



UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:)
)
)
Nicholas Morelli and)
David Kochis,)
)
 Respondents.)

**Docket Number: WC2204386,
F/V Alyssa Ann**

INITIAL DECISION AND ORDER

Date: July 31, 2024

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

Appearances: For the Agency:
Jennifer Clinchy, Enforcement Attorney
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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.

PROCEDURAL BACKGROUND

The National Oceanic and Atmospheric Administration (“NOAA” or “Agency”) initiated this proceeding when it issued a Notice of Violation and Assessment of Administrative Penalty (“NOVA”), dated June 30, 2023, to Nicholas Morelli and David Kochis (collectively, “Respondents,” or “Resp. Morelli” and “Resp. Kochis,” respectively). The NOVA charges Respondents with two counts of alleged violations of the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act,” “Act,” or “MSA”). In Count 1 of the NOVA, Resp. Kochis, as Captain, and Resp. Morelli, as deckhand, of the fishing vessel Alyssa Ann (“F/V Alyssa Ann,” “Alyssa Ann,” or “Vessel”) are charged, jointly and severally, with harassing a West Coast Groundfish Observer assigned to the F/V Alyssa Ann with conduct that has sexual connotations or creates an intimidating, hostile, or offensive environment, in violation of applicable law, on or about July 8, 2022, through July 9, 2022. In Count 2 of the NOVA, Resp. Kochis, as Captain of the Vessel, is charged with harassing a West Coast Groundfish Observer assigned to the F/V Alyssa Ann with conduct that has sexual connotations or creates an intimidating, hostile, or offensive environment, in violation of applicable law, on or about August 16, 2022. The applicable law cited for each count is 16 U.S.C. §§ 1857(1)(A) and (1)(L), and 50 C.F.R. §§ 660.12(e)(1) and (e)(4).

In response to the NOVA, Resp. Kochis timely requested a hearing on the alleged violations, and the matter was forwarded to this Tribunal for administrative adjudication.² By Order dated August 1, 2023, I was designated to preside over the litigation of this matter. On that same date, I issued a Prehearing Order to the parties, setting forth various prehearing filing deadlines and procedures, including deadlines for each party to file a Preliminary Statement and Initial Disclosures. Thereafter, the Agency timely filed both a Preliminary Statement and Initial Disclosures; Respondents, however, failed to do so. On November 6, 2023, I issued an Order to Respondents to Show Cause, in which I set a deadline for Respondents to explain their failure to file these documents and why an order adverse to their interests should not be issued. Resp. Kochis did not respond. On November 30, 2023, Resp. Morelli contacted the Docket Clerk for this Tribunal by email to provide an updated mailing address and to provide notice that he had limited access to a telephone, email, and the Internet.

On December 20, 2023, I issued an Order barring Resp. Kochis from presenting certain evidence at hearing and, given the updated information provided by Resp. Morelli on November 30, affording Resp. Morelli with another opportunity to explain his failure to comply in this proceeding.³ When Resp. Morelli did not respond, I issued an Order on January 31, 2024, barring Resp. Morelli from presenting certain evidence at hearing as well.

² The procedural rules governing this proceeding, set forth at 15 C.F.R. Part 904 (“Rules of Practice”), provide that “[a] hearing request by one joint and several respondent is considered a request by the other joint and several respondent(s).” 15 C.F.R. § 904.107(b).

³ See Order Barring Respondent Kochis from Presenting Certain Evidence at Hearing and Order to Respondent Morelli to Show Cause, dated December 20, 2023, and corrected on December 26, 2023, due to a typographical error.

Also on January 31, 2024, I issued an Order scheduling the evidentiary hearing in this matter to take place in Seattle, Washington, beginning on April 16, 2024 and continuing, as necessary, through April 17, 2024. Subsequently, on March 6, 2024, I issued a notice to the parties with the precise hearing location details after a courtroom was secured. The Order scheduling the hearing and notice of hearing location details were sent to the email and mailing addresses of record for Respondents and, on March 13, 2024, were mailed again to Resp. Kochis at two additional mailing addresses found for him in public records.

On April 16, 2024, I conducted the evidentiary hearing, as scheduled, in Seattle Washington. The Agency appeared for the hearing, but Respondents did not appear. Consequently, a default judgment was entered against Respondents in accordance with 15 C.F.R. § 904.211(a)(2). Nevertheless, testimony was taken from the available Agency witnesses for full development of the record, particularly with regard to penalty. To that end, the Agency presented the testimony of four witnesses: Karl Hellberg (“SA Hellberg”), a Special Agent in the Office of Law Enforcement with the National Marine Fisheries Services (“NMFS”) component of NOAA; [REDACTED] (“Ms. [REDACTED]”), a West Coast Ground Fish Observer at the time of the alleged violations; [REDACTED] (“Ms. [REDACTED]”), a West Coast Ground Fish Observer at the time of the alleged violations; and Jon McVeigh (“Mr. McVeigh”), a NOAA Fisheries Observer Program Manager. The Agency also introduced Agency Exhibits (“AX”) 1 and 2, which were admitted into evidence.

On May 10, 2024, the parties were provided with the official transcript of the evidentiary hearing,⁴ along with an Order Scheduling Post-Hearing Submissions that established various post-hearing filing deadlines. In accordance with these deadlines, the Agency timely filed a Motion to Conform Hearing Transcript to Testimony, which I granted by Order dated June 25, 2024. The Agency also timely filed its Post-Hearing Brief. Respondents did not file any submissions or otherwise communicate with this Tribunal.

PROVISIONS OF APPLICABLE LAW

Liability

Burden of Proof and Strict Liability

To prevail on its claims that Respondents violated the Act and implementing regulations, the Agency must prove facts supporting the alleged violations by a preponderance of reliable, probative, substantial, and credible evidence. *Tony Quoc Bui*, NOAA Docket No. SE1603549, 2019 NOAA LEXIS 9, at *13 (NOAA Mar. 25, 2019) (citing 5 U.S.C. § 556(d)); *Cuong Vo*, NOAA Docket No. SE010091FM, 2001 NOAA LEXIS 11, at *17 (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.

⁴ Citations to the transcript of this evidentiary hearing are made in the following format: “Tr. [page].”

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. *Id.* (citing *Fernandez*, 1999 NOAA LEXIS 9, at *8-9 (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. *Id.* (citing *Cuong Vo*, 2001 NOAA LEXIS 11, at *17 (citing *Paris*, 4 O.R.W. 1058 (NOAA 1987))).

The law is well-settled that violations of the Magnuson-Stevens Act are strict liability offenses and that an alleged violator's state of mind is irrelevant in determining whether a violation occurred. *See, e.g., 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 and that violations are thus considered strict liability offenses); *Cloud*, NOAA Docket No. AK1202525, 2017 NOAA LEXIS 7, at *12 n.4 (NOAA App. 2017) (same); *Accursio Alba*, NOAA Docket No. 914-027, 1982 NOAA LEXIS 29, at *7 (NOAA App. 1982) (same).

Magnuson-Stevens Act and West Coast Groundfish Fisheries

In 1976, Congress enacted the Magnuson-Stevens Act, 16 U.S.C. §§ 1801-1883, as amended, "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, by exercising sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish, within the exclusive economic zone." Pub. L. No. 94-265, § 2, 90 Stat. 331 (1976). To achieve this purpose, Congress empowered the Secretary of Commerce to assess a civil penalty against any person found to have committed an act prohibited by Section 307 of the statute. 16 U.S.C. § 1858(a). Section 307 provides, in pertinent part, that it is unlawful for "any person" to "violate any provision of this Act or any regulation or permit issued pursuant to this Act" or to "forcibly assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with any observer on a vessel under this Act, or any data collector employed by the National Marine Fisheries Service or under contract to any person to carry out responsibilities under this Act" 16 U.S.C. § 1857 (1)(A) and (L). A "person" is defined by the statute as "any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government." 16 U.S.C. § 1802(36). In turn, an "observer" is "any person required or authorized to be carried on a vessel for conservation and management purposes by regulations or permits under this Act." 16 U.S.C. § 1802(31).

The Act authorizes the Secretary of Commerce "to station observers aboard commercial fishing vessels to collect scientific data required for fishery and protected species conservation and management, to monitor incidental mortality and serious injury to marine mammals and to other species listed under the Endangered Species Act (ESA), and to monitor compliance with existing Federal regulations." Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries, Observer Health and Safety, 72 Fed. Reg. 61,815, 61,815 (Nov. 1, 2007).

Section 303 of the Act, under discretionary provisions pertaining to the content of fishery management plans, provides:

Any fishery management plan . . . with respect to any fishery may . . . require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery; except that such a vessel shall not be required to carry an observer on board if the facilities of the vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized

16 U.S.C. § 1853(b)(8).

The regulations set forth at 50 C.F.R. Part 660, Subparts C through G, implement the Pacific Coast Groundfish Fishery Management Plan (“PCGFMP”) and govern fishing vessels of the United States in the Exclusive Economic Zone off the coasts of Washington, Oregon, and California. 50 C.F.R. § 660.10(a). The regulations include provisions establishing an observer program for the fishery, *see* 50 C.F.R. § 660.16, with the term “observer” defined by reference to the general regulations implementing the Magnuson-Stevens Act, which define the term as “any person serving in the capacity of an observer employed by NMFS, either directly or under contract, or certified as a supplementary observer by NMFS.” 50 C.F.R. § 600.10.

Additionally, the regulations contain certain general prohibitions, making it unlawful for any person to “[f]orcibly assault, resist, oppose, impede, intimidate, harass, sexually harass, bribe or interfere with an observer” in the Groundfish observer program. 50 C.F.R. § 660.12(e)(1). Further, it is unlawful for any person to:

Harass an observer by conduct that: (i) Has sexual connotations, (ii) Has the purpose or effect of interfering with the observer’s work performance, and/or (iii) Otherwise creates an intimidating, hostile, or offensive environment. In determining whether conduct constitutes harassment, the totality of the circumstances, including the nature of the conduct and the context in which it occurred, will be considered. The determination of the legality of a particular action will be made from the facts on a case-by-case basis.

50 C.F.R. § 660.12(e)(4).⁵ To be considered harassment, the conduct in question must be both objectively and subjectively offensive, such that a reasonable person would find the

⁵ Notably, a definition of “harass” can also be found in the general regulations implementing the Magnuson-Stevens Act, which define the term as “unreasonably interfer[ing] with an individual’s work performance, or . . . engag[ing] in conduct that creates an intimidating, hostile, or offensive environment.” 50 C.F.R. § 600.10. However, this more restrictive definition (inasmuch as it requires *unreasonable* interference) is not the appropriate one to apply in this proceeding; rather, the appropriate definition is the one appearing in the

circumstances to be hostile or abusive and the alleged victim did, in fact, perceive the circumstances to be so. *See Cloud*, 2017 NOAA LEXIS, at *11 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-87 (1998)). Moreover, the appropriate standard to apply here is the “reasonable person similarly situated” standard, consistent with the prevailing law of the Ninth Circuit, which has rejected a general “reasonable person” standard in favor of focusing on the perspective of a reasonable person of the same sex as the alleged victim in the case at hand. *See id.* at *12 (citing *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991)).

Failure to Appear

The Rules of Practice provide that if, after proper service of notice, respondents fail to appear for a hearing, the Judge is authorized to “find the facts as alleged in the NOVA . . . and enter a default judgment against the respondents.” 15 C.F.R. 904.211(a)(2) (Failure to Appear).

Penalty

The Act provides that any person is found to have violated 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 Rules of Practice provide, in pertinent part:

regulations more specific to the West Coast Groundfish Fisheries at 50 C.F.R. § 660.12(e) (quoted above). *See Cloud*, NOAA Docket No. AK1202525, 2017 NOAA LEXIS 7, at *20 n.6 (NOAA App. 2017).

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).

Additionally, I took 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").⁶ which is publicly available on the Internet at <https://www.noaa.gov/sites/default/files/2023-06/Penalty-Policy-FINAL-June24-2019.pdf>.

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.⁷ *Id.* 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); and 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

⁶ Pursuant to the Prehearing Order dated August 1, 2023, the Agency advised that it utilized its Penalty Policy in its assessment of the proposed penalty in this case, and it provided a link to that Penalty Policy. Agency's Initial Disclosures at 6. I have taken official notice of that Penalty Policy as provided in the Prehearing Order.

⁷ 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.

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 “such other matters as justice may require,” including the conduct of an alleged violator after a violation occurs, such as cooperation with investigators in any ongoing investigation. 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. *Id.* (citing 15 C.F.R. § 904.108(c)-(e).)

There is no presumption in favor of the penalty proposed by the Agency, and an Administrative Law Judge (“ALJ”) is not “required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document.” *Tommy Nguyen*, NOAA Docket No. SE0801361FM, 2012 NOAA LEXIS 2, at *21 (NOAA Jan. 18, 2012); *see also* 15 C.F.R. § 904.204(m). The ALJ must independently determine an appropriate penalty “taking into account all of the factors required by applicable law.” 15 C.F.R. § 904.204(m); *see also* 15 C.F.R. § 904.108 (enumerating factors to be taken into account in assessing a penalty).

FACTUAL SUMMARY⁸

Resp. Kochis has fished commercially for 17 years, previously working as a deckhand on several commercial groundfish and crab vessels along the west coast and off the coast of Alaska before taking on the role of Captain aboard the *Alyssa Ann*. AX 1 at 4. Resp. Morelli has over 15 years of experience as a commercial fisherman, fishing for groundfish, crab, and salmon in or around Alaska. AX 1 at 6. At the time of the incidents in this case, Resp. Kochis was the Captain and Resp. Morelli was the deckhand of the *Alyssa Ann*. AX 1 at 5-6, 10-11. The Vessel is considered “small,” measuring 43.9 feet in length, and is without a bathroom or “head” on board, so crewmembers “must use a bucket out on the back of the deck” as a toilet. Tr. 44, 71, 80, 116; AX 1 at 13, 36.

⁸ As noted above, Respondents failed to appear for the scheduled hearing in this matter and a default judgment was entered against them pursuant to the Rules of Practice found at 15 C.F.R. § 904.211(a)(2). Tr. 5-10. Accordingly, I have found the facts as alleged in the NOVA dated June 30, 2023, and they are incorporated by reference here.

On July 8-9, 2022, Ms. [REDACTED], a West Coast Groundfish Observer at that time, was assigned to the F/V Alyssa Ann to perform Observer duties throughout the two-day fishing trip. Tr. 41; AX 1 at 20-22. This was Ms. [REDACTED]'s second trip as an Observer aboard the Alyssa Ann, the first occurring just a few days earlier and concluding without issue, apart from a great deal of personal drama between Respondents and their respective girlfriends. Tr. 41-43; AX 1 at 6, 21. Ms. [REDACTED] described the Vessel as "tiny" in size with no available area for privacy if one needed to change clothing or go to the bathroom. Tr. 44-45. The only individuals aboard the Alyssa Ann for this trip were Ms. [REDACTED] and Respondents. Tr. 43-44. Throughout the trip, there was no land in sight and Ms. [REDACTED]'s cellular coverage was largely non-existent. Tr. 47.

Ms. [REDACTED] described Respondents' behavior as "too comfortable" in that they incessantly asked her a lot of personal questions, including whether she liked "to do drugs and party." Tr. 48; AX 1 at 22. On another occasion, she acquiesced to answering a phone call for Resp. Kochis from his girlfriend when he was in the middle of "pulling up a set" of fishing gear. Tr. 50. Resp. Kochis' girlfriend sounded irritated and upset during the call. Tr. 50-51. Resp. Kochis explained that her behavior was due to him telling her that Ms. [REDACTED] wore only "a bikini and . . . bibs" while performing her sampling duties during their first trip. Tr. 51. In actuality, Ms. [REDACTED] wore a sweatshirt and sweatpants. Tr. 51.

For his part, Resp. Morelli shared with Ms. [REDACTED] that his friend "liked to beat his girlfriend" to keep her in line, and he shared his thoughts that his own girlfriend might leave him if he cheated on her with another woman, a belief he repeatedly stated to Ms. [REDACTED] over a 15-minute period, while expressing, as he looked directly at her, that "maybe [he] should just fuck the next girl [he sees] as soon as [they] get out of here." Tr. 51-52, 54-56. Ms. [REDACTED] perceived this behavior as an attempt by Resp. Morelli to have intimate relations with her. Tr. 55.

Additionally, from the beginning of the trip, Respondents used racial slurs, specifically using the word "nigger," when referring to other boaters and fish. Tr. 56; AX 1 at 22. Despite Ms. [REDACTED]'s objections and Respondents' apology for making her feel uncomfortable, they continued to use the same racial slur "constantly" throughout the duration of the trip, at times looking directly at Ms. [REDACTED] when the slur was used. *Id.* I noted during the hearing that Ms. [REDACTED] was dark-complected, and Ms. [REDACTED] testified that her ethnicity is Mexican. Tr. 68-69. Ms. [REDACTED] found Respondents' behavior in this regard, personally as well as generally, offensive. Tr. 69.

As the trip neared its end, Respondents invited Ms. [REDACTED] to go out with them "for drinks" and expressed an interest in developing a friendship with her, but the invitation was withdrawn when Ms. [REDACTED] insisted that she include her boyfriend. Tr. 56-58; AX 1 at 22.

Ms. [REDACTED] documented these events in her logbook, which she would fill out on a daily basis and submit to NOAA on a monthly basis. Tr. 39-41; AX 1 at 19-22. All of this behavior by Respondents made Ms. [REDACTED] feel very uncomfortable, unsafe, and anxious. Tr. 51-52, 64-65.

In her words, “I was in a constant state of upset.” Tr. 70. She perceived Respondents as “very pushy” and felt she had to stay on guard throughout the trip to protect herself. Tr. 65. Consequently, she did not sleep much throughout the trip. Tr. 65.

At the conclusion of the trip and after she disembarked from the Vessel, Ms. ██████ notified her safety coordinator of the events that had transpired. Tr. 63. In response to an inquiry from her safety coordinator about the safety of women on the Alyssa Ann in the future, Ms. ██████ stated that “people of color or women shouldn’t be on this vessel.” Tr. 63. On July 15, 2022, almost a week after the trip concluded, Ms. ██████ received a text message from Resp. Kochis at nearly midnight asking how she was doing. AX 1 at 5, 22.

Ms. ██████ completed one more Observer trip aboard another vessel but ultimately decided against future work as an Observer following the events that took place on the Alyssa Ann. Tr. 62. She did not want to risk putting herself “in uncomfortable situations or scenarios with creepy men,” all while being stuck on a vessel with them for several days. Tr. 63.

On August 15-16, 2022, Ms. ██████, a West Coast Ground Fish Observer at that time, was deployed to work aboard the F/V Alyssa Ann as an Observer. Tr. 76. The only individuals aboard the Alyssa Ann for this trip were Ms. ██████ and Respondents. Tr. 77. Throughout the trip, no land was in sight and no cell phone signal was available.⁹ Tr. 84. There were no spaces aboard the Vessel to allow privacy to change clothes or use the bathroom. Tr. 80; AX 1 at 27, 29. In fact, Ms. ██████ purchased a bucket to use as a toilet and was directed to an area “underneath the electronic monitoring camera on the back deck” of the Vessel when she needed to use the bucket. Id. Ms. ██████ used the galley area to sleep because she was not comfortable sleeping in the state room with either of Respondents. Tr. 80-81.

From the outset, Ms. ██████ did not get “a good feeling” from Respondents, and found they were not as professional as crew from other vessels, so she chose to keep her distance from them as much as possible. Tr. 81. In one example, Resp. Morelli “exclaimed . . . you’re married” and “seemed a little upset by it,” which Ms. ██████ perceived as both crude and unprofessional. Tr. 81. In another example, as Ms. ██████ was preparing to disembark from the trip, she asked Resp. Morelli to pass her the survival suit¹⁰ she brought aboard, which generated a comment by Resp. Kochis to “be careful, Nick [Resp. Morelli] might want to sniff your suit.” Tr. 82; AX 1 at 28. While this remark made Ms. ██████

⁹ While Observers are equipped with Garmin devices that connect to the Observer’s phone and can create a satellite signal to potentially contact another individual or the U.S. Coast Guard in an emergency, any “rescue” could take “several hours.” Tr. 84.

¹⁰ A survival suit is required gear when aboard a commercial fishing vessel. It is a hooded suit that one steps into and zips up. It covers the entire body, keeps the person afloat in the water should the vessel sink, and reduces the risk of hypothermia. Tr. 26. Observers routinely use their survival suits for training and practice purposes, and the suits are very warm, to prevent hypothermia, so “you get very sweaty” in the suits during these training and practice exercises. Tr. 91.

uncomfortable, as it presumably referred to any scent or odor she left in her survival suit from sweating while wearing it, she did not wish to engage or respond and chose to “laugh off” the comment. Tr. 82, 91-92; AX 1 at 29. Next, [REDACTED] was preparing to offload the bucket she had used as a toilet when Resp. Kochis offered to keep it and make use for it on the Vessel. Tr. 83; AX 1 at 29. Ms. [REDACTED] agreed to let him keep it, to which Resp. Kochis responded that “Nick [Resp. Morelli] will probably want to sniff this too, but that’s okay, I just won’t tell him you peed in it.” Tr. 83; AX 1 at 29. Again, this comment made Ms. [REDACTED] feel “very uncomfortable,” but she chose not to respond as she was already disembarking from the Vessel and she did not wish to create any conflict. Tr. 83; AX 1 at 29. Ms. [REDACTED] recorded these experiences in the logbook that she kept throughout the trip and that was submitted to NOAA within one month of the trip. Tr. 79-80; AX 1 at 27-29. In her notes from the trip, Ms. [REDACTED] stated that she would not recommend this Vessel for female observers. Tr. 86; AX 1 at 29. She offered this recommendation because she did not believe the working environment aboard the Alyssa Ann was “safe or appropriate for female observers” after her experience on this trip and the comments made by Respondents, which she found to be offensive and embarrassing. Tr. 86, 88.

Ms. [REDACTED]’s experience aboard the Alyssa Ann impacted her work as an Observer because she felt distracted from her duties in order to pay attention to what Respondents were doing at any given time. Tr. 87. Her sleep was also impacted, as she chose “to rest on the galley bench” rather than sleep in the “bed area” because of her discomfort around Respondents. Tr. 87. These events led to feelings of anxiety and were “the final straw” for Ms. [REDACTED], such that she chose to leave her position as an Observer shortly thereafter and abandon her focus in marine biology. Tr. 86, 88-89.

NOAA’s Office of Law Enforcement received incident reports from the West Coast Ground Fish Observer Program regarding the treatment of Ms. [REDACTED] and Ms. [REDACTED] while aboard the Alyssa Ann. Tr. 21; AX 1 at 4-17. Consequently, SA Hellberg conducted an investigation and interviewed Ms. [REDACTED] and Ms. [REDACTED], as well as Respondents. Tr. 22-23, 25, 27, 28; AX 1 at 5-8, 12-14. He documented his findings in his investigative reports dated September 23, 2022, and December 16, 2022. AX 1 at 4-17. Ms. [REDACTED] and Ms. [REDACTED] recounted to SA Hellberg the events that took place during their respective trips aboard the Alyssa Ann, and their accounts were consistent with the information they recorded in their logbook entries. Tr. 23-26.

In his interview, Resp. Morelli remembered Ms. [REDACTED], describing her as “the dark skinned girl from Texas.” AX 1 at 16. He stated that when he asked Ms. [REDACTED] about smoking marijuana, he was making general conversation, not inviting her to smoke with him. *Id.* He explained that he enjoys smoking marijuana but does so at home, not on the boat. *Id.* He acknowledged that Resp. Kochis often “pushes the line” with his comments and jokes but maintained that Resp. Kochis does not mean to cause any harm by them. Tr. 27-28, AX 1 at 16.

In his interview, Resp. Kochis acknowledged asking Ms. [REDACTED] to go out for a beer at the conclusion of their second trip together but asserted that the invitation was one of friendship

and nothing more. Tr. 29-30; AX 1 at 14. He also acknowledged use of the word “nigger” in the context of referring to sea urchins as “nigger nuts” and claimed that it is “a common nickname used in the commercial fishing industry for sea urchins.” AX 1 at 13-14. Notably, Mr. McVeigh, an Agency witness who had previously worked as an Observer for about four years in or around the same fishing sector as the Alyssa Ann, testified that he has never heard of that nickname. Tr. 97, 117-18. He went on, “Fishermen often have colorful names for things, but I’ve never heard that one, I think. Most fishermen I’ve ever worked with wouldn’t use the N word.” Tr. 118. Resp. Kochis admitted to making comments to Ms. [REDACTED] about Resp. Morelli “sniffing her survival suit and pee bucket” but stated that he did not intend to be offensive or cause hurt feelings with his “bad jokes.” Tr. 30-31; AX 1 at 14. In his interview, he apologized for his behavior, and according to SA Hellberg, Resp. Kochis appeared to be very embarrassed by it. Tr. 31; AX 1 at 14.

Mr. McVeigh, a NOAA Fisheries Observer Program Manager, provided background as to the importance of the program and the data collected by Observers in their work aboard fishing vessels. He explained that the data Observers collect, referred to as “fishery dependent information,” has many important uses. Tr. 98. It is used as a data source for stock assessments, which estimates the abundance of fish stocks. *Id.* That information is then used in fish management processes to “set harvest quotas, and seasons, and closures.” *Id.* The data collected by Observers is also used by the regional fishery council, a “policy body” that makes recommendations for the fishery, and for research purposes. Tr. 98-99. He also explained that “the numbers, the estimates, the biological samples that observers collect are used in so many different ways that they are really highly scrutinized.” Tr. 99-100. For this reason and for assurance in the reliability of the data, there is a “rigorous quality control process” in place and Observers undergo rigorous training. Tr. 100-01. In fact, NOAA invests significant resources into recruiting, hiring, and training observers. Tr. 112. Because of this significant investment, and the fact that certain fisheries, like the one at issue here, requires “100 percent observer coverage” (meaning that a vessel may not be released from the requirement to carry an Observer during a fishing trip even if an Observer is not available), the retention of Observers is a “high priority” for NOAA. Tr. 112-14.

In addition to technical training in areas of marine safety, sampling techniques, and fish identification, Observers also receive training in conflict resolution to, for example, learn tools to deescalate potentially heated situations while on board a vessel. Tr. 101-03. Mr. McVeigh affirmed the importance for Observers to establish and maintain a rapport with the crew in order to perform their work efficiently and effectively. Tr. 105. Nevertheless, he noted that the various comments made to Ms. [REDACTED] regarding her personal life, as well as the “late night communication,” are not typical. Tr. 108. Likewise, regarding Ms. [REDACTED]’s experience aboard the Alyssa Ann, he found “the very personal and inappropriate nature of the comments regarding the bucket and the immersion suit . . . to be offensive, and frankly gross.” Tr. 110. In his view, the West Coast Fishing Fleet consists of “very passionate community members” who are also “very hard working” and “very professional,” and he added that “this behavior is not anything I would call common.” Tr. 111.

ANALYSIS OF LIABILITY

Argument Regarding Liability

In its Post-Hearing Brief (“Ag. Br.”), the Agency asserts that liability for the charged violations was established at the evidentiary hearing on April 16, 2024, in Seattle, Washington. Ag. Br. at 2, 13. The Agency maintains that by virtue of Respondents’ default, the facts as alleged in the NOVA may be deemed to be true, and that those facts alone establish that Respondents committed the charged violations. Ag. Br. at 13. However, as additional support for a finding of liability, the Agency cites to evidence adduced at hearing that, it argues, “clearly demonstrates that Respondents did violate the MSA and regulations promulgated thereafter.” *Id.*

At the outset, the Agency asserts that, under the Act, “[c]onduct towards an observer is harassment if, among other things, it (1) has sexual connotations; or (2) otherwise creates an intimidating, hostile, or offensive environment. Each of these factors separately constitute harassment.” Ag. Br. at 13 (citing *Kim*, 2003 NOAA LEXIS 20, at *11 (Nov. 6, 2003)).

The Agency notes that while the term “sexual connotations” is not defined in the Act or its implementing regulations, case law informs that “[t]he analysis to determine whether conduct had sexual connotations involves both objective and subjective components.” Ag. Br. at 13-14 (citing *Cloud*, 2017 WL 10845065, at *7 (NOAA App. 2017)). With regard to the objective component, “the applicable lens is that of a ‘reasonable victim of the same sex as [the observer],’” and “[f]or the subjective test, the victim must in fact perceive the conduct to be offensive.” Ag. Br. at 14-15 (citing *Cloud*, 2017 WL 10845065, at *5, 6).

As for the terms “intimidating” and “offensive,” the Agency notes that those terms are also not defined in the Act or its implementing regulations; however, the Agency observes, “previous NOAA cases have looked to the terms’ common meanings, finding that the common legal definition of ‘intimidation’ is ‘unlawful coercion; extortion, duress, putting in fear,’ and ‘offensive’ is ‘[c]ausing displeasure, anger, or resentment; esp. repugnant to the prevailing sense of what is decent or moral.’” Ag. Br. at 15-16 (quoting *Cloud*, 2017 WL 10845065, at *8 (citing Black’s Law Dictionary; *Bah*, 2022 NOAA LEXIS 1, at *89 (NOAA Mar. 7, 2022))). Further, the Agency asserts, a “[h]ostile work environment may arise from ‘purely psychological aspects of the workplace environment’ that serve to substantially affect the terms and conditions of a victim’s employment.” *Id.* (quoting *Cloud*, 2017 WL 10845065, at *8 (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986))).

Drawing from past cases in which, for example, comments made by crew members about an Observer’s body or appearance were found to have sexual connotations, the Agency argues that “a reasonable female observer similarly situated would have found Kochis’s and Morelli’s comments towards ██████ to have had sexual connotations.” Ag. Br. at 14-15 (citing *United States v. Cusick*, 2012 U.S. Dist. LEXIS 15907, at *11–12 (D. Mass. Feb. 9, 2012) (criminal

action for violation of 16 U.S.C. § 1857(1)(L)); *Bah*, 2022 NOAA LEXIS 1, at *87; *Cloud*, 2017 WL 10845065, at *7). The Agency highlights, in particular, “Kochis mentioning to his girlfriend that [REDACTED] was working on deck in only a bikini and bibs and later telling [REDACTED] of this comment,” “Kochis and Morelli inviting [REDACTED] out for drinks, but later retracting their invitation when she mentioned inviting her boyfriend,” “Kochis and Morelli repeatedly asking Anaya whether she liked to do drugs and party,” and “Morelli repeatedly making comments about cheating on his girlfriend with the next woman he saw, while making eye contact with [REDACTED].” Ag. Br. at 14-15 (citing Tr. 48, 51, 54-58). The Agency then asserts that “[REDACTED] subjectively perceived that Kochis’s and Morelli’s comments had sexual connotations,” recounting her testimony that she believed “Morelli was ‘trying to sleep with [her]’ when he made the comments regarding cheating on his girlfriend with the next woman he saw” and that “she interpreted his ‘direct eye contact, and how insistent he was with it’ as having sexual connotations.” Ag. Br. at 15 (quoting Tr. 55). She also stated to SA Hellberg that “she felt that Kochis’s and Morelli’s repeated questions asking her whether she liked to party hinted at ‘drug use and having sex.’” *Id.* (quoting AX 1 at 7).

Additionally, the Agency argues that Respondents’ “conduct towards [REDACTED] also created an intimidating, hostile, or offensive environment.” Ag. Br. at 15. Noting that “the totality of the circumstances, including the nature of the conduct and the context in which it occurred,” should be considered in determining whether conduct constitutes harassment, the Agency highlights the following facts: “[REDACTED] was far out at sea, with no sight of land and no consistent cell phone signal, on a ‘tiny’ fishing vessel with two men”; “[s]he was the only female on board the vessel, and she knew that if she were to request an emergency evacuation, such an evacuation could take several hours”; and the vessel was so small and lacking in privacy that she was unable to remove herself even temporarily to a private stateroom where she could have gotten respite from the situation. Ag. Br. at 17 (citing Tr. 43-47, 60, 70-71). In this context, the Agency asserts, “Kochis and Morelli made several comments to [REDACTED] that a reasonable female observer in a similar situation would perceive as intimidating, hostile, and/or offensive.” Ag. Br. at 17. The Agency points out, in particular, “Morelli commenting that he should ‘fuck the next girl [he] see[s],’ while maintaining eye contact with [REDACTED],” “Morelli telling [REDACTED] about his friend that ‘beat the shit out of [his girlfriend]’ to keep her in line,” “Kochis’s comments about [REDACTED] working in only a bikini and bibs,” “Kochis’s and Morelli’s repeated comments about partying and doing drugs,” and “Kochis’s and Morelli’s repeated use of racial slurs when [REDACTED] was a woman of color.” Ag. Br. 17-18 (citing 48, 51-52, 54, 56, 68-69). The Agency then asserts that “[s]ubjectively, [REDACTED] perceived Kochis’s and Morelli’s comments as intimidating, hostile, and/or offensive conduct,” with their conduct making her feel “uncomfortable, anxious, offended, and unsafe” and causing her sleep to suffer. Ag. Br. at 18 (citing Tr. 51-52, 63-65).

With regard to Ms. [REDACTED]’s treatment while aboard the *Alyssa Ann*, the Agency argues that Resp. Kochis’s conduct towards her also “had sexual connotations” and “otherwise created an intimidating, hostile, or offensive environment.” Ag. Br. at 18. Pointing to “when [REDACTED] asked Morelli to pass her survival suit” and “Kochis commented ‘be careful, [Morelli] is notorious for sniffing survival suits,’” and “when asked to pass her bucket, which she had used

as a bathroom, Kochis stated “[Morelli] is notorious for sniffing buckets too, but don’t worry, I just won’t tell him you peed in it,” the Agency argues that “[a] reasonable female observer similarly situated to ██████ would perceive Kochis’s comments as having sexual connotations.” Ag. Br. at 19 (citing AX 1 at 28; Tr. 82, 91). Further, the Agency asserts, “█████ subjectively felt that Kochis’s comments had sexual connotations,” noting that “[s]urvival suits are a piece of personal protective gear issued to observers” that provide flotation in the water, protect against hypothermia, and must be utilized regularly every few months for practice and training, which “█████ believed that Kochis could have deduced” given that fishermen are also encouraged to practice donning their own survival suits. *Id.* Thus, “█████ understood Kochis’s comment about Morelli wanting to sniff her suit as well as her bucket to mean that they wanted to ‘get [her] scent.’” *Id.* (quoting Tr. 91). The Agency also highlights Ms. ██████’s logbook notations characterizing these comments as “sexual harassment” and remarking that “she ‘would not recommend this vessel for female observers.’” Ag. Br. at 20-21 (quoting AX 1 at 28, 29; Tr. 86).

As for Resp. Kochis’s conduct creating an intimidating, hostile, and/or offensive environment, the Agency argues that, considering the totality of the circumstances, a reasonable female observer similarly situated to Ms. ██████ would have perceived his comments as such. Ag. Br. at 20. For support, the Agency highlights certain facts, including that “█████ was the only woman on board a small fishing vessel with an all male crew”; “█████ depended on the crew for her safety and food”; while fishing was underway, “█████ did not have sight of land or any cell phone connection” and “she knew that any evacuation from the vessel could take several hours”; and the Alyssa Ann lacks privacy or a bathroom, requiring Ms. ██████ to bring a bucket on board to use as a toilet. Ag. Br. at 20 (citing Tr. 77, 80-81, 83-85). The Agency then argues that “[s]ubjectively, ██████ perceived Kochis’s comments as creating an intimidating, hostile, and/or offensive environment,” with the comments making Ms. ██████ feel “uncomfortable, anxious, and offended.” Ag. Br. at 21 (citing Tr. 82-83, 87-88). The Agency makes the point that this experience aboard the Alyssa Ann was the “final straw” that led Ms. ██████ to leave “the observer program and the marine biology field entirely, although she had pursued that field with her education.” *Id.* (citing Tr. 86, 88-89).

Discussion of Liability

As outlined earlier in this decision, Respondents failed to appear for the scheduled hearing in this matter despite proper service of notice of the hearing. Tr. 5-10. In accordance with 15 C.F.R. § 904.211(a)(2), a default judgment was consequently entered against Respondents, and I have found the facts alleged in the NOVA to be true. Tr. 10, AX 2 at 1-5.

Moreover, at the hearing, the Agency proceeded to present testimonial and documentary evidence through witnesses and admitted exhibits for full development of the record. Thus, in addition to the facts found by virtue of the entered default judgment, the evidentiary record in this matter is replete with undisputed evidence that supports a determination of liability. Given the default judgment, I need not recount with particularity this

ample support for concluding that Respondents' conduct amounted to harassment, as defined by applicable law and legal precedent. But suffice to say that the Agency has met its burden of proof to establish liability for the violations set out in the NOVA, namely, that as charged in Count 1, Resp. Kochis, as Captain, and Resp. Morelli, as deckhand, of the Alyssa Ann are jointly and severally liable for violating the Act and applicable regulations by harassing an assigned West Coast Groundfish Observer with conduct that has sexual connotations or creates an intimidating, hostile, or offensive environment on or about July 8, 2022, through July 9, 2022, and that as charged in Count 2, Resp. Kochis, as Captain of the Alyssa Ann, is liable for violating the Act and applicable regulations by harassing an assigned West Coast Groundfish Observer with conduct that has sexual connotations or creates an intimidating, hostile, or offensive environment on or about August 16, 2022. It is concluded, therefore, that Respondents are liable for the charged violations in the NOVA dated June 30, 2023.

ANALYSIS OF PENALTY

Argument Regarding Penalty

As to the penalty assessment, the Agency urges that I assess a penalty "that is sufficient to punish Kochis's and Morelli's wrongful conduct given its nature, circumstances, extent, and gravity, as well as their culpability; that achieves specific and general deterrence; and that considers such other factors as justice may require." Ag. Br. at 21-22 (citing 16 U.S.C. § 1858(a); 15 C.F.R. §§ 904.108(a), 904.204(m)). The Agency particularly emphasizes the importance of deterrence, maintaining that I "should send Respondents, and others, a strong deterrence message to ensure that observers can work in a safe and harassment-free environment." Ag. Br. at 22.

Addressing the "nature, extent, and gravity of the violations," the Agency emphasizes the significance of the data collected by Observers and the crucial role of that data in fisheries management. Ag. Br. at 22. For example, such data contributes to policy recommendations for fisheries management, stock assessments, and the establishment of seasons and closures for various fish stock. *Id.* (citing Tr. 98-99). The Agency asserts that "[i]t is extremely important that observers are able to do their work unimpeded and unbiased so as to ensure the highest quality data for fisheries management," which ultimately results in "sustainable fisheries and fishing opportunities for coastal communities." *Id.* (citing Tr. 99-100). The Agency also makes the point that it utilizes "significant resources in recruiting, hiring, and training observers" and that because of that investment, the retention of Observers, particularly those with more experience, is a high priority. Ag. Br. at 23 (citing Tr. 112). Further, compromises to retention efforts that lead to a shortage of Observers can, in turn, "result in wide-ranging impacts on the fisheries program, including keeping fishing vessels in port if there are insufficient observers available to meet the demand by fishing vessels that are required to carry them." *Id.* (citing Tr. 113).

The Agency urges that sexual harassment of Observers, by its nature, “is a serious matter” and something that Congress specifically sought to prevent in enacting the Magnuson-Stevens Act. Ag. Br. at 23 (citing 16 U.S.C. §§ 1857(1)(L), 1858(a), 1859(a)(1)). The Agency reiterates that both Ms. [REDACTED] and Ms. [REDACTED] were negatively impacted by Respondents’ conduct inasmuch as they felt “anxious, uncomfortable, upset, and offended” and their lingering discomfort prompted them to leave their careers. Ag. Br. at 23-24 (citing Tr. 51-52, 62-65, 69-70, 82-83, 86-89). Additionally, the Agency argues that “[i]n his role as captain, Kochis . . . sexually harassed, or allowed his crewmember to sexually harass, both of the female observers he had worked with,” such that their actions “were not simply a one-time lapse in judgment.” Ag. Br. at 24.

Regarding Respondents’ degree of culpability in this case, the Agency argues that they were “at least negligent.” Ag. Br. at 24. Noting their experience in commercial fishing, with both men having “been fishing for years and in various fisheries,” *id.* (citing AX 1 at 13, 15), the Agency asserts that “[t]he duty to know and follow the law is squarely on Respondents, as commercial fishermen,” *id.* (citing *Daniels*, 2014 NOAA LEXIS 7, at *64 (NOAA Oct. 24, 2014)). Their “failure to follow the law or even recognize when a violation has occurred can be characterized as a failure to exercise the degree of care that a reasonably prudent person would exercise, as well as a disregard of the consequences that may result from their actions.” Ag. Br. at 24-25.

The Agency points out that Respondents did not raise “an ability to pay defense” or otherwise supply “verifiable financial information,” eliminating the need to further consider this factor. Ag. Br. at 25 (citing 15 C.F.R. § 904.108(c), (e); Prehearing Order (Aug. 1, 2023), at 4; *Rojas, Jr.*, 2003 NOAA LEXIS 2, at *17 (NOAA Jan. 24, 2003)). Additionally, the Agency asserts that it is “not aware of any prior violations assessed against either Respondent. Therefore, this factor should not affect the Court’s penalty assessment.” Ag. Br. at 25 (citing *Iakovou*, 2019 NOAA LEXIS 2, at *63 (NOAA July 24, 2019)).

Lastly, with regard to “such other matters as justice may require,” the Agency urges that “[s]exual harassment aboard fishing vessels is an important and considerable problem” and that deterrence “is critically important.” Ag. Br. at 25. The Agency maintains that “[a] significant penalty in this case will send a strong and clear message that such conduct will not be tolerated and will be met with serious consequences. A meaningful penalty is also important to demonstrate as much to observers so that they continue to report harassment when it occurs.” *Id.*

Discussion of Penalty

The Agency makes many persuasive arguments. Beginning with “the nature, circumstances, extent, and gravity of the prohibited acts committed,” the evidentiary record developed in this case establishes the significant role of Observers and the data they collect in fishery management. The Agency’s arguments in this regard are well supported by the testimony of Mr. McVeigh, who explained the value of the “fishery dependent information”

that Observers collect during their deployments. In particular, he explained the uses of that data in fishery management to include the establishment of harvest quotas, seasons, and closures of a fishery. Additionally, the data is utilized by policy makers to make fishery recommendations as well as for research purposes. Thus, the potential harm to the regulatory scheme or program is great when there are compromises to the Observer program and to the collection of such vital data. While it does not appear from the record before me that Respondents' conduct affected the abilities of Ms. [REDACTED] and Ms. [REDACTED] to fulfill their data collection duties on the F/V Alyssa Ann, such that no actual harm to the integrity of the data collection occurred, the potential for a different outcome existed. And although the integrity of the data collection may not have been compromised on these particular trips, damage to the Observer program overall was in fact realized. The evidence presented through the testimony of Ms. [REDACTED] and Ms. [REDACTED] establishes that they chose to leave their careers as Observers due to Respondents' conduct toward them during their deployments. As Ms. [REDACTED] expressed, the events aboard the Alyssa Ann were "the final straw." While Ms. [REDACTED] completed a subsequent deployment, she too decided to end her Observer career because of Respondents' treatment, stating that she did not want to risk being in "uncomfortable situations or scenarios with creepy men" on a vessel for several days. In addition to these personally adverse impacts from Respondents' conduct, the Agency also suffered negative impacts when it lost two experienced Observers. As Mr. McVeigh testified, the Agency commits significant resources to the recruitment and training of Observers for its program, and the retention of Observers is a high priority, not only due to the Agency's investment in personnel but also because certain fisheries, like the one at issue in this case, require "100 percent observer coverage," such that a vessel may not be released from the requirement to carry an Observer during a fishing trip even if one is not available to deploy.

Considering all of these points, I agree with the Agency's arguments concerning "the nature, circumstances, extent, and gravity" of Respondents' prohibited conduct and that a commensurate penalty be assessed for their violations. To that end, I have examined the Agency's Penalty Policy as guidance with regard to the offense level that corresponds to Respondents' prohibited conduct. Under that Penalty Policy, harassing or intimidating any NMFS-approved observer may be a Gravity Level II or Gravity Level III offense. Penalty Policy at 33-34. The Penalty Policy describes each level as follows: a Level II offense is where the harassment or intimidation caused minimal interference with the observer's work and there was no economic gain from the violation; and a Level III offense is where the harassment or intimidation caused significant interference with the observer's work or there was some economic gain from the violation. Penalty Policy at 33 n.31.

The evidence in this case does not suggest that Respondents' conduct caused significant interference with the performance of Ms. [REDACTED] and Ms. [REDACTED]'s work or data collection. While I recognize that Respondents' conduct, serious as it was, caused intimidation, offense, discomfort, and anxiety, it appears that despite such conditions, both Observers were able to complete their job functions throughout their deployments. Further, the record does not indicate that Respondents benefited economically from their prohibited conduct. Thus, the gravity of the violations appears to be Level II offenses.

Next, I turn to the factor of Respondents' degree of culpability. As the Agency points out, Respondents each had many years of experience within the commercial fishing industry and had a duty to know and follow the law. SA Hellberg's investigative report reveals that this was the first time that Resp. Kochis was "running a commercial fishing vessel in the role of Captain." AX 1 at 13. Nevertheless, the Agency argues, Resp. Kochis, in his role as Captain of the Alyssa Ann, "sexually harassed, or allowed his crewmember to sexually harass," Ms. [REDACTED] and Ms. [REDACTED] during their deployments aboard the vessel. This is a noteworthy point. In his role as Captain, Resp. Kochis held a higher duty of care and responsibility over the vessel in his charge, a duty that included the safety of those on board. In this regard he failed. He not only allowed harassment to take place under his watch by his only crew member, Resp. Morelli, but he participated in that harassment directly. I agree with the Agency that harassment is a serious matter, made worse here by the Captain's own participation in the violative conduct.

Consulting the Agency's Penalty Policy for guidance, it describes "four levels of increasing culpability" as follows: 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. The term "negligence" is described as "the failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances," and the Penalty Policy further explains that "negligence denotes a lack of diligence, a disregard of the consequences likely to result from one's actions, or carelessness." Penalty Policy at 9.

The Agency argues that Respondents' level of culpability was "at least negligent," and I tend to agree. In SA Hellberg's investigative report that documented his interviews with Respondents, confirmed by his testimony at hearing, he recounts that Resp. Kochis was apologetic for his conduct and that his demeanor reflected embarrassment. Tr. 31; AX 1 at 14. Resp. Morelli, apart from denying that he invited Ms. [REDACTED] to smoke marijuana with him and asserting that he declined to drink beers with Ms. [REDACTED] because he thought it unprofessional, acknowledged that while Resp Kochis "border line pushed it with his joking comments . . . he does not mean any harm by it." Tr. 27-28; AX 1 at 16. Thus, from these facts and circumstances, it appears that, while Respondents possessed control over their actions and conduct, they "failed to exercise the degree of care that a reasonably prudent person would exercise in like circumstances," and from such carelessness they exhibited a disregard for the consequences of their prohibited actions and conduct. Penalty Policy at 9. Accordingly, Respondents' level of culpability was negligence.

Applying a Level II for the gravity of the committed offense under the Act and a negligent level of culpability, the Penalty Policy guides that the midpoint of the penalty range for this violation is \$5,750 per count. Penalty Policy at 5, 24, 33. From this "initial base penalty," "adjustments are applied to reflect legitimate differences among similar violations,"

two of which are a violator's history of prior offenses and such other matters as justice may require. Penalty Policy at 10.

As the Agency identified in its briefing, there is no indication in the record of any history of prior violations by Respondents, so further consideration of that factor is not necessary. Additionally, no argument was made regarding an inability to pay a civil monetary penalty, such that further consideration of that factor is not warranted.

Regarding "such other matters as justice may require," the Agency urges that I impose a "significant penalty" to deter "the important and considerable problem" of sexual harassment within the fishing industry. Curiously, however, the Agency has proposed a penalty less than the midpoint range guided by the Penalty Policy and has provided no explanation for their rationale (for example, in a "Preliminary Worksheet – Recommended Assessment of Penalty and Permit Sanction" (Penalty Policy at 23)). The Penalty Policy explains that "a NOAA attorney may move above or below the midpoint of a penalty range within a penalty box by taking into account 'such other matters as justice may require.'" Penalty Policy at 12. Examples of such matters include "cooperating with investigators in any on-going investigation" and "a long history of compliance," but many other potential mitigating and aggravating considerations are outlined in the Penalty Policy. Penalty Policy at 12-13. Further, the Penalty Policy provides that "[w]here any other matters are to be taken into consideration, the NOAA attorney must provide a detailed description of the mitigating or aggravating factor on the Preliminary Penalty Assessment Worksheet, and must clearly articulate the basis for the penalty adjustment based on this factor." Penalty Policy at 13.

Presumably, Respondents' cooperation with law enforcement during the investigation of this matter by being interviewed by SA Hellberg and the fact that no history of violations exists throughout their many years of experience in the commercial fishing industry led to a downward adjustment of the Agency's proposed penalty of \$4,500 per count of violation rather than the higher midpoint accounted for in the Penalty Policy. Whatever the rationale might have been, I find no justification to exceed the penalty initially proposed by the Agency. I also have determined that the proposed penalty of \$4,500 for each count of violation, or \$9,000 in total (\$4,500 for Count 1 plus \$4,500 for Count 2) is reasonable and appropriate for Respondents' violations of the Act and applicable regulations and are consistent with the guidelines of the Agency's Penalty Policy. Given the lack of participation in this proceeding by Respondents and of arguments for penalty mitigation, I find no basis to reduce the penalty proposed by the Agency. Accordingly, based on my review of the evidentiary record before me and the arguments presented, I assess a total penalty of \$9,000, broken down as follows: \$4,500 for Count 1, assessed jointly and severally against Resp. Kochis and Resp. Morelli; and \$4,500 for Count 2, assessed against Resp. Kochis alone.

DECISION AND ORDER

Respondents are liable for the charged violations in this case. A total civil monetary penalty of \$9,000 is imposed for the charged violations, with a penalty of \$4,500 assessed jointly and severally against Respondents Kochis and Morelli for Count 1 and a penalty of \$4,500 assessed against Respondent Kochis for Count 2. Once this Initial Decision becomes final under the provisions of 15 C.F.R. § 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: July 31, 2024
Washington, D.C.