450, that has a monetary value on the open market. JX 1 ¶7; AX 5. (8) Gharst Senior and Mrs. Gharst are the holders of Individual Fishing Quota ("IFQ") shares. JX 1 ¶8; AX 16. (9) Gharst Senior and Mrs. Gharst receive transferable allocations of IFQ species from the Agency annually based on their owned shares. JX 1 ¶9; AX 16.

b. General Background and Factual Summary

Gharst Senior, co-owner and operator of the F/V Miss Debbie, and Mrs. Gharst, co-owner of the F/V Miss Debbie, are a married couple and holders of the Federal Fisheries Permit for the Gulf of Mexico Reef Fish ("Permit") that was in effect at the time of the alleged violations. Tr. 319; AX 4; AX 5. The Gharsts' Permit is classified as a "limited access permit," meaning that new permits of this kind are no longer issued by NMFS. Tr. 126. As a consequence, the only way a person may obtain this type of permit is by purchasing an existing permit from a current permit holder for an agreed upon price. Tr. 127.

At the time of the hearing in this matter, Gharst Senior and Mrs. Gharst had owned the F/V Miss Debbie for 15 years. Tr. 271. The F/V Miss Debbie is a 32-foot vessel built in 1983. Tr. 271. Gharst Junior is the son of Gharst Senior and a crewmember for the F/V Miss Debbie. Tr. 287, 316, 325, 359. Gharst Junior has worked for his father, Gharst Senior, aboard the Miss Debbie for approximately eleven years. Tr. 360. After a couple of years fishing and “learn[ing] the ropes,” Gharst Junior became the only crew member aboard the Miss Debbie. Tr. 361. Gharst Junior’s only source of income is from fishing aboard the Miss Debbie. Tr. 369. He receives a share of the proceeds from the sale of the fish from each fishing trip. Tr. 324.

Mr. McIntosh, an expert in the secondary market for Gulf of Mexico Reef Fish Permits, testified that, based on an April 2023 conversation with a broker, these types of limited access permits carry a value of \$35,000 to \$36,000. Tr. 128, 131; AX 18. Based on this information and a review of past transactions processed in his office, he estimated the value of the Gharsts’ Permit, in the secondary market, to be worth \$25,000 to \$50,000. Tr. 134; AX 18. Alternatively, rather than being sold, this type of limited access permit can be “leased” by assigning, or moving, the permit to another’s vessel for use on that vessel, or to another’s name on the vessel. Tr. 127, 137-40. Mr. McIntosh testified that, based on the information he obtained for 2023, the leasing value for Gulf of Mexico Reef Fish Permits ranged from \$28,000 to \$30,000. Tr. 130-31.

The IFQ program utilized by NMFS is a “catch share program” that “allocate[s] . . . shares to participants in the program.” Tr. 73. These shares are maintained in a shareholder’s account which is also linked to a permitted vessel account. Tr. 76; AX 17. The “shares” represent a “percentage of the entire pie or [commercial] quota for that fishery.” Tr. 73, 76; AX 17. This share percentage, when multiplied by the quota amount, yields an “annual pounds of allocation” which are then used by fisherman to “[possess,] land, [and sell] fish from those IFQ species” in a calendar year, or to transfer allocation amounts to other shareholders in the program. Tr. 73-74, 76-77, 81; AX 17. “Shares are considered to have monetary value because every year they distribute allocation to a shareholder.” Tr. 74. Similarly, the allocation amounts, which expire at the end of the year, also have a monetary value. Tr. 74. Dr. Stephen, an expert in NOAA’s IFQ program and in the valuation of shares and allocation, testified that, in May 2023, she reviewed the Gharsts’ shareholder accounts⁵ and determined the value of their shares and allocations for years 2021 and 2022 (as well as historical allocations dating back to 2010), and she also determined the value of their 2023 share values from January to May 2023. Tr. 77-80, 82-84; AX 16. Dr. Stephen determined that the total value of the Gharsts’ shares, across all share categories, based on 2023 values was \$154,949.64. Tr. 84; AX 16. She also determined the value of their allocation for 2023 using 2023 average price per pound values from January through May to be \$14,892.77. Tr. 93; AX 16.

⁵ It is undisputed that Gharst Junior does not own any IFQ shares or allocations. Tr. 109.

Mr. Hood, an expert in the field of federal management of Gulf reef fish, offered testimony explaining the importance of the Agency's regulations regarding Gulf reef fish management, including the bases for prohibitions set forth in the regulations. Tr. 25-27, 31. The Gulf reef fish fishery management unit covers 34 species of fish and sets various limitations, including size, catch, bag, and trip limits. Tr. 28-29. An important element of fishery management is for fish to be maintained intact through landing so that the species can be identified, for example, by law enforcement personnel, and so that fish assessments can be made for size-limitation purposes. Tr. 29. Additionally, NOAA utilizes "port samplers," who meet vessels at the dock to determine the species and size of fish that have been landed and to gather biological samples if time allows. Tr. 29-30. This information aids NOAA in assessing the stock of the fishery, including its health. Tr. 29-30.

Mr. Hood also offered testimony about the prohibition from using Gulf reef fish as bait. Tr. 31. He explained that when NOAA assesses the fishery stock population, they examine the total number of fish that are killed, including those fish that are landed and sold and those that are released or discarded, some of which either survive or die. Tr. 31-33. However, if reef fish are used as bait, in violation of NOAA's regulations, those bait fish are not able to be considered for purposes of assessing the health of the stock. Tr. 32. As it relates to this case, Mr. Hood testified that red snapper, amberjack, and banded rudderfish are covered by the Gulf Reef Fish Fishery Management Unit and are prohibited from use as bait fish. Tr. 33-34. In particular, the red snapper component of the Gulf Reef Fish Fishery has faced overfishing over the years and is currently in a state of recovery and part of a rebuilding plan that extends until 2032. Tr. 34-35. Mr. Hood explained that when prohibited bait fish are used, particularly red snapper, "it slows down the recovery plan because it means that there's more fish being killed than what we think is happening." Tr. 36. This, in turn, negatively impacts the quality of the information NOAA receives and relies upon when making management decisions about the fishery. Tr. 36-37.

On May 8, 2016, Lt. Marlow was on patrol in the patrol vessel, Guardian, while in federal waters in the Gulf of Mexico. Tr. 219-22, 225-26; AX 3 at 2-3. He was accompanied by fellow FWC enforcement officers, Officer Nelson and Officer Robb. Tr. 219-22, 225-26, 249-55; AX 3 at 3. They were directed by an FWC aircraft that was also patrolling the area from overhead to the F/V Miss Debbie, because it was suspected of throwing red snapper overboard. Tr. 219-22, 225-26, 258; AX 3 at 2, 4. As the Guardian approached the Miss Debbie, they observed several red snapper, one alive and the others discolored and showing signs of rigormortis, floating directly behind the vessel in the current line. Tr. 219-22, 225-26, 249-55, 256; AX 3 at 2, 4. Law enforcement described the Captain, Gharst Senior, as agitated by their presence—yelling, shouting, and throwing his hands in the air—and continuing to do so after Lt. Marlow instructed him over a loud hailer not to touch his gear. Tr. 219-22, 225-26, 249-55; AX 3 at 2, 4. As the Guardian came within a few feet of the Miss Debbie, and in spite of the law enforcement directive not to touch any gear, Gharst Senior grabbed a 5-gallon bucket from the stern of the vessel and dumped overboard its contents, which law enforcement observed to be the remains

of multiple fish that sank into the water. Tr. 219-22, 225-26, 249-55; AX 3 at 2, 4. During the boarding, law enforcement advised Gharst Senior and Gharst Junior of the regulatory requirement that prohibited the disposal of anything upon the approach of law enforcement. Tr. 258.

On March 11, 2019, Lt. Marlow and Officers Nelson and Boyd were on patrol in federal waters within the Gulf of Mexico aboard the patrol vessel, Guardian, when they encountered the Miss Debbie fishing in the area. Tr. 148, 205-07. Officers Nelson and Boyd were equipped with agency-issued body cameras which documented their interactions with the Miss Debbie. AX 1 at 4; AX 6-8. The Guardian, “a 45-foot long aluminum catamaran-hulled vessel,” has markings distinctive of an enforcement vessel, namely a gray hull with green and gold enforcement markings on its side as well as an “agency seal and badge” and a “NOAA emblem.” Tr. 148-49, 204. The Guardian also has a distinctive sound unique to a patrol vessel and a sound so loud that Lt. Marlow recalled Gharst Senior remarking that he could recognize the boat on approach by its sound. Tr. 204-05.

As the Guardian approached the Miss Debbie, Lt. Marlow used the Guardian’s loud hailer to instruct Gharst Senior and Gharst Junior not to remove their gear and not to throw anything overboard. Tr. 150, 152-53; AX 1 at 4; AX 7 at 3:12-22; AX 8 at 1:05-08, 1:19-29. Officers Nelson and Boyd reiterated those instructions by loudly instructing Gharst Senior and Gharst Junior not to touch their gear and not to throw anything overboard. AX 8 at 1:21-1:29. Nevertheless, Lt. Marlow and Officer Nelson observed Gharst Junior gesturing with his hands in a manner that appeared to them to be removing something from the starboard gear⁶ and throwing something into the water beside the boat. Tr. 153-54, 177, 207-08, 228-29; AX 8 at 1:22-1:27. Soon thereafter, Officer Nelson also observed Gharst Junior holding a red grouper that was still attached to the fishing hook on his gear, asserting that he was trying to release the fish back into the water to keep it alive. Tr. 154, 228-30. A back-and-forth verbal exchange ensued with Gharst Junior reiterating his desire to return the fish to the water and Officer Nelson reiterating his command to leave the fish on the deck. Tr. 153-55, 209; AX 7 at 3:24-31; AX 8 at 1:29-40. Despite Officer Nelson’s repeated instructions to leave the fish on the deck, Gharst Junior threw the fish back in the water, still attached to the fishing gear and hook. Tr. 154, 208-09, 366; AX 7 at 4:25-43, 4:50-5:03; AX 8 at 1:29-2:02, 2:45-58.

Thereafter, the FWC officers boarded and inspected the Miss Debbie. Tr. 151-52, 155; AX 1. This inspection revealed that sets of fishing equipment on the port side of the vessel where Gharst Senior was fishing were rigged with red snapper as fishing bait. Tr. 155, 158-60; AX 1 at 4-6; AX 11. Additionally, law enforcement observed a cut up piece of fish that they believed to be amberjack or rudderfish, but because it was not fully intact, they could not definitively identify the species. Tr. 155-56; AX 1 at 4, 7; AX 11. During the inspection, Gharst Senior confirmed he was fishing with rudderfish and red snapper and provided a written

⁶ When fishing together, Gharst Senior fishes from the port side of the vessel and Gharst Junior fishes from the starboard side of the vessel. The Gharsts follow this practice so routinely that even some members of law enforcement are familiar with their habit. Tr. 207, 365.

statement to this effect. Tr. 158, 160; AX 1 at 4, 13. He and Gharst Junior were cooperative with law enforcement during this boarding. Tr. 287, AX 1 at 4. Gharst Senior was cited for using reef fish as bait and a warning was issued to Gharst Junior for the same, and Gharst Junior was cited for disposal of fish upon approach of law enforcement. AX 1 at 4, 15-16. Regarding this March 11, 2019 incident, Gharst Senior concedes that he used red snapper as bait and that he knew it was illegal to do so. Tr. 287-89, 294. Gharst Junior concedes that he was made aware of the prohibition against using banded rudderfish as bait. Tr. 375.

On September 26, 2019, uniformed Officers Nelson and Kossey and Lt. Marlow were on patrol in federal waters within the Gulf of Mexico aboard the patrol vessel Intrepid. Unlike the Guardian, the Intrepid is an unmarked patrol vessel, meaning it lacks any law enforcement markings, and its appearance resembles that of a typical center console fishing boat. Tr. 162-63; AX 2 at 3. Officer Nelson and Lt. Marlow were equipped with agency-issued body cameras which documented their interactions with the Miss Debbie. AX 2 at 3; AX 9; AX 19. They approached the Miss Debbie from its starboard side, where Gharst Junior was positioned. Tr. 163-64. From about ten yards away, Officer Nelson overheard Lt. Marlow tell Gharst Junior that he “saw [him] dump the whole bag,”⁷ followed by Officer Kossey stating “that filet that just went into the water, I saw that.” Tr. 163-65, 211-16; AX 2 at 3, 5; AX 19 at 0:18-0:27, 0:38-0:42, 4:52; AX 9 at 1:12-1:19. Officer Nelson then observed what appeared to be a red snapper filet “sinking into the water” that was “below the surface of the water on the port side of the Miss Debbie in close proximity to where [Gharst Senior] was standing.” Tr. 165; AX 2 at 3. Lt. Marlow instructed Gharst Senior and Gharst Junior to keep their hands where he could see them. Tr. 213. Gharst Junior complied by placing his hands up and resting them on the top of his head. Tr. 213. Gharst Senior appeared to also comply by setting down a fish after Lt. Marlow repeated his instruction, but then Gharst Senior “gave us a motion in that manner where his left hand kind of almost like pushing us off and disregarding us” and then proceeded to “grab[] another filet . . . and thr[o]w it over the port side gunnel.” Tr. 213-14. Officer Nelson also observed Gharst Senior “take a red snapper filet off of the bait table and throw it into the water off the port side of the Miss Debbie” in spite of law enforcement commands, stated clearly from 15 feet away, to set down any fish. Tr. 165-66; AX 2 at 3; AX 9 at 1:53-2:04; AX 19 at 1:00-1:28. During the boarding of the Miss Debbie, Officer Nelson observed red snapper being used as bait on the bandit reel hooks. Tr. 168-69; AX 2 at 3; AX 12 at 2-3. Thereafter, the Gharsts were cited for using Gulf reef fish, namely red snapper, as bait and for failing to make fish available for inspection and not landing fish in whole condition. AX 2 at 1-6.

Gharst Junior disputes claims that he discarded items overboard the F/V Miss Debbie upon approach by law enforcement. Tr. 365-69. He believes the law enforcement officers mistook his actions for something else, stating “What I’m thinking they were seeing me reach for the hook to remove the circle hook and everything else,” explaining the hand motion of removing a circle hook by rotating it around the mouth plate of the fish. Tr. 366-68. Officer Nelson disagrees, and he asserts that Gharst Junior’s hand movements “looked like it was

⁷ The bag was retrieved near the starboard gunwale where Gharst Junior was standing at the time of the discard and the Ziploc baggie contained “one unfired .22 caliber round” of ammunition. Tr. 216-17.

taking something off of a line or hook and throwing it in the water,” all of which occurred prior to taking the red grouper off of the circle hook after the boarding. Tr. 380-81; AX 8 at 1:22-1:27. Further, body cam video footage from this incident reveals a discussion between Officer Nelson and Gharst Junior in which Gharst Junior confirms the use of rudder jack as bait on the starboard gear, believing it was allowable. AX 6 at 0:44-1:42. In this discussion, Officer Nelson reiterates that he could see that Gharst Junior was in a hurry to remove something off of the reel but he explained to Gharst Junior that the best thing to do is not to touch anything. AX 6 at 0:48-1:03. Gharst Junior also asserts that, unlike his father, he does not use red snapper or banded rudderfish as bait and contends that he has “never been caught on any of the stops with snapper fillet and restrictions or anything on my side [referring to the starboard side of the vessel]. It’s always been on my father’s side [referring to the port side of the vessel].” Tr. 363-65, 373. Nevertheless, he acknowledges being aware of his father fishing with prohibited bait and concedes that his fishing income includes proceeds from the sale of fish that were caught by Gharst Senior using prohibited bait. Tr. 372.

Gharst Senior admits that he used red snapper as bait during the March 11, 2019, and September 26, 2019, fishing trips discussed above. Tr. 279. According to Gharst Senior, his use of red snapper for bait stems from encounters with dolphin while fishing. Tr. 278-79. He explained that, in his experience with bandit reel fishing gear, dolphin “love the bandit boats,” because the dolphin can easily pull off the smaller fish, like snapper, that get hooked on the gears. Tr. 278-79. In such encounters, the dolphin may “rake the whole fish all the way down the sides” and “pull the tail off.” Tr. 279. If the tail has been removed, “we can’t sell it, and we can’t throw it overboard either,” because doing so could encourage the dolphin to follow the boat for food. Tr. 279-80. The best way to deal with the situation and get rid of the damaged fish, according to Gharst Senior, is “to take the fillets off it and throw the carcass overboard,” because the dolphin won’t be interested in a fish carcass. Tr. 280. Gharst Senior then splits up the fillets and puts them “on the very bottom hook of my string [gear],” referring to the smaller fish gear on the back of his boat.⁸ Tr. 280. In addition to the use of such fillets, he uses other forms of bait like mullet and minnow. Tr. 280. He explained that once three or more dolphin have located his fishing vessel, “it’s over with fishing” and “time to go home.” Tr. 278.

Notably, Officer Nelson does not recall seeing any dolphin or porpoise near or around the F/V Miss Debbie on May 8, 2016, March 11, 2019, or September 26, 2019. Tr. 381. From his boardings of the F/V Miss Debbie, he also does not recall seeing signs of depredation, like teeth marks from dolphin or porpoise, or missing fish scales, and no signs of depredation were depicted in the photographs he took during the boardings. Tr. 381-82.

With regard to the proposed penalty in this matter, Respondents have asserted an inability to pay the proposed penalty. Gharst Senior and Mrs. Gharst contend they can pay a \$1,200 penalty in \$200 monthly installments for a 6-month period. Gharst Junior claims he can afford only a \$600 penalty, payable in \$100 monthly installments for a 6-month period. Tr. 286-

⁸ Gharst Senior explained that “the two gears in the front of my boat are for my groupers. The two gears on the back of the boat on the east side are for the small fish.” Tr. 280.

87, 349, 369. In support, they submitted federal tax returns for 2022 for Mrs. Gharst and Gharst Senior. RX 2. Gharst Junior has not filed a federal tax return for several years. Tr. 362-63. Additionally, Respondents submitted financial statements including employment data, monthly income and expenses, and personal financial statements including assets and liabilities. RX 1; RX 3.

IV. LIABILITY

a. Principles of Law Regarding Liability

Congress designed the Magnuson-Stevens Act “to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States.” Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 401, 90 Stat. 331 (codified at 16 U.S.C. § 1801 *et seq.*). As amended, its aim is to “promote domestic commercial and recreational fishing under sound conservation and management principles.” 16 U.S.C. § 1801(b)(3). Among other provisions, the Act established eight regional fishery management councils, including the Gulf of Mexico Fishery Management Council, to manage fisheries within their respective geographic areas of authority and develop relevant regulations. 16 U.S.C. §§ 1851, 1852, 1853; Pub. L. No. 94-265, §§ 302(a), 303, 90 Stat. 346-48, 351-52.

In this case, Agency regulations implemented pursuant to the Act provide that it is generally unlawful for any person to “[d]ispose⁹ of fish or parts thereof or other matter in any manner, after any communication or signal from an authorized officer, or after the approach by an authorized officer or an enforcement vessel or aircraft.” 50 C.F.R. § 600.725(e). Further, in Gulf of Mexico fisheries it is unlawful for any person to “[u]se or possess prohibited gear or methods or possess fish in association with possession or use of prohibited gear, as specified in [Part 622].” 50 C.F.R. § 622.13(l). Regarding prohibited gear and methods, Part 622 specifies that “Gulf reef fish may not be used as bait in any fishery,” absent certain exceptions that do not apply here. 50 C.F.R. § 622.9(e).

Section 307(1)(A) of the Act makes it unlawful “for any person – to violate any provision of this Act or any regulation or permit issued pursuant to this Act.” 16 U.S.C. § 1857(1)(A). A “person” is defined as “any individual . . . , any corporation, partnership, association, or other entity . . . , and any Federal, State, local, or foreign government or any entity of any such government.” 16 U.S.C. § 1802(36). The Agency must prove facts constituting a violation by a preponderance of reliable, probative, substantial, and credible evidence. *Bui*, NOAA Docket No.

⁹ While Agency regulations do not define the term “dispose,” definitions applicable to Part 600 include the term “discard” to mean “to release or return fish to the sea, whether or not such fish are brought fully on board a fishing vessel.” 50 C.F.R. § 600.10 (definition of discard). The online Merriam-Webster Dictionary defines “dispose of” to mean “to get rid of” and, similarly, defines “discard” to mean “to get rid of especially as useless or unwanted.” See <https://www.merriam-webster.com/dictionary/dispose> and <https://www.merriam-webster.com/dictionary/discard> (last visited May 9, 2024).

SE1603549, 2019 WL 7579972, at * 5 (NOAA Mar. 25, 2019) (citing 5 U.S.C. § 556(d); *Vo*, NOAA Docket No. SE010091FM, 2001 WL 1085351, at *6 (NOAA Aug. 17, 2001) (citing 5 U.S.C. § 556(d); *Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100-03 (1981)); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). This standard requires the Agency to demonstrate that the facts it seeks to establish are more likely than not to be true. *Bui*, 2019 WL 7579972, at *5; *Fernandez*, NOAA Docket No. NE970052FM/V, 1999 WL 1417462, at *3 (NOAA Aug. 23, 1999) (citing *Herman & MacClean v. Huddleston*, 459 U.S. 375, 390 (1983)). To satisfy this burden of proof, the Agency may rely upon either direct or circumstantial evidence. *Bui*, 2019 WL 7579972, at *5; *Vo*, 2001 WL 1085351, , at *6 (citing *Paris*, 4 O.R.W. 1058 (NOAA 1987)).

Violations of the Magnuson-Stevens Act are strict liability offenses, and, therefore, state of mind is irrelevant in determining whether a violation occurred. *Rodier*, NOAA Docket No. NE1603827, 2019 WL 7168050, at *5 (NOAA Dec. 17, 2019) (citing *Accursio Alba*, NOAA Docket No. 914-027, 1982 WL 42985, at *4 (NOAA App. 1982); *see also Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999) (holding that scienter is not required to impose civil penalties for violations of the Magnuson-Stevens Act and the implementing regulations); *Nguyen*, NOAA Docket No. SE0801361FM, 2012 WL 1497024, at *5 (NOAA Jan. 18, 2012) (“The Magnuson-Stevens Act, and the regulations promulgated thereunder, do not set forth a scienter requirement. Accordingly, any violations are strict liability offenses.”).

b. Argument Regarding Liability

In its Post-Hearing Brief (“Ag. Br.”), the Agency notes, preliminarily, that the Gharsts (Senior and Junior) “were both warned and educated by law enforcement regarding their duty to not dispose of fish, fish parts, or any other matter upon the approach of law enforcement, during a May 8, 2016 boarding” by law enforcement. Ag. Br. at 4 (citing AX 3; Tr. 219-22, 257-58).

Nevertheless, on March 11, 2019, while fishing aboard the Miss Debbie for Gulf reef fish in federal waters, approaching law enforcement personnel observed Gharst Junior “remove something from the fishing gear he was tending and throw it into the water on the starboard side of the vessel” in spite of the warning by enforcement over the loudhailer of the enforcement vessel “not to remove their gear or throw anything overboard.” Ag. Br. at 4 (citing AX 1; AX 6; AX 8; Tr. 152-53, 207-09, 228-29, 380). The discarded item was never recovered. Ag. Br. at 4 (citing AX 1; Tr. 175-76). Further communication with law enforcement ensued and despite an express order to the contrary, Gharst Junior “threw a grouper and all associated fishing gear overboard in direct defiance of the law enforcement officers’ commands.” Ag. Br. at 4 (citing AX 1; AX 6; AX 8; Tr. 154-55, 208-09). The resulting boarding revealed that the Gharsts (Senior and Junior) “had finfish onboard not in whole condition, and in fact were using species of Gulf reef fish as bait (red snapper, banded rudderfish aka rudder jack, and vermilion snapper),” which is prohibited by Agency regulations. Ag. Br. at 4-5 (citing AX 1; AX 6; AX 8; Tr. 155-58, 209). Gharst Senior admitted to this in a written statement and Gharst Junior admitted to this verbally in response to law enforcement. Ag. Br. at 5 (citing AX 1; AX 6; AX 7; AX 8). The

Agency asserts that Gharst Junior was a crew member throughout this incident and working within the scope of his employment, making the owners of the Miss Debbie, Gharst Senior and Mrs. Gharst, responsible for his actions. Ag. Br. at 8-9.

Although law enforcement was able to recover the fish and associated gear that Gharst Junior threw overboard the second time, the object that he first discarded was never recovered. The Agency argues that law enforcement's inability to recover the first object Gharst Junior threw overboard (which the enforcement officers suspected was illegal bait) does not defeat the establishment of liability given the broad language of the Agency's regulations that prohibit "disposal of 'any matter' upon the approach of law enforcement." Ag. Br. at 7 (citing 50 C.F.R. § 600.725(e)). Indeed, such broad language is necessary, the Agency asserts, so as not to reward the disposal of evidence that can prevent or hinder prosecution for violations of law. Ag. Br. at 7.

Turning to the events of September 26, 2019, the Agency argues that Gharst Junior, again, "disposed of fish, parts thereof, or other matter upon the approach of uniformed law enforcement" aboard a patrol vessel by "dump[ing] the contents of a plastic Ziploc [bag] into the water off the starboard side of the vessel." Ag. Br. at 9. Here, too, "the object disposed of overboard was never recovered." Ag. Br. at 9. Just after Gharst Junior's actions, Gharst Senior "disposed of two red snapper fillets by throwing them overboard on the port side of the vessel" despite "repeated commands" to the contrary by law enforcement and accompanied by a "dismissive hand gesture towards the officers giving the commands" when he threw the second fillet overboard. Ag. Br. at 10. The boarding that ensued revealed the prohibited use of Gulf reef fish as bait. Specifically, law enforcement discovered "pieces of red snapper on the gear actively being used to fish at the time of the boarding." Ag. Br. at 10. To rebut the claim by Gharst Junior that only Gharst Senior was using illegal bait during both boardings (March 11 and September 26, 2019), the Agency argues that Gharst Junior's prior admission (to using prohibited bait) during the March 11, 2019, boarding contradicts his assertion and brings into question his credibility. Further, the Agency makes the point that, by his own admission, Gharst Junior "benefitted financially from the vessel's use of illegal bait and he participated in the fishing activities that day knowing that Gharst Senior was using red snapper fillets as bait in violation of the Agency's regulations." Ag. Br. at 10-11 (citing Tr. 371-72). The Agency asserts that the Gharsts (Senior and Junior) were engaged in a common undertaking that violated agency regulations and, thus, should both be held liable. Ag. Br. at 11. As a co-owner of the Miss Debbie, Mrs. Gharst was "responsible for the actions of the vessel's captain and crew" and therefore shares in the liability for any violative conduct. Ag. Br. at 11.

In Respondents' Post-Hearing Brief ("Resps. Br."), they make the point that the May 2016 boarding referenced by the Agency did not lead to any "charges filed." Resps. Br. at 3 (citing Tr. 252). Regarding the March 11, 2019, boarding, Respondents assert that "Gharst Junior explained he thought the Red Grouper was undersized and that was the reason he put it back in the water so it was alive instead of placing it on the deck to die as requested by FWC Officer Nelson." Resps. Br. at 3 (citing Tr. 366-68). Respondents argue that "Lt. Marlow jumped to an uninformed conclusion that Gharst Junior did something wrong when in fact he had

simply started to unhook a Red Grouper,” which was later “determined to be of legal size” and hooked with legal gear. Resps. Br. at 3 (citing Tr. 366-68). Respondents do not dispute Gharst Senior’s use of Banded Rudderfish and Red Snapper as bait and they confirm Gharst Senior’s acknowledgement of the same. Resps. Br. at 3-4 (citing Tr. 155-60, 199). They also note, based on hearing testimony from Mr. Hood, that “Banded Rudderfish is really a Pelagic fish but was administratively classified as a Gulf Reef Fish for enforcement purposes due to similar appearance to Amberjack.” Resps. Br. at 2, 5 (citing Tr. 58, 307-08). They argue that because of Gharst Senior’s belief that “since Banded Rudderfish was a Pelagic fish and not a Gulf Reef Fish it was okay to use” as bait. Resps. Br. at 4, 5 (citing Tr. 310-11). They dispute, however, that Vermillion Snapper was used for bait. Resps. Br. at 2, 4 (citing Tr. 156-57; AX 6; AX 8).

With regard to the September 26, 2019, incident, Respondents acknowledge that there were two Red Snapper filets thrown overboard by Gharst Senior. Resps. Br. at 4 (citing AX 9; Tr. 199-200). They also acknowledge the use of “some damaged Red Snapper” and “Banded Rudderfish” as bait. Resps. Br. at 4. Gharst Senior argued that since the Red Snapper had become damaged by dolphin, it was not otherwise marketable. Resps. Br. at 4 (citing JX 1). Additionally, Gharst Senior argued that he believed Banded Rudderfish to be a Pelagic fish, not a Gulf reef fish, and therefore permissible to use as bait. Resps. Br. at 4-5 (citing Tr. 310-11). Nevertheless, Respondents acknowledge an additional boarding on March 22, 2020, in which Gharst Senior was “found to be in possession of cut up Banded Rudderfish,” presumably for use as bait, and paid the penalty pursuant to a summary settlement. Resps. Br. at 5 (citing Tr. 308-09).

In its Reply Brief (“Ag. Rep. Br.”), the Agency argues that Respondents’ misplaced argument regarding “whether banded rudderfish might be considered a pelagic species for matters other than the management of Gulf Reef fish” is a diversion, and it reiterates that Banded Rudderfish “are classified as Gulf Reef Fish as a matter of law” and that “any responsible commercial reef fisherman with over forty years’ experience in the industry would know that.” Ag. Rep. Br. at 4. Furthermore, the Agency points to the March 2020 boarding, subsequent to the violations alleged here, and highlights that “Gharst Senior and Gharst Junior were once again caught using banded rudderfish as bait.” Ag. Rep. Br. at 5 (citing AX 1 and AX 20).

The Agency takes issue with Respondents’ argument that “Gharst Junior was only attempting to unhook a red grouper from a circle hook . . . when first approached by law enforcement,” declaring that such a position is “directly contradicted by the video evidence and the unbiased testimony of the law enforcement officers present that day.” Ag. Rep. Br. at 5 (citing AX 1; AX 6; AX 8; Tr. 153, 207-09, 228-29, 380). The Agency asserts that unlike Gharst Junior’s self-serving assertion, the law enforcement officers in this case have no reason to lie. Ag. Rep. Br. at 5 (citing Tr. 228-29, 380).

In response to the argument about whether vermilion snapper was used as bait, the Agency contends “Respondents continue to attempt to minimize the significance of their violations by quibbling over whether the Agency proved the use of vermilion snapper as bait”

when “a specific finding by the Tribunal regarding the vermillion snapper is not necessary, given the thoroughly documented and admitted use of red snapper and banded rudderfish [as bait] [that was] uncovered during that boarding.” Ag. Rep. Br. at 6. In a similar vein, the Agency argues that “Respondents also attempt to minimize their conduct based on the small number of Gulf reef fish they were caught using as bait during the boardings in question”¹⁰ but argues that the limited number of fish that were documented should not be used to minimize “the scope of Respondents’ misconduct.” Ag. Rep. Br. at 6. It further notes that bait violations are difficult to uncover and document since it can be thrown overboard or cut-up in pieces to escape detection. Ag. Rep. Br. at 6. Further, the Agency asserts that the evidence presented reveals that “the Gharsts’ use of Gulf reef fish as bait is a regular practice, continued over multiple hours and multiple trips and multiple years.” Ag. Rep. Br. at 6 (citing AX 1; AX 2; AX 3; AX 20; Tr. at 279-81). Lastly, the Agency questions Respondents’ argument about the use of Gulf reef fish as bait due to dolphin predation and notes that no evidence was presented to support such claims. Ag. Rep. Br. at 7. In fact, the Agency contends, “the only testimony regarding the presence or absence of dolphins during the boardings in question came from Officer Nelson, who stated that he saw no dolphins during the boardings and did not see any evidence of dolphin predation on the fish being used as bait.” Ag. Rep. Br. at 6 (citing Tr. at 381-82). Regardless, the Agency asserts dolphin predation should not be viewed as a mitigating factor to Respondents’ “lack of remorse and outright defiance of the Agency’s regulations.” Ag. Rep. Br. at 7.

c. Analysis of Liability

i. Counts 2 and 4 (the use of Gulf reef fish as bait, a prohibited fishing method under 50 C.F.R. 622.9(e), in violation of the Act and 50 C.F.R. § 622.13(l))

With respect to counts 2 and 4, the record in this case establishes Respondents’ use of prohibited bait, namely red snapper, in each of the charged violations. Gharst Senior acknowledged his use of such prohibited bait through a written statement pertaining to the March 11, 2019, incident. AX 1 at 4, 13. On September 26, 2019, Officer Nelson observed the use of red snapper as bait on the bandit reel hooks aboard the Miss Debbie. Tr. 168-69; AX 2 at 3; AX 12 at 2-3. In fact, Gharst Senior has freely admitted his use of red snapper as bait. Tr. 279. Respondents also conceded the use of red snapper as bait in this case in their prehearing submissions, arguing that the use of prohibited bait was limited, consisting of “only four red snapper fillets” in the March 11, 2019 incident and “only a couple of fillets” in the September 26, 2019 incident. See Respondents’ PPIP at 2-3.

While Gharst Junior has maintained that he does not use prohibited bait on the fishing gear and lines he uses on the starboard side of the Miss Debbie fishing vessel, the evidence

¹⁰ Presumably, the Agency is referencing statements in Respondents’ brief in which they state “On March 11, 2019, there were two (2) Red Snapper filets utilized as bottom hook grouper bait by Gharst Senior” and “There were two (2) Red Snapper filets thrown overboard by Gharst Senior and one (1) Red Snapper filet on a Gharst Senior bottom hook on the September 26, 2019 incident.” See Resps. Br. at 4 (citing Tr. 155, 199-200; AX 9). See also Respondents’ PPIP at 2-3.

establishes that he benefits financially by the known use of prohibited bait that his father, Gharst Senior, uses on a seemingly routine basis. The facts of this case establish that Gharst Junior is the only “crew member” aboard the Miss Debbie, and his crew share payment comes from the proceeds of the fishing activities aboard the vessel, which also serve as his only source of income. Mrs. Gharst, while not physically present when these violations occurred, is a co-owner of the vessel. She, too, receives a share of the proceeds from fishing activities as a portion of the 60% “boat share” of the proceeds, which she shares with her husband, Gharst Senior, after the deduction of various expenses. Tr. 324-25, 334; RX 1 at 2.

It is a well-established principle in case law relating to Magnuson-Stevens Act violations that individuals may not escape liability while retaining the fruits of the unlawful activity, including, for example, proceeds from the catch. See *Drinkwater*, 2015 WL 13358072 at *2 (NOAA App. Nov. 18, 2015) (Order Denying Respondents’ Petition for Administrative Review) (citing *Bateman v. United States*, 768 F. Supp. 805, 808 (S.D. Fla. 1991) (acknowledging that vessel owners justifiably absorb their share of culpability in NOAA cases where the owners are likely to realize a benefit from the violation)); *United States v. Kaiyo Maru Number 53*, 503 F. Supp. 1075, 1090 (D. Ala. 1980) (holding that “[t]he regulatory program is designed to punish the vessel and its owners for any transgressions.”); *Boggess*, 4 O.R.W. 260, 264 (NOAA App. 1985); *Rebecca Irene Fisheries, LLC*, NOAA Docket No. AK 01-5112, 2004 WL 1472847, at *8-9 (NOAA May 26, 2004) (because owner acquires a share of the vessel’s production, the owner must bear a major responsibility for unlawful acts on the vessel). While not the individuals who physically attached red snapper as bait to the fishing gear during the incidents at issue, both Mrs. Gharst and Gharst Junior benefited by the unlawful activity as recipients of income from the proceeds of the catch when prohibited bait was used. Further, as it relates to Gharst Junior, agency regulations make it unlawful to “possess fish in association with possession or use of prohibited gear and methods” as specified in Part 622, which includes prohibitions from using Gulf reef fish, like red snapper, as bait in any fishery, with certain exceptions that are inapplicable here. See 50 C.F.R. §§ 622.13(l) and 622.9(e). Thus, aside from benefiting financially from the proceeds of such unlawful activity, Gharst Junior was in unlawful possession of fish obtained through the use of prohibited gear and methods.

I considered Respondents’ arguments regarding the use as bait of red snapper that had suffered depredation from dolphin or porpoise in the area of fishing activities and that was otherwise not marketable for sale. Gharst Senior further explained that he believed it to be pointless to discard the damaged fish overboard so as not to encourage dolphin or porpoise to follow the boat for food. Instead, he utilizes the fillets as bait and throws only the carcass overboard to discourage dolphin or porpoise from remaining in the area. While this argument may attempt to generally explain Gharst Senior’s continued use of unlawful bait, specifically red snapper, it is unavailing for purposes of defeating liability for the charged violations in this case. At the outset, his claims are simply unsupported by the evidence. The credible testimony of Officer Nelson established that neither dolphin nor porpoise were present near or around the Miss Debbie at the time of each incident. Photographic evidence taken during each inspection aboard the Miss Debbie and submitted as part of the incident reports do not depict any evidence of depredation of red snapper. Officer Nelson also did not recall seeing any such

signs, like teeth marks or missing fish scales, on the red snapper he examined during each boarding. Thus, apart from Gharst Senior's self-serving and generalized statements, support for his claims does not exist.

I also considered Respondents' arguments concerning the small number of red snapper fillets involved in each incident, presumably as a means of minimizing the impact from their conduct. I find such an argument unconvincing. I agree with the Agency's position—that the limited number of fish that were documented should not minimize Respondents' violative behavior, given that bait violations are difficult to detect and document because bait can be thrown overboard or cut into pieces to escape detection, as evidenced in this case.

Therefore, I conclude that Respondents are liable for violating Agency regulations and the Act by using prohibited Gulf reef fish, namely red snapper, as bait on March 11, 2019, and September 26, 2019.

- ii. Counts 1 and 3 (disposal of fish, parts thereof, or other matter, after a communication or signal from an authorized officer, or after the approach by an authorized officer or an enforcement vessel, in violation of the Act and 50 C.F.R. § 600.725(e))*

Regarding counts 1 and 3, the record in this case establishes repeated behavior by Respondents to disregard law enforcement commands, at times flagrantly so, relating to the overboard disposal of fish or other matter upon the approach by law enforcement while Respondents were actively fishing from the Miss Debbie. By way of background, I note that prior to the 2019 incidents at issue in this case, Gharst Senior and Gharst Junior were specifically warned to not dispose of fish or other matter upon approach of law enforcement during the May 8, 2016 encounter described above. Nevertheless, Respondents repeated this unlawful behavior.

On March 11, 2019, as law enforcement aboard the patrol vessel, Guardian, approached the Miss Debbie as it was actively fishing, Lt. Marlow used a loud hailer to instruct Gharst Senior and Gharst Junior not to remove any gear and not throw anything overboard. Despite this loud and clear instruction, Gharst Junior made gestures with his hands while handling the starboard fishing gear that led law enforcement to conclude he had removed an object from that gear and that he had thrown it into the water, never to be recovered. Subsequently, a verbal exchange between Officer Nelson and Gharst Junior ensued with regard to a red grouper that Gharst Junior was holding that was attached to a hook on his fishing gear. Gharst Junior wanted to return the fish to the water to keep it alive, but Officer Nelson repeatedly instructed Gharst Junior to set the fish on the deck of the Miss Debbie. In spite of Officer Nelson's instructions, Gharst Junior threw the fish back in the water, still attached to the fishing gear and hook.

While Gharst Junior specifically and Respondents generally have challenged the allegation that Gharst Junior threw an object overboard upon approach by law enforcement, body camera footage from the incident does reveal hand gestures by Gharst Junior, prior to

handling the red grouper, that corroborate the testimony by law enforcement that they observed Gharst Junior throw an object into the water, possibly bait, that was never recovered. AX 8 at 1:22-1:28. Gharst Junior's self-serving denial compared to the testimony of multiple law enforcement officers with no personal stake in the outcome of this case lead me to find the Agency's evidence more persuasive on this point.

Body camera footage from this incident also reveals Gharst Junior's acknowledgment that the bait used on the starboard fishing gear, namely "rudder jack," was the same type of bait that was used on the port side of the vessel (Tr. 177) and that he believed it was legal to use such bait, an erroneous understanding that Officer Nelson corrected through his discussions on board the Miss Debbie by advising Gharst Junior (and Senior) that such a species is considered Gulf reef fish and prohibited from use as bait. AX 6 at 1:06-1:42.

Additionally, the evidence presented from this incident, including the body camera footage, reveals that Gharst Junior chose to disregard clear and repeated instructions from law enforcement, namely Officer Nelson, to leave the red grouper he was handling from his starboard fishing gear on the deck of the Miss Debbie. Instead, he chose to disregard commands against touching his gear or throwing anything back into the water and did just the opposite by throwing the red grouper and fishing gear overboard and back into the water. His claims of concern over keeping the fish alive are unavailing and do not justify a clear disregard for a failure to follow the instructions of law enforcement. Collectively, this demonstrates a deliberate pattern of behavior to dispose objects overboard at the sight of law enforcement, actions that serve to potentially destroy or make unavailable evidence of unlawful activity and to thwart efforts by law enforcement to enforce federal law.

Roughly six months later, on September 26, 2019, the Gharst's conduct did not improve. In fact, it became more egregious. Unlike the cooperation given during the March incident, Respondents' subsequent behavior toward law enforcement was defiant. Testimonial and documentary evidence, coupled with body camera footage (AX 9, AX 19), demonstrate that both Gharst Junior and Gharst Senior threw objects overboard as law enforcement drew near the Miss Debbie for boarding and inspection, despite explicit law enforcement commands not to do so. While Gharst Junior eventually complied with law enforcement instructions, after having already dumped a plastic bag overboard, Gharst Senior momentarily hesitated from throwing fish overboard but then continued to throw red snapper fillets overboard after making a dismissive gesture toward law enforcement.

Respondents do not dispute this activity, but attempt to mitigate the gravity of the behavior by arguing that only two red snapper fillets were thrown overboard by Gharst Senior on this occasion. As discussed above, I find no merit in this argument, especially given the recurring nature of this violative behavior with an increasing disregard for law enforcement and the enforcement of federal law.

Utilizing the same rationale and established case law regarding the liability of owners of fishing vessels discussed above, I conclude that Mrs. Gharst is also liable for these violations

because she is a co-owner of the F/V Miss Debbie and, as a recipient of income from the proceeds of the catch, she is a beneficiary of the unlawful activities of Gharst Senior and Gharst Junior.

I therefore conclude that Respondents are liable for having violated Agency regulations and the Act by the disposal of fish, parts thereof, or other matter, after a communication or signal from an authorized officer, or after the approach by an authorized officer or an enforcement vessel, on March 11, 2019, and on September 26, 2019.

V. PENALTY

a. Principles of Law Regarding Civil Penalty

The Act provides that any person who violates any provision of the Act or implementing regulation may be assessed a civil penalty. 16 U.S.C. § 1858(a). The amount of the civil penalty cannot exceed \$230,464 for each violation. *See* 16 U.S.C. § 1858(a) (establishing the maximum statutory penalty amount); 15 C.F.R. § 6.3(f)(15) (adjusting the penalty amount in 16 U.S.C. § 1858(a) for inflation effective January 15, 2024); *see also* 15 C.F.R. § 6.4 (providing the effective date for inflation adjustments). No penalty assessment may be made unless the alleged violator is given notice and opportunity for a hearing conducted in accordance with Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554. 16 U.S.C. § 1858(a).

To determine the appropriate amount of a civil penalty, the Act identifies certain factors to consider:

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

16 U.S.C. § 1858(a) (emphasis omitted). Similarly, the procedural rules governing this proceeding, set forth at 15 C.F.R. part 904, provide, in pertinent part:

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

15 C.F.R. § 904.108(a).

These procedural rules also provide the following with regard to claims of an inability to pay a civil monetary penalty:

If a respondent asserts that a civil penalty should be reduced because of an inability to pay, the respondent has the burden of proving such inability by providing verifiable, complete, and accurate financial information to NOAA. NOAA will not consider a respondent's inability to pay unless the respondent, upon request, submits such financial information as Agency counsel determines is adequate to evaluate the respondent's financial condition. Depending on the circumstances of the case, Agency counsel may require the respondent to complete a financial information request form, answer written interrogatories, or submit independent verification of his or her financial information. If the respondent does not submit the requested financial information, he or she will be presumed to have the ability to pay the civil penalty.

Financial information relevant to a respondent's ability to pay includes but is not limited to, the value of respondent's cash and liquid assets; ability to borrow; net worth; liabilities; income tax returns; past, present, and future income; prior and anticipated profits; expected cash flow; and the respondent's ability to pay in installments over time. A respondent will be considered able to pay a civil penalty even if he or she must take such actions as pay in installments over time, borrow money, liquidate assets, or reorganize his or her business. NOAA's consideration of a respondent's ability to pay does not preclude an assessment of a civil penalty in an amount that would cause or contribute to the bankruptcy or other discontinuation of the respondent's business.

15 C.F.R. §§ 904.108 (c) and (d).

Additionally, I take official notice of the Agency's guidance document titled "Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions," effective June 24, 2019, ("Penalty Policy"),¹¹ which is publicly available on the Internet.¹²

¹¹ Pursuant to the PPIP Order dated April 29, 2022, the Agency, in its PPIP submission dated June 10, 2022 requested that the Tribunal take official notice of the Agency's Penalty Policy that is publicly available on the Internet. Agency's PPIP at 9.

¹² See <https://www.noaa.gov/general-counsel/gc-enforcement-section/penalty-policy-and-schedules> (last visited May 13, 2024).

Under the Penalty Policy, penalties are described, in the form of a calculation, as follows: Base Penalty [(Initial Base Penalty based on the Gravity of the Offense and Culpability) + (Upward/Downward Adjustment for Specific Circumstances)] + [Proceeds of Unlawful Activity and Any Additional Economic Benefit] = Penalty Assessment. Penalty Policy at 4.

The “initial base penalty” amount considers two factors, collectively constituting the seriousness of the violation: “(1) the gravity of the prohibited act that was committed; and (2) the alleged violator’s degree of culpability,” which assesses the mental culpability in committing the violation. Penalty Policy at 4-5. The “gravity” component (also referred to as the “gravity of the violation” or “gravity-of-offense level”) of the initial base penalty is comprised of four to six (depending upon the particular statute at issue) different offense levels, reflective of a continuum of increasing gravity, taking into consideration the nature, circumstances, and extent of a violation. Penalty Policy at 8. Thus, offense level I represents the least significant offense level, while offense level VI represents the most significant offense level.¹³ Penalty Policy at 8. The “culpability” factor (also referred to as “degree of culpability”) is comprised of four levels of increasing mental culpability: unintentional activity (such as an act that is inadvertent, unplanned, and the result of accident or mistake); negligence (such as carelessness or a lack of diligence); recklessness (such as a conscious disregard of substantial risk of violating conservation measures); or an intentional act (such as a violation that is committed deliberately, voluntarily, or willfully). Penalty Policy at 9-10.

These two factors are depicted in a penalty matrix, with the “gravity” factor represented by the vertical axis of the matrix and the “culpability” factor represented by the horizontal axis of the matrix. Penalty Policy at 7. The intersection of the levels used in each factor then identifies a penalty range on the matrix; the midpoint of this penalty range determines the “initial base penalty” amount. Penalty Policy at 7-8.

Once an “initial base penalty” amount is determined, adjustments are applied to reflect legitimate differences among similar violations. Penalty Policy at 10. The “adjustment factors” consist of an alleged violator’s history of prior offenses, and “other matters as justice may require,” including the conduct of an alleged violator after a violation occurs such as cooperation. Penalty Policy at 10-12. Next, proceeds of unlawful activity and any additional economic benefit of noncompliance to an alleged violator are considered and factored into the penalty calculation (such as the gross value of fish, fish product, or other product illegally caught, or revenues received; delayed costs; and avoided costs). Penalty Policy at 13-15. Finally, the Agency “will consider at the appropriate stage the ability of the alleged violator to pay a penalty” when requested information that is “verifiable, accurate, and complete to enable consideration of this factor in adjusting the proposed penalty” has been provided by the alleged violator. Penalty Policy at 15. The burden to demonstrate inability to pay rests with the alleged violator. Penalty Policy at 15 (citing 15 C.F.R. § 904.108(c)-(e)).

¹³ Appendix 3 of the Penalty Policy contains listed schedules of common violations, broken down by statute. “Where a violation is not listed in the schedules, the attorney determines the offense level by using the offense level of a similar listed violation.” Penalty Policy at 8.

There is no presumption in favor of the penalty proposed by the Agency, and an Administrative Law Judge is not “required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document.” *Nguyen*, 2012 WL 1497024, at *8; *see also* 15 C.F.R. § 904.204(m). The Judge must independently determine an appropriate penalty “taking into account all of the factors required by applicable law.” 15 C.F.R. § 904.204(m); *see also* 15 C.F.R. § 904.108 (enumerating factors to be taken into account in assessing a penalty).

b. Arguments Regarding Civil Penalty

In its Post-Hearing Brief, the Agency argues that Respondents’ “disposal of potential evidence of wrongdoing upon the approach of law enforcement or after communication from law enforcement” strikes at the very “heart of the Agency’s enforcement activities” and that a more egregious threat to the Agency’s enforcement mission is hard to imagine. Ag. Br. at 12. Compounding this behavior is the fact that “Respondents committed this violation on both March 11th and September 26th, 2019, after having been warned and educated about this very violation during a May 8, 2016, boarding during which Respondents engaged in the same misconduct.” Ag. Br. at 12. Thus, the Agency asserts, Respondents’ actions were not due to misunderstanding or mistake but rather an intentional choice to violate Agency regulations. Ag. Br. at 13. To lend further support to this position, the Agency recounts the circumstances of the September 26, 2019 incident, as follows:

Upon the close approach of the uniformed officers aboard the law enforcement vessel *Intrepid*, Gharst Junior dumped the contents of a Ziploc bag overboard and Gharst Senior followed suit by disposing of illegal red snapper fillets by throwing them overboard directly in front of the law enforcement officers preparing to board his vessel and in direct contravention of the law enforcement officers’ directions not to do so. Perhaps most telling in terms of Respondents’ state of mind was the hand gesture made by Gharst Senior towards the law enforcement officers as he threw a second red snapper fillet overboard. That gesture summed up Respondents’ disdain for the presence and authority of the officers present and the Gharsts’ clear intention to ignore both law enforcement’s presence and orders.

Ag. Br. at 12. The Agency urges that the Tribunal “send a clear message to Respondents and all fishers that the disposal of fish, fish parts, or other matter upon the approach of law enforcement or upon a communication from law enforcement cannot and will not be tolerated and will result in substantial penalties equal to or greater than those initially assessed by the Agency.” Ag. Br. at 13. The Agency notes that while its Penalty Policy does not specifically characterize an offense level regarding Respondents’ “disposal,” their conduct “is analogous to other listed Level II offenses such as interfering with or providing false statements to an

authorized officer, or discarding fish and thereby preventing an observer from sampling them.” Ag. Br. at 13.

With regard to Respondents’ use of Gulf reef fish as bait, the Agency argues that such conduct “thwarts the ability of law enforcement to properly enforce size or retention limits.” Ag. Br. at 14 (citing Tr. 29, 155-56, 226). Further, it “impedes the Agency’s ability to properly manage fish populations and, left unpunished, breeds contempt for the regulations and encourages others to break the law.” Ag. Br. at 14 (citing Tr. 29-33, 39-40). Such conduct also poses an “unfair economic advantage over law-abiding fishers by avoiding the costs associated with either purchasing or catching legal bait” and compromises the “status of the Gulf of Mexico red snapper stock as it continues to rebuild towards sustainable levels.” Ag. Br. at 14 (citing Tr. 34-38, 44-45).

The Agency contends that “Respondents have shown both a lack of remorse and a strong likelihood of continued violations. This tribunal should ensure that the penalty it assesses is sufficiently large to more than offset any benefits Respondents may perceive in continuing to use Gulf reef fish for bait, conduct they continued to engage in after the violations at issue in this case, as shown by the 2020 boarding documented in AX 20.” Ag. Br. at 14. It urges that my penalty assessment in this matter “should equal or exceed the penalty assessed by the Agency in order to adequately deter future misconduct by Respondents and to avoid Respondents’ simply viewing the penalty as an acceptable cost of doing business.” Ag. Br. at 14-15.

As to Respondents’ inability to pay a monetary penalty, the Agency notes that its regulations provide “that if respondents fail to provide the information required, then they will be presumed to have the ability to pay the civil penalty.” Ag. Br. at 15 (citing 15 C.F.R. 904.108(c)). “Here Respondents have failed to produce sufficient evidence of their alleged inability to pay to overcome the high standard set forth by the Agency in 15 C.F.R. 904.108(d): ‘A respondent will be considered able to pay a civil penalty even if he or she must take such actions as pay in installments over time, borrow money, liquidate assets, or reorganize his or her business. NOAA’s consideration of a respondent’s ability to pay does not preclude an assessment of a civil penalty in an amount that would cause or contribute to the bankruptcy or other discontinuation of the respondent’s business.’” Ag. Br. at 15.

With regard to Respondents’ Red Grouper and Gag Grouper shares and Respondents’ claims of “drastic reductions in their Red Grouper and Gag Grouper shares into 2023,” Resps. Br. at 5 (citing Tr. 102-17), the Agency contends that Respondents’ shares remain the same. While their allocation was cut, that was “based on a reduction to the quota to prevent overfishing, and the cut in quota was actually accompanied by an increase in the value of the allocation given, despite the reduction.” Ag. Rep. Br. at 5 (citing AX 16; AX 17; Tr. 112-13). The Agency goes on to state that “the reductions are only relevant to the extent they affected the value of the Respondents’ allocations for the relevant year.” Ag. Rep. Br. at 5.

Respondents contend that they are unable to pay an administrative penalty “in excess of One Thousand Two Hundred Dollars (\$1,200.00) for Mr. and Mrs. Gharst and Six Hundred Dollars (\$600.00) for James E. Gharst.” Resps. Br. at 1 and 5 (citing RX 1; RX 2; RX 3; RX4; Tr. 349). In support, Respondents cite to “drastic reductions in their Red Grouper and Gag Grouper shares into 2023” as confirmed by Agency witness Dr. Stephen. Resps. Br. at 5 (citing Tr. 102-117). Further, they note that the devastating impacts from Hurricane Michael in October 2018 caused damage to the Gharst’s home and vessel, resulting in a 5-month gap during which they were unable to fish. Resps. Br. at 6. They argue, contrary to the Agency’s position, that they should not be forced to sell their IFQ shares, allocations, and vessel, as doing so would effectively discontinue their business and any income derived from that business, leaving only Mrs. Gharst’s social security retirement benefits as their source of income. Resps. Br. at 5-6. Respondents also note that there have been no new alleged violations “in the three (3) years since the March 22, 2020 boarding.” Resps. Br. at 6.

Respondents contend that “they have carried their burden to show that they do not have the financial ability, without liquidating their boat, IFQ shares and allocations to pay a penalty in excess of what is offered and set out above.” Resps. Br. at 6. They argue that “the Agency did not submit competent evidence on the Respondents’ financial consideration as required by 15CFR§904.108(h) even though the Respondents did execute written authorization to allow the Agency to conduct independent verification of Respondents’ financial condition.” Resps. Br. at 6 (citing 15 C.F.R. § 904.108(g)).

In its Reply Brief, the Agency challenges Respondents’ assertions and states that “the Agency’s regulations are clear that Respondents have the burden of proving an inability to pay through the production of verifiable, complete, and accurate financial information.” Ag. Rep. Br. at 1 (citing 15 C.F.R. § 904.108(c)). The Agency contends that Respondents’ references to 15 C.F.R. §§ 904.108(g) and (h) are only triggered when a statute requires the Agency to consider a respondent’s ability to pay a penalty, which is not the case here since “this enforcement action was brought under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), which does *not require* the Agency to consider a respondents’ ability to pay in assessing a penalty.” Ag. Rep. Br. at 2 (citing 16 U.S.C. § 1858). Rather, the Agency continues, its regulations state that “the Agency *may* consider that factor *if* Respondents produce the required verifiable, complete, and accurate financial information requested by the Agency,” which Respondents failed to do. Ag. Rep. Br. at 2 (citing 15 C.F.R. § 904.108(c)).

In support, the Agency notes the procedural history of this case in which “the Agency was ultimately forced to file a motion to compel Respondents to produce the financial documentation sought by the Agency in order to evaluate their alleged inability to pay the penalty as assessed. But the documentation produced by Respondents was not verifiable, complete, and accurate, as required by the Agency’s regulations.” Ag. Rep. Br. at 2. “For example, the financial information Respondents James K. Gharst (Gharst Senior) and Deborah Gharst submitted as evidence in RX 1 omitted significant assets, including their IFQ shares worth \$154,949.64 (Transcript (Tr.) at 84), their IFQ allocation for 2023 worth \$14,892.77 (Tr. at

93), and their Commercial Gulf reef fish limited access permit worth between \$25,000 and \$50,000 (AX 18, Tr. at 134-135).” Ag. Rep. Br. at 2. Further, hearing testimony established that Respondents undervalued their assets when, for example, they claim “their mortgage-free home is worth \$76,000, only \$10,500 more than they paid for it in 1999,” but failed to perform a comparative market analysis, consult any real estate websites available on the internet, or consult their local taxing authority for the assessed value of their home to support such a conclusion. Ag. Rep. Br. at 2. Consulting such sources show that “the true value of that asset is much higher than declared by Respondents under penalty of perjury.” Ag. Rep. Br. at 2 (citing Tr. 341-45). “Respondents similarly apparently failed to consult any objective sources in valuing their boat or vehicles.” Ag. Rep. Br. at 2. (citing Tr. at 299-300, 338-39, 345-47). Additionally, the Agency contends that “Respondents provided confusing and contradictory information regarding their monthly income (RX 1 at 2, Tr. 332-337) and failed to have the bank verify their deposits as required in the Agency’s standard financial forms (RX 1 at 8, Tr. 348-349).” Ag. Rep. Br. at 2-3.

The Agency also challenges Respondents’ claims of damage and loss from Hurricane Michael as unsupported by any documentary evidence (such as pictures of damage sustained, copies of insurance claims, estimates of needed repairs and receipts for same, or copies of any insurance company reimbursements) that was within Respondents’ control to produce, and which is necessary to support otherwise “unsupported allegations of damages to their home, cars, and vessel and the accompanying admission that they received an unspecified amount of money from their home insurance policy as well as a Small *Business* Loan that they supposedly used to complete unspecified repairs to their vessel and home and to pay off their home’s mortgage.” Ag. Rep. Br. at 3 (citing Tr. 320-21, 346-47). The Agency argues that when a party fails to submit such information, “it is appropriate to infer that the evidence would not have been favorable to the party who choose [sic] not to introduce it.” Ag. Rep. Br. at 3. Regarding Gharst Junior, the Agency contends that his information “is also incomplete and cannot be verified” given that, by his own admission, “he has failed to file federal income tax returns as required by law, making it difficult [for the Agency] to evaluate or verify in any way his claimed income.” Ag. Rep. Br. at 3 (citing Tr. 362, 371).

Consequently, the Agency contends that “Respondents have failed to carry their burden of producing verifiable, complete, and accurate financial information to the Tribunal in support of their claim that they cannot pay any civil penalty in excess of \$1,800” and the Tribunal should, accordingly, reject their unsupported claims. Ag. Rep. Br. at 3. The Agency argues that the evidence it has presented establishes that “Gharst Senior and Deborah Gharst have assets well in excess of the penalty assessed by the Agency, including their unencumbered house, vessel, cars, IFQ shares, IFQ allocation, and limited access permit.” Ag. Rep. Br. at 4. The Agency reiterates the regulatory language of 15 C.F.R. § 904.108(d), namely, that “A respondent will be considered able to pay a civil penalty even if he or she must take such actions as pay in installments over time, borrow money, liquidate assets, or reorganize his or her business. NOAA’s consideration of a respondent’s ability to pay does not preclude an assessment of a civil penalty in an amount that would cause or contribute to the bankruptcy or other discontinuation of the respondent’s business.” Ag. Rep. Br. at 4.

In their Reply Brief (“Resps. Rep. Br.”), Respondents contend that “15 CFR § 904.1(24) clearly covers the Magnuson-Stevens Act and 15 CFR § 108(a-h) does require the Agency to consider the asserted inability to pay once the Respondents’ asserted they had an inability to pay.” Resps. Rep. Br. at 1. They argue that they “completed and filed all of the Agency’s requested discovery material including executed Releases which permitted the Agency’s counsel to obtain any additional information they needed.” Resps. Rep. Br. at 1. Respondents reiterate that their only source of steady income is derived from Mrs. Gharst’s social security retirement benefits and whatever income is generated through fishing activities aboard the F/V Miss Debbie. Resps. Rep. Br. at 1-2. That fishing income “is mainly governed by the amount of their yearly Grouper allocation determined by NOAA/NMFS,” and their Red Grouper allocation was “cut from 14,599 pounds [“lbs.”] . . . in 2019 to 5,425 lbs. for 2023,” while “their Gag Grouper allocation for 2023 is only 983 lbs.” Resps. Rep. Br. at 1. Respondents explain that while their “IFQ shares are identified as a percentage (%), it is calculated into lbs. on an annual basis effective January 1 each year depending on the respective quota amounts that NOAA/NMFS sets for the commercial sector to harvest and sell for that year which is referred to as the allocation lbs.” Resps. Rep. Br. at 1-2. Once Respondents reach their allocation limit, they must “purchase additional allocations for the remainder of that year if they want to continue fishing/selling that species,” but “there is no guarantee that additional allocations can be purchased from other share/allocation holders.” Resps. Rep. Br. at 2. Respondents urge that this “unknown factor is certainly a major factor to consider in their inability to pay” a penalty, particularly in light of Mrs. Gharst’s limited monthly retirement income of \$786. Resps. Rep. Br. at 2 (citing RX 1 at 2).

Citing 50 C.F.R. § 600.740, Respondents argue that a civil monetary penalty is a remedy when other remedies are not appropriate and suggests that “Agency counsel wants to backdoor the forced sale of the Respondents’ IFQ Permit, Shares, and Vessel when the Agency’s choice of a civil penalty under 50 CFR §600.740(a)(2) usually precludes 50 CFR §600.740(a)(3) penalty (forfeiture of vessel and catch).” Resps. Rep. Br. at 2. They point out that while the pending enforcement action related to two incidents in 2019, the subsequent March 2020 incident “was resolved by the minimum \$250.00 civil summary procedure against Kur[k] Gharst only.” Resps. Rep. Br. at 2-3. Respondents suggest that this demonstrates “a relevant factor which reflects that in 2020 the cut-up Banded Rudderfish being used as bait was not regarded as a significant violation and a reasonable monetary penalty was imposed and paid.” Resps. Rep. Br. at 3. They urge that “it should not be the policy of the Magnuson-Stevens Act to put the Respondents out of business due to the type of violations involved in these cases because of their inability to pay a large civil penalty.” Resps. Rep. Br. at 3 (citing *Van Le*, NOAA Docket No. SE0903064ES, 2012 WL 3012678 (NOAA June 18, 2012)). Respondents reiterate that an appropriate civil penalty would be \$1,800. Resps. Rep. Br. at 3.

c. Analysis of Civil Penalty and Assessment

Having determined that Respondents are liable for the charged violations of federal law and regulations, I now turn to the issue of what, if any, amount of a civil monetary penalty is appropriate. As a general matter, I note that Respondents have been charged jointly and

severally. NOAA's regulations provide that "a NOVA may assess a civil penalty against two or more respondents jointly and severally. Each joint and several respondent is liable for the entire penalty but, in total, no more than the amount finally assessed may be collected from the respondents." 15 C.F.R. § 904.107(a).

At the outset, I also note that Respondents' arguments that the Agency is required to consider an inability to pay a proposed penalty claim, and that the Agency bears some burden with regard to investigating such a claim, is misplaced and unsupported by applicable law. Under the Magnuson-Stevens Act, NOAA "may" consider Respondents' ability to pay but is not required to do so. Specifically, as stated above, the Act provides that "in assessing such penalty the Secretary *may also* consider any information provided by the violator relating to the ability of the violator to pay." 16 U.S.C. § 1858(a) (emphasis added). Further, Agency regulations place the burden on Respondents to establish their inability to pay through the submission of verifiable, complete, and accurate financial information, and Respondents are presumed to be able to pay the penalty if they do not submit the information the Agency requests and that Agency counsel determines is adequate to evaluate their financial condition. 15 C.F.R. § 904.108(c).

The regulations that Respondents cite and rely upon as the basis for shifting the burden on this issue to NOAA — 15 C.F.R. § 904.108(g) and (h) — do not apply in this case, because they pertain to circumstances where the applicable statute "requires" NOAA to consider a respondent's ability to pay. *See* 15 C.F.R. 904.108(g) and (h) ("*Whenever a statute requires* NOAA to take into consideration a respondent's ability to pay . . .") (emphasis added). Here, as recited above based on the applicable law, NOAA is not required to consider a respondent's ability to pay claim. Rather, it "may" do so. Such permissive language in the Act does not place an obligation or duty on the Agency, and applicable regulations place the burden of proof on this issue squarely on Respondents, not the Agency. As the Agency has properly noted and as stated above, "Respondents have the burden of proving an inability to pay through the production of verifiable, complete, and accurate financial information." Ag. Rep. Br. at 1 (citing 15 C.F.R. § 904.108(c)).

To that end, I have carefully examined Respondents' arguments and supporting evidence with regard to their claims of an inability to pay a penalty for their violations. My analysis of those claims and the other factors to be considered when assessing a civil monetary penalty follows.

i. Nature, Circumstances, Extent, and Gravity of the Violations

The evidence presented establishes repetitive behavior on Respondents' part with regard to the disposal of items (fish, fish parts, or other matter) upon the approach of law enforcement and the use of prohibited Gulf reef fish, namely red snapper, for bait. The credible testimony offered by Mr. Hood, an expert in the field of federal management of Gulf reef fish, is instructive with regard to evaluating the above-referenced penalty factors. Mr. Hood explained that an important element of fishery management is for fish to be maintained

intact through landing for proper identification and assessment with regard to fish species and size limitation, including an assessment by law enforcement. This information is critical for the assessments of the stock and the overall health of a fishery. He elaborated that in assessing the stock of a fishery, NOAA looks to data regarding the total number of fish killed, including those that are landed and sold, released, or discarded. When Gulf reef fish are used for bait, in spite of NOAA's prohibitions, those fish are not able to be evaluated for purposes of assessing the stock and its health. Specifically with regard to the red snapper component, Mr. Hood noted that it has faced overfishing, is currently in a state of recovery, and is part of a rebuilding plan until 2032. Thus, the use of red snapper as bait serves to negatively impact this recovery plan and the quality of data that NOAA receives and relies upon to make management decisions regarding the fishery.

This background illustrates how grave Respondents' conduct is as well as the damaging effects from that conduct. Here, Respondents, despite a warning in 2016 for the very same behavior, have used red snapper for bait on a recurring basis and have discarded red snapper overboard in the presence of law enforcement, seemingly in an attempt to dispose of evidence and impede detection of wrongdoing. Their actions directly compromise the recovery efforts for a fishery that has been overfished for many years. Their actions also compromise the quality and accuracy of data NOAA receives in its management of the Gulf Reef Fishery, because the red snapper Respondents have repeatedly used for bait and/or discarded cannot be accounted for and used by NOAA in its stock assessment. Respondents have made the argument, presumably to mitigate any penalty, that a small number of red snapper were used in the charged violations. But I doubt the truthfulness of such an argument. At the outset, their argument is based on violations that have been detected and documented by law enforcement. Given the persistent nature of Respondents' use of red snapper for bait and deliberateness to conceal wrongdoing by discarding red snapper overboard, the suggestion that these incidents are isolated and involve only a few fish is simply unconvincing and does not persuade me to mitigate the amount of any penalty on that basis.

Additionally, and as pointed out by the Agency, Respondents' consistent use of prohibited bait provides them with a financial benefit. It avoids the cost of purchasing legal bait, thereby giving Respondents an unfair economic advantage over others that abide by the law and do not use prohibited bait. Accordingly, the gravity and recurring nature of Respondents' violations and the general economic advantage Respondents gained by their prohibited conduct has been considered and given significant weight in my penalty assessment.

ii. Respondents' Degree of Culpability and History of Prior Violations

The evidence presented demonstrates deliberate behavior on the part of Respondents. The Agency evaluated Respondents' level of culpability to be intentional and, based on the credible evidence in this case, I agree. As I carefully reviewed the evidentiary record in this case, there left no doubt that Respondents' violative behavior was deliberate.

On May 8, 2016, Gharst Senior was warned for disposing of fish upon the approach of law enforcement. At that time, aircraft patrol alerted vessel patrol to what appeared to be (from the air) the disposal of red snapper from the Miss Debbie. Evidence of this disposal became apparent to law enforcement on vessel patrol when they observed the discards floating directly behind the Miss Debbie and also observed Gharst Senior dump a 5-gallon bucket of multiple fish overboard, in direct opposition to law enforcement commands not to touch any gear. Law enforcement noted that Gharst Senior appeared agitated by their presence by yelling, shouting, and throwing his hands in the air, as law enforcement first approached.

On March 11, 2019, Respondents were cited for the same unlawful activity for which they had been previously warned — disposal upon approach of law enforcement — in addition to the use of prohibited Gulf reef fish for bait, namely red snapper. On this occasion, Respondents were cooperative and were later credited for that cooperation by the Agency.¹⁴

On September 26, 2019, approximately six months later, Respondents were cited for the same violative behavior. Their actions were defiant, demonstrably in flagrant disregard of federal law and the rules they knew they were bound to follow. As the Agency noted, and as was abundantly clear from the body camera footage, the most striking example of this defiance was Gharst Senior's dismissive gesture toward law enforcement before throwing yet another red snapper overboard in plain sight. Moments prior, law enforcement repeatedly instructed Gharst Senior and Gharst Junior not to touch their gear or throw anything overboard, instructions that were ignored when Gharst Junior tossed a plastic bag overboard and Gharst Senior discarded red snapper overboard in the presence of law enforcement.

The Agency argues that Gharst Senior's "gesture summed up Respondents' disdain for the presence and authority of the officers present" and demonstrates their "clear intention to ignore both law enforcement's presence and orders," all of which "strikes . . . at the heart of the Agency's enforcement activities." Ag. Br. at 12. The evidence presented, including the uncontroverted body camera footage from each incident, compels me to agree with this argument. Accordingly, I have given significant weight to the intentional nature of Respondents' violative behavior in my assessment of a penalty.

iii. Ability to Pay and Other Matters as Justice May Require

Respondents' primary argument in this matter relates to their claim of an inability to pay a civil monetary penalty that exceeds \$1,200 for Mrs. Gharst and Gharst Senior payable in monthly installments (RX 1 at 11-12), and \$600 for Gharst Junior (RX 3 at 1). To support their claim, they have submitted financial information on NOAA-issued forms for Mrs. Gharst and

¹⁴ The Agency noted that Respondents were given credit for their cooperation on this occasion with a \$1,500 reduction in the proposed penalty for Count 2. Tr. 351, 354; Preliminary Worksheet—Recommended Assessment of Penalty and/or Permit Sanction (filed June 10, 2022).

Gharst Senior, admitted into evidence as RX 1, and for Gharst Junior, admitted into evidence as RX 3.

These financial forms elicit information from each applicant under specific categories, namely: employment data; monthly sources of income; monthly expenses; personal financial statements regarding assets and liabilities; a general information category that includes: Schedule A: Banking Relations, Schedule B: Accounts and Notes Receivable, Schedule C: Real Estate Owned, Schedule D: Stocks/Bonds/Mutual Funds Owned, Schedule E: Fishing Vessels, Schedule F: Loans/Bills Payable, Schedule G: Motor Vehicles, and Federal Income Tax Information with copies to be attached for the last three federal income tax returns; and a vessel operating statement for the most recent fiscal year. Each page requires a dated signature by the applicant to the following declaration: “With knowledge of the penalties for false or incomplete statements as provided by 18 U.S.C. 1001, \$10,000 fine and/or five years imprisonment, I declare (or certify, verify, state) under penalty of perjury that the foregoing is true and correct.” See RX 1 at 1-7, RX 3 at 2-9.

Respondents submitted a Form 1040 U.S. Individual Income Tax Return for 2022 for Mrs. Gharst and Gharst Senior to support their claims. RX 2. Gharst Junior has not filed a federal income tax return for many years, is not exempted from doing so, and identified “unpaid federal income tax” as a liability on his financial forms. Tr. 362-63, 371; RX 3 at 5, 8.

Additional financial forms from those referenced above included a bank confirmation form that requires a dated applicant signature for submission to and completion by the bank — Respondents signed their respective forms but only Gharst Junior provided actual bank verification (RX 1 at 8, RX 3 at 10) — and a financial verification request and authorization form signed and dated by the applicant (RX 1 at 9-10, RX 3 at 11).

One of Respondents’ arguments concerning their ability to pay a civil penalty relates to claims of a “drastic” reduction in their shares of Red and Gag Grouper. Resps. Br. at 1, 5. In support they cite to RX 4 – an allocation ledger summary for Mrs. Gharst and Gharst Senior’s IFQ account that was created on May 8, 2023. They also cite to the testimony of Dr. Stephen to support this claim. Respondents argue that “once their annual January 1 allocation is caught and sold the Gharst's must stop catching that species of fish or must purchase additional allocations for the remainder of that year if they want to continue fishing/selling that species,” and “[t]here is no guarantee that additional allocations can be purchased from other share/allocation holders.” Resps. Rep. Br. at 2.

The Agency has countered this argument by stating that while Respondents’ shares remain the same, the annual allocation was cut “based on a reduction to the quota to prevent overfishing” and that the “quota was actually accompanied by an increase in the value of the allocation given, despite the reduction.” Ag. Rep. Br. at 5 (citing AX 16; AX 17; Tr. 112-13). Further, “reductions are only relevant to the extent they affected the value of Respondents’ allocations for the relevant year.” Ag. Rep. Br. at 5. Dr. Stephen’s testimony elaborated on this point, in response to questions from Respondents’ counsel in which he inquired about the

changes in quota that resulted in a nearly 2/3 decrease. Tr. 113. Dr. Stephen explained that this occurred in 2019 following a stock assessment, noting that the “red grouper commercial quota in its entirety was reduced.” Tr. 113. As a consequence, the “amount of allocation he would receive from that would be a reduced amount, again still based on the same percentage of shares.” Tr. 113. That reduced amount has continued through 2023. Tr. 114, 117. Dr. Stephen shed further light on this type of scenario by explaining that “typically when you see a decrease in the quota, we see a kind of uptick again in the value of it based on the supply and demand.” Tr. 84-85, 99-100, 118.

Given this inherent fluctuation of annual allocations within the IFQ program and the resulting effects in value from supply and demand, I am not persuaded by Respondents’ arguments that recent decreases in annual allocations (resulting in higher values) for certain species of fish that Respondents target in their commercial fishing activities would have long-term and permanent financial consequences to Respondents that would impact their ability to pay a civil monetary penalty. Also, as Respondents noted, the potential exists to purchase additional allocations in a given year, if necessary, and while I acknowledge, as Respondents argue, that there is no “guarantee” that additional allocations will be available to be purchased, that potential uncertainty, which may or may not actually occur, does not support a determination of decreased financial capacity in the years to come.

With regard to the financial documentation submitted by Respondents, the Agency maintains that the documentation “was not verifiable, complete, and accurate, as required by the Agency’s regulations.” Ag. Rep. Br. at 2. As an example, the Agency notes that Mrs. Gharst and Gharst Senior “omitted significant assets, including their IFQ shares worth \$154,949.64 (Tr. at 84), their IFQ allocation for 2023 worth \$14,892.77 (Tr. at 93), and their Commercial Gulf reef fish limited access permit worth between \$25,000 and \$50,000 (AX 18, Tr. at 134-135).” Ag. Rep. Br. at 2. Further, the Agency argues,

[f]or the assets they did include, testimony established that Respondents undervalued them. For example, Respondents claim their mortgage-free home is worth \$76,000, only \$10,500 more than they paid for it in 1999, but Respondents did not have a comparative market analysis performed to come to this conclusion nor did they consult any of the many real estate sites available on the internet or even the value assessed by their local taxing authority, all of which show that the true value of that asset is much higher than declared by Respondents under penalty of perjury. Tr. 341 to 345. Respondents similarly apparently failed to consult any objective sources in valuing their boat or vehicles. Tr. at 299-300, 338-339, 345-347.

Id. The Agency also notes that “Respondents provided confusing and contradictory information regarding their monthly income (RX 1 at 2, Tr. 332-337) and failed to have the bank verify their deposits as required in the Agency’s standard financial forms (RX 1 at 8, Tr. 348-

349).” Ag. Rep. Br. at 2-3. Similarly, they “also failed to submit any documentary evidence to support their claims that they suffered losses due to Hurricane Michael, despite the fact that such evidence was within their control. They provided no pictures of any damage, no copies of any insurance claims, no copies of any insurance company reimbursements, and no repair estimates or receipts.” Ag. Rep. Br. at 3. The Agency contends that “no documents were submitted in support of any of their assertions” and urges that such a failure may appropriately lead the Tribunal “to infer that the evidence would not have been favorable to the party who choose not to introduce it.” Ag. Rep. Br. at 3 (citing *Frontier Fishing Corp.*, NOAA Docket No. NE970201FM/V, 2007 WL 3054279, at *8 n.11 (NOAA Oct. 4, 2007) (“The general rule is ‘the omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause.’”)).

In response, Respondents contend that they “completed and filed all of the Agency’s requested discovery material including executed Releases which permitted the Agency’s counsel to obtain any additional information they needed. During the hearing it became clear that the Agency elected to not request any financial information or neglected to submit such information as evidence during the hearing.” Resps. Rep. Br. at 1. They argue that they met their burden of proof and that burden then shifted to the Agency to refute Respondents’ evidence that supports their claim of an inability to pay a large penalty. Resps. Br. at 1, 6. Further, they assert that Respondents should not be forced out of business to pay a large civil penalty for the violations at issue in this case and they argue that “[w]hile it appears that Agency counsel desires that the Gharst’s go bankrupt or otherwise discontinue their business that should not be the course of action by the Court.” Resps. Rep. Br. at 1; Resps. Br. at 5.

Reviewing the evidentiary record on this issue, I take note, as the Agency has, of many deficiencies in the financial information Respondents have submitted to support their claims of an inability to pay a penalty beyond the modest penalty they propose. I agree with the Agency’s observation that apart from Respondents’ own self-serving testimony there is little, if any, support for their claims. Applicable regulations demand that “if a respondent asserts that a civil penalty should be reduced because of an inability to pay, the respondent has the burden of proving such inability by providing verifiable, complete, and accurate financial information” 15 C.F.R. § 904.108 (c). Contrary to Respondents’ assertions, the evidence they presented does not satisfy this burden of proof.

Turning to the particulars of the financial information Respondents supplied, I note that Mrs. Gharst and Gharst Senior identified some bottom-line information pertaining to the prior three years of taxable income, namely for 2019, 2020, and 2021. But only one federal tax return, for the 2022 tax year, was included with their submission, contrary to the instructions on the form and the applicable regulations. See RX 1 at 6; RX 2; 15 C.F.R. § 904.108 (d) (“Financial information relevant to a respondent’s ability to pay includes but is not limited to, . . . income tax returns”) (emphasis added).

Further, some contradictions exist between the information supplied on that 2022 tax return and the information Mrs. Gharst and Gharst Senior supplied on their financial forms dated October 31, 2022. Notably, Mrs. Gharst's social security benefits appear to be significantly higher as declared on the 2022 federal tax return, \$11,473 annually (or \$956.08 monthly) (RX 2 at 1, 14), as compared to the amount of monthly sources of income from social security she represented that she receives on her financial forms for the same 2022 calendar year, \$786 monthly (or \$9,432 annually) (RX 1 at 2). Gharst Senior's income is also challenging to reconcile, exacerbated by the internally inconsistent and contradictory testimony offered by Mrs. Gharst, who maintained and supplied the financial information used to complete the financial forms, the same financial information that was presumably transmitted to the Gharsts' accountant for preparation of the 2022 federal tax return.

Additionally, throughout Mrs. Gharst's testimony describing how the proceeds from the sale of fish were distributed among Respondents, she made references to percentages of the "crew share" and of the "boat share" that came from the proceeds from the sale of fish, but those percentages appeared to change throughout her testimony. Tr. 320-35. Early in her testimony, she explained "I take the total amount of the check [referring to the proceeds from the sale of the fish], 60 percent goes to the boat, 40 percent comes to me. Then I take the expenses off their share, then I pay the crew, and Kurk's [Gharst Senior's] not part of the crew." Tr. 324. In response to her counsel's question, she explained that from the "boat share," she and Gharst Senior receive their income after living expenses and boat-related expenses are deducted. Tr. 325. Later in her testimony, she confirmed the "boat share" was 60 percent of the proceeds from the sale of fish (Tr. 334) but explained that from that 60 percent of the "boat share," "I take all the expenses out and then divide what's left over between them [referring to Gharst Senior and Gharst Junior]." Tr. 334. In other portions of her testimony, she testified that the boat share was "40 percent" and that Gharst Senior's "salary is off the 40 percent." Tr. 332, 335. To compound this confusion, on the financial forms from Mrs. Gharst and Gharst Senior, they identified that Gharst Senior receives \$2,000 monthly as salary/wages from the "crew share" of the proceeds and \$1,500 as "other income" from the "boat share" of the proceeds, despite Mrs. Gharst's testimony that Gharst Senior was not part of the crew and the only crew member is Gharst Junior. Tr. 324-25, 332, 334; RX 1 at 2. Such contradictions and inconsistencies cast significant doubt upon the accuracy and reliability of this financial information.

I also noted, as Agency counsel elicited through Mrs. Gharst's testimony, that she and Gharst Senior neglected to identify and include on their financial forms the value of their IFQ shares and allocations as assets, each of which well-exceeded the "w/market value in excess of \$1,000" threshold specified on the financial form. Tr. 338-41, RX 1 at 3. Mrs. Gharst countered that she did not include their IFQ shares and allocations, which she acknowledged are worth a lot of money, because they depend upon them for their livelihood. Tr. 339-41. The evidence presented at hearing reveals that they are indeed worth a lot of money. Dr. Stephen, an expert in NOAA's IFQ program and in the valuation of shares and allocation, determined the total value of their shares, based on 2023 values, to be \$154,949.64 and the value of their 2023 allocations to be \$14,892.77. Tr. 84, 93, AX 16. While I recognize that these shares and

allocations are instrumental to Respondents' commercial fishing operation, the undisputed evidence shows that these IFQ shares and allocations are significant assets with high market values that Respondents failed to identify in their financial forms, thus providing an incomplete, if not skewed, depiction of their financial circumstances.

With regard to the asset value of the F/V Miss Debbie, Mrs. Gharst testified that it was worth \$25,000, which she attributed entirely to the value of their Permit, but she acknowledged that they have invested \$18,000 in repairs to the vessel, which would increase its value by that amount. Tr. 338-39. Notably, Mr. McIntosh, an expert in the secondary market for Gulf of Mexico Reef Fish Permits, testified that such permits carry a value of \$35,000 to \$36,000 (Tr. 128, 131; AX 18) and that Mrs. Gharst and Gharst Senior's Permit, in particular, carried an estimated value in the secondary market of \$25,000 to \$50,000 (Tr. 134; AX 18).

With regard to Mrs. Gharst and Gharst Senior's residence, it is noteworthy that they listed the value of their home to be \$76,000, "only \$10,500 more than they paid for it in 1999," as the Agency pointed out. Ag. Rep. Br. at 2. The Agency argues that they "undervalued" this asset. (Ag. Rep. Br. at 2). I agree. The evidence presented establishes that this residence is owned "free and clear," meaning that there is no longer a mortgage on the home. Tr. 341. Mrs. Gharst testified that she did not consult a realtor or any other organization to determine the value of their home. Tr. 343. Rather, she determined the value based upon a neighbor's home purchase and concluded that \$76,000 was the value of homes in their neighborhood. Tr. 343. During cross-examination, Agency counsel reviewed estimated home values of their residence from various Internet sources (Zillow, Avado, and Realtor.com) that provided a range in value from \$255,000 to \$289,000. Tr. 344. Mrs. Gharst expressed surprise by such estimates, countering that the property tax assessor does not value their home at such levels. Tr. 344. Turning to the local Bay County Property Appraiser information that is publicly available online at <https://baypa.net>, Agency counsel identified that the 2023 working value (now 2023 certified value) of the "Just (Market) Value" (meaning, the value established by the Property Appraiser for ad valorem purposes) of Respondents' residence was assessed at \$166,445.¹⁵ Tr. 345. Notably, that market value is increasing, with "2024 Working Values" for the just market value identified on the Bay County Property Appraiser website to be \$167,442.¹⁶ It is clear from this evidence that the value of Mrs. Gharst's and Gharst Senior's home was significantly undervalued at \$76,000, providing an inaccurate picture of their financial circumstances.

All of these deficiencies cast doubt upon the accuracy and reliability of the largely unverified financial information supplied by Respondents. In many instances, Mrs. Gharst and Gharst Senior failed to include valuable assets to provide a true and accurate picture of their

¹⁵ See Bay County Property Appraiser, <https://qpublic.schneidercorp.com/application.aspx?AppID=834&LayerID=15170&PageTypeID=4&PageID=6825&Q=731465957&KeyValue=15157-415-000> (last visited May 14, 2024).

¹⁶ *Supra* note 15.

financial situation. Where assets were identified, their residential home as an example, they were significantly undervalued. Income amounts also appear to be questionable based upon the scant information available (a single 2022 federal tax return from Mrs. Gharst and Gharst Senior, and Gharst Junior's failure to file a tax return for the past several years), compounded by the inconsistent and contradictory testimony of Mrs. Gharst concerning the methodology by which income is determined. I cannot, therefore, conclude that Respondents have demonstrated an inability to pay a civil monetary penalty. On the contrary, the credible evidence presented demonstrates that Respondents are financially capable of paying a monetary penalty for their violative behavior.

I also considered Respondents' argument that there have been no new violations since a March 22, 2020, boarding. To the extent this argument is raised to suggest that credit or a reduction in any penalty should be awarded to Respondents for their recent compliance with the law, that argument is rejected. It is expected, and required, that members of the regulated community comply with the law. Recent compliance amidst a backdrop of multiple violations spanning months of time does not justify a reduction in any penalty for the violative behavior that preceded it. Further, NOAA's Penalty Policy notes that "no downward adjustment will be made if the good faith efforts to comply primarily consist of coming into compliance" Penalty Policy at 12.

Consulting the Penalty Policy as non-binding guidance, my de novo review of this case leads me to conclude that the penalty proposed by the Agency is reasonable and consistent with the credible evidence presented. As discussed in detail above, the evidence supports an "intentional" level of culpability on the part of Respondents. The evidence presented is also consistent with the determination of a gravity offense Level of II with regard to Counts 1 and 3. Agency counsel noted that the Penalty Policy does not specifically characterize an offense level regarding Respondents' "disposal," but points to other analogous Level II offenses (such as interfering with or providing false statements to an authorized officer, or discarding fish and thereby preventing an observer from sampling them). Ag. Br. at 13; Penalty Policy at 33. Having reviewed the Penalty Policy, including Appendix 3, containing offense level guidance under the Act, and the facts of this case, I agree and I find it reasonable to assess a gravity offense Level II for Counts 1 and 3.¹⁷ Aside from the downward adjustment of \$1,500 for the cooperation of Gharst Senior in Count 2 (the prohibited use of Gulf reef fish as bait on March 11, 2019), the proposed penalty consists of the midpoint of the penalty range in the matrix box for each count of violation, which I find appropriate (perhaps even lenient, given the recurring nature of these violations). See Penalty Policy at 24.

After a careful and thorough examination of all the evidence in this case, I conclude that a monetary penalty of \$51,500 against Respondents, jointly and severally, is an appropriate penalty. As discussed above, the credible evidence establishes that Respondents' actions were

¹⁷ Counts 2 and 4, regarding the use of prohibited Gulf reef fish for bait, appear to be an example of a Level I offense under the Act in the Penalty Policy. See Penalty Policy at 30, App'x 3 ("Failing to comply with bait requirements").

intentional and recurring, demonstrating a persistent disregard for the federal laws to which they are bound and for the members of law enforcement tasked with administering those laws. Further, the evidence presented does not support Respondents' claims of an inability to pay the assessed penalty.

VI. DECISION AND ORDER

Respondents are liable for the charged violations in this case. A civil monetary penalty of \$51,500 is imposed for the charged violations. Once this Initial Decision becomes final under the provisions of 15 CFR § 904.271(d), Respondents will be contacted by NOAA with instructions as to how to pay the civil penalty imposed herein.

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



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

Dated: May 22, 2024
Washington, D.C.