



UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:

Richard T. Hayslett, Jr.,

Respondent.

Docket No. NE2201102,
F/V Ocean Hunter

INITIAL DECISION AND ORDER

Date: August 22, 2024

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

Appearances: For the Agency:
Scott E. Sakowski, Esq.
National Oceanic and Atmospheric Administration
Office of General Counsel, Enforcement Section
Gloucester, Massachusetts

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National Oceanic and Atmospheric Administration
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St. Petersburg, Florida

For Respondent:
Richard T. Hayslett, Jr., *pro se*
Hampton, Virginia

In this action, Complainant, the National Oceanic and Atmospheric Administration (“NOAA” or the “Agency”), alleges that Respondent, Richard T. Hayslett, Jr. (“Respondent” or “Mr. Hayslett”), violated 16 U.S.C. § 1857(1)(A), a provision of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1891(d) (the “Magnuson-Stevens Act” or the “Act”), and its implementing regulation, 50 C.F.R. § 648.14(i)(1)(vi)(A)(1), by fishing for Atlantic sea scallops in, or possessing or landing scallops from, a Habitat Management Area. A hearing was held in this matter on June 6, 2024, at which, despite due notice, Mr. Hayslett failed to appear. I therefore found that Mr. Hayslett had waived his right to hearing and

consented to a judgment on the record, and I entered a default judgment against him in accordance with 15 C.F.R. § 904.211. In light of this default, and for the reasons outlined more specifically below, I find Mr. Hayslett liable for the single count of violation alleged in the Agency's April 25, 2024, Amended Notice of Violation and Assessment of Administrative Penalty ("Amended NOVA"). Based on the record developed at hearing, including all the evidence presented by the Agency, and after considering the statutory penalty factors outlined at section 1858(a) of the Act, I further find that Mr. Hayslett's violation warrants a penalty of **\$3,000**.

I. Procedural Background

NOAA initiated this proceeding on July 20, 2023, when it issued a Notice of Violation and Assessment of Administrative Penalty ("NOVA") to Ocean Hunter, Inc. ("OCI"), and Mr. Hayslett. NOVA 1. In a single count, the Agency alleged that on or around March 2, 2022, in their respective roles as owner and operator of the commercial fishing vessel ("*F/V*") *Ocean Hunter*, OCI and Mr. Hayslett violated 16 U.S.C. § 1857(1)(A), a provision of the Magnuson-Stevens Act, and its implementing regulation, 50 C.F.R. § 648.14(i)(1)(vi)(A)(1), by fishing for Atlantic sea scallops in, or possessing or landing scallops from, a Habitat Management Area. For this violation, the Agency proposed a total penalty of \$105,905.10. NOVA 1.

In response to the NOVA, OCI and Mr. Hayslett requested a hearing on the alleged violation and the proposed penalty, and the matter was forwarded to this Tribunal. Hr'g Request (Sept. 20, 2023); Transmittal Memo (Sept. 22, 2023). I designated myself to preside over this matter via an Order dated September 26, 2023. Order of Designation (Sept. 26, 2023). That same day, I issued a Prehearing Order setting various case deadlines, including deadlines for the parties to file the initial disclosures that serve as the presumptive form of discovery in NOAA enforcement actions. See Prehr'g Order 4 (Sept. 26, 2023); 15 C.F.R. § 904.240 (setting initial disclosure requirements). The parties duly exchanged their disclosures, and on December 19, 2023, I issued a Notice of Hearing Order scheduling the evidentiary hearing in this matter to be held beginning on April 16, 2024, in Norfolk, Virginia. Agency's Initial Disclosures (Nov. 9, 2023); Respondents' Initial Disclosures (Dec. 1, 2023) ("Rs' Disclosures"); Notice of Hr'g Order (Dec. 19, 2023).

On January 2, 2024, the parties requested leave to engage in alternative dispute resolution ("ADR"). Joint Req. for Appointment of Settlement Judge (Jan. 2, 2024).

Order Granting Joint Req. for Appointment of Settlement Judge, Initiating Alternative Dispute Resolution Process, & Appointing Neutral (Jan. 9, 2024). With the ADR Judge's assistance, the parties arrived at a planned settlement agreement. Mot. for Leave to Withdraw as Counsel 1 (Mar. 26, 2024).

At some point thereafter, Mr. Hayslett ceased to participate in this matter. On March 26, 2024, David N. Ventker, Esq. and Marissa M. Henderson, Esq. of Ventker Henderson Stancliff, PLLC, who had represented both OCI and Mr. Hayslett from the case's outset, filed a motion for leave to withdraw as counsel to Mr. Hayslett on the grounds that he had ceased to respond to their communications. Mot. for Leave to Withdraw as Counsel. I denied the motion

based on counsel's failure to indicate they had notified Mr. Hayslett of their planned withdrawal. Order Den. Mot. for Leave to Withdraw as Counsel (Mar. 26, 2024).

On March 27, 2024, Mr. Hayslett's counsel filed an Amended Motion for Leave to Withdraw as Counsel, this time certifying that they had served Mr. Hayslett with the Motion at his residence and via email. Am. Mot. for Leave to Withdraw as Counsel (Mar. 27, 2024). Then, on March 29, 2024, the Agency requested leave to amend the NOVA to remove OCI as a party and to revise the proposed penalty as to Mr. Hayslett downward to \$3,000, on the basis that the Agency had reached a final settlement exclusive to OCI. Agency's Mot. to Amend Notice of Violation & Assessment of Civil Penalty (Mar. 29, 2024) ("Motion to Amend"). That same day, the Agency also filed a request to hold the hearing in this matter virtually. Agency's Mot. for Virtual Merits Hr'g (Mar. 29, 2024) ("Motion for Virtual Hearing").

On April 1, 2024, I issued an order that postponed the previously-scheduled hearing to allow time for briefing and resolution of the Amended Motion for Leave to Withdraw, Motion to Amend, and Motion for Virtual Hearing. Order Postponing Hr'g & Setting Response Deadline (Apr. 1, 2024). The Order also set a uniform response deadline of April 19, 2024, for the pending motions. Order Postponing Hr'g & Setting Resp. Deadline 2. Mr. Hayslett did not file a response to any of the three motions.

On April 23, 2024, I issued two orders that: (1) granted counsel's request to withdraw their appearances as to Mr. Hayslett; (2) granted the Agency's request for leave to amend the NOVA; (3) granted the Agency's motion for a virtual hearing; and (4) rescheduled the hearing to occur remotely via videoconference on June 6, 2024. Order Granting Pending Mots. (Apr. 23, 2024); Order Rescheduling Hr'g (Apr. 23, 2024). The Order Rescheduling Hearing stated that procedural information for attending the virtual hearing would be provided at a later date. Order Rescheduling Hr'g 2. The Order also extended the parties' deadline to supplement their Initial Disclosures without motion, permitting the parties to disclose written direct testimony for their witnesses until May 24, 2024. Order Rescheduling Hr'g 1–2.

On May 22, 2024, I issued a notice that provided the parties with the necessary procedural information for attending the virtual hearing on June 6, 2024, and for a prehearing conference to be held May 30, 2024. Order Updating Hr'g Location & Setting Prehr'g Conference (May 22, 2024). Mr. Hayslett did not appear at the prehearing conference.

On May 23, 2024, the Agency filed a supplement to its Initial Disclosures to disclose direct testimony in the form of affidavits from the following, previously-disclosed witnesses: Louis A. Chiarella, Jed A. Fiske, Travis Ford, Mariah J. Klenke, and Carl A. Lemire. Agency's 2nd Suppl. to its Initial Disclosures (May 23, 2024).

The matter proceeded to hearing on June 6, 2024. Respondent did not appear. Accordingly, I found Mr. Hayslett in default and determined that he had waived his right to a hearing. Tr. 5–7 (June 6, 2024); *see also infra* Part IV.B.1 (findings of fact in support of default judgment). Thereafter, at the Agency's request, I admitted into evidence exhibits identified as AX 1–5 and RX 6, as well as the written affidavits the Agency had provided in lieu of direct

testimony for its witnesses, which I designated as follows: AX 6, Affidavit of Louis A. Chiarella; AX 7, Affidavit of Jed A. Fiske; AX 8, Affidavit of Travis Ford; AX 9, Affidavit of Mariah J. Klenke; and AX 10, Affidavit of Carl A. Lemire. Tr. 8–9. I conducted a brief colloquy with Agency counsel regarding the Agency’s position on penalty, and the Agency then rested. Tr. 10–14. At the close of the hearing, I instructed the Agency to file any post-hearing brief by July 8, 2024. The Agency timely filed a Post-Hearing Brief on July 1, 2024. Agency’s Post-Hr’g Br. (July 1, 2024) (“Agency Br.”). On August 6, 2024, I issued a Notice of Transcript and Post-Hearing Order that supplied the parties with a copy of the hearing transcript and directed Respondent to file any initial post-hearing brief by no later than August 21, 2024. Notice of Tr. & Post-Hr’g Order (Aug. 6, 2024). Respondent did not file a post-hearing brief by the August 21 deadline, and the record closed as of that date.

II. Issues Presented

A. Liability

In assessing liability, I must determine whether Respondent unlawfully fished for Atlantic sea scallops in, or possessed or landed scallops from, a Habitat Management Area, in violation of 50 C.F.R. § 648.14(i)(1)(vi)(A)(1) and 16 U.S.C. § 1857(1)(A). Because Mr. Hayslett requested and later failed to appear at a duly-noticed hearing, my liability determination is informed by his default. *See* 15 C.F.R. § 904.211(a)(2) (“If, after proper service of notice, any party appears at the hearing and an opposing party fails to appear, the Judge is authorized to: . . . Where the respondents have failed to appear, find the facts as alleged in the NOVA . . . and enter a default judgment against the respondents.”).

B. Civil Penalty

If liability for a charged violation is established, then I must determine the amount of any appropriate civil penalty to be imposed for the violation. In doing so, I must evaluate factors including the nature, circumstances, extent, and gravity of the violation; Respondent’s degree of culpability and any history of prior violations; and such other matters as justice may require. *See* 16 U.S.C. § 1858(a) (enumerating factors to be considered in assessing a penalty under the Magnuson-Stevens Act); 15 C.F.R. § 904.108(a) (same).

III. Factual Summary¹

A. The Great South Channel Habitat Management Area and Prohibited Scallop Fishing

The Great South Channel Habitat Management Area (“GSC HMA”) is a large area off the coast of New England with a complex hardbottom of boulders, gravel, and cobble, and associated subaquatic surface-dwelling organisms (epifauna). AX 6 ¶ 13; *see also* 50 C.F.R.

¹ The following is a summary of the facts that I have found in this matter based on a careful and thorough review of the record and the credible evidence presented at hearing.

§ 648.370(h)(1) (designating GSC HMA and providing coordinates by which the GSC HMA is defined). The GSC HMA contains habitat critical to the spawning and growth of juvenile cod and other groundfish—of which cod, specifically, are overfished and subject to overfishing. AX 6 ¶¶ 9, 13. “[T]he gravel and boulders and epifaunal communities have spaces between them that allow young fish to shelter and hide from predators, which improves their ability to survive. Other gravel and cobble areas are used for reproduction.” AX 6 ¶ 13.

To protect this habitat, scallop dredging and all other types of fishing with bottom-tending mobile gear in the GSC HMA is prohibited. 50 C.F.R. § 648.370(h) (June 18, 2020). Dredges—large, heavy, chain-link sacks dragged along the seafloor by a metal beam—pose a risk of significant damage to the hardbottom habitat present in the GCC HMA, as they “essentially mow a path through the gravel and cobble habitat: dispersing and destroying the epifauna and flattening the complex, unleveled bottom where fish shelter.” AX 6 ¶ 15; AX 8 ¶ 9.

B. The United States Coast Guard’s Boarding of the *F/V Ocean Hunter* while it Dredged for Scallops Inside the GSC HMA

The *F/V Ocean Hunter* is an 81-foot fishing vessel owned by OCI. AX 1 at 51 (Certificate of Documentation for the *F/V Ocean Hunter*). In March of 2022, the vessel held a federal full-time limited-access Atlantic sea scallop fishing permit. AX 2 at 1 (2021 Fishing Year Permit for the *F/V Ocean Hunter*, listing permits including “scallop – limited access – full time”); AX 1 at 52 (same). At all relevant times, Mr. Hayslett was the *F/V Ocean Hunter*’s operator and captain. Rs’ Disclosures 1–2; Am. NOVA 1.

On March 2, 2022, NOAA’s Office of Law Enforcement (“OLE”) was alerted, via data transmitted by the *F/V Ocean Hunter*’s Vessel Monitoring System (“VMS”),² that the vessel was on a declared Atlantic sea scallop fishing trip and fishing in the GSC HMA. AX 1 at 6, 17. In response, OLE Enforcement Officer Jed Fiske coordinated with the United States Coast Guard (“USCG”) to conduct an at-sea boarding of the vessel. AX 1 at 6. At approximately 4:30 p.m., EST, on March 2, 2022, three boarding officers (“BO”) from the USCG Cutter *Sanibel* boarded the *F/V Ocean Hunter*. AX 1 at 71, 73; AX 9 ¶ 6. These included Lieutenant Junior Grade Mariah Klenke (“BO Klenke”); Machinery Technician Nicholas P. Deluca (“BO Deluca”); and Gunner’s Mate Deimonte R. Guinn (“BO Guinn”). AX 1 at 71, 73; AX 9 ¶ 6.

At the time of boarding, the vessel was positioned within the GSC HMA. AX 1 at 71 (Offense Investigation Report signed by BO Deluca); AX 1 at 73 (BO Klenke Boarding Report); AX

² A vessel’s VMS is used by the Agency to track vessel position, speed, and direction. See 50 C.F.R. § 648.10 (VMS requirements for fisheries in the northeastern United States). The *F/V Ocean Hunter*’s VMS was performing normally during the fishing trip at issue: In a March 8, 2022, Health and Performance Report, the *F/V Ocean Hunter*’s VMS provider, Skymate, stated that its network was operating normally between February 27, 2022, and March 6, 2022. AX 1 at 19; AX 10 ¶ 11. Skymate further reported that the vessel’s VMS had a strong signal and was reliably transmitting position reports during that period. AX 1 at 19; AX 10 ¶ 11.

10 ¶ 13 (testifying that the location at which the USCG boarded the vessel was approximately 407 meters inside the border of the GSC HMA). Moreover, when the Coast Guard encountered the vessel, it had two scallop dredges deployed in the water, and the boarding officers had to request that one be brought aboard so the team could safely board. AX 1 at 73; *see also* AX 1 at 49–50 (fishing vessel trip report for *F/V Ocean Hunter* for trip beginning February 27, 2022, listing fishing gear code as “DRS”); AX 7 ¶ 10 (explaining that “DRS” stands for “standard scallop dredge”).

When the officers came aboard, Mr. Hayslett was “very welcoming” and had all of his relevant documents ready for review. AX 1 at 73. He asked if he could continue fishing while the officers conducted their inspection. AX 1 at 73. Mr. Hayslett showed BO Klenke where he was fishing on his ECC GLOBE chart plotter,³ explaining that he was being careful not to cross west of the pink line displayed on it, which would take him into “a management area.” AX 1 at 73.

BO Klenke advised him that he was currently in the GSC HMA, to which Mr. Hayslett responded that he did not know that and that he was relying on the lines shown on his chart plotter. AX 1 at 71; AX 1 at 73–74; *see also* AX 1 at 77 (statement of BO Guinn: “[B]ased on the information he was being provided by his equipment, he believed he was fishing legally. The entire crew and the master did not give me the impression they were lying.”). Respondent further stated that “when vessels accidentally cross into a closed area or HMA, NOAA faxes the vessel a message that instructs them to leave the area—it had happened to another vessel earlier that day, but he had not received the fax.” AX 1 at 74; AX 1 at 77 (statement of BO Guinn, recalling that Mr. Hayslett informed “us that another vessel had accidentally drifted into the Habitat Management Area earlier and had received a ‘fax’ that they were illegally fishing in the area and had to leave,” which “also added to the captain’s belief that he was not fishing illegally”).

At the time the boarding team was conversing with Mr. Hayslett, the vessel’s chart plotter did indicate that the vessel was outside (east of) the pink line Mr. Hayslett referred to as the HMA boundary. AX 1 at 73; AX 1 at 40 (photograph of chart plotter, showing vessel’s path east of the plotted GSC HMA boundary). Thinking the boundaries of the HMA in the chart plotter to be in error, BO Klenke had the USCG cutter “pass the HMA boundary coordinates over the radio to place on [Mr. Hayslett’s] GLOBE application.” AX 1 at 74. However, when the

³ A chart plotter is a marine navigation device that utilizes global positioning data (“GPS”) from orbiting satellites and electronic nautical charts (“ENCs”) to display on a screen a vessel’s position, heading, and speed in real time. NOAA ENC® - Electronic Navigational Charts, <https://nauticalcharts.noaa.gov/charts/noaa-enc.html> (lasted visited Aug. 20, 2024). An “ECC GLOBE” and “P-Sea WindPlot MAX” are both types of chart plotters. Electronic Charts Company, Inc., ECC GLOBE, <https://electroniccharts.com/Globe.php> (last visited Aug. 20, 2024) (“GLOBE is an advanced plotting and navigation software application designed for the commercial marine industry.”); P-Sea Software Co., USA, GPS Chart Plotter with Moving Maps for Marine Navigation, <https://www.p-sea.com> (last visited Aug. 20, 2024).

HMA coordinates were inputted into the vessel's GLOBE, they "concurred with the points he had already plotted." AX 1 at 74.

BO Klenke then asked the cutter to supply her with the *F/V Ocean Hunter's* current position from its radar.⁴ AX 1 at 74. She compared that radar position to the position data on the vessel's GPS screen and determined that "[t]he two coordinates did not concur" such that the vessel "was between 800–1000yds west of where the master believed he was operating." AX 1 at 74 (emphasis added); see also AX 1 at 92 (photograph of vessel's GLOBE application, with tag showing the *F/V Ocean Hunter's* position inside the HMA line as generated from the radar coordinates provided by the *Sanibel*); compare AX 1 at 115 (*F/V Ocean Hunter's* position per CGC *Sanibel's* radar screen) with AX 1 at 99 (*F/V Ocean Hunter's* position per GLOBE application); compare AX 1 at 116 (*F/V Ocean Hunter's* position per CGC *Sanibel's* radar screen) with AX 1 at 110 (*F/V Ocean Hunter's* position per P-Sea WindPlot MAX's GPS screen).⁵ This placed the vessel .22 nautical miles (approximately 407 meters) inside the GSC HMA's eastern boundary. AX 10 ¶ 13.

BO Klenke asked Mr. Hayslett when his GPS was last verified, to which he replied that he was not sure, but that in November when the vessel was taking on water the USCG had located him without issue. AX 1 at 74. But see AX 1 at 77 (statement of BO Guinn, recalling that Mr. Hayslett responded "a guy came and checked all that stuff about two weeks ago"). BO Klenke also asked Mr. Hayslett if he had a support team that could verify his radar accuracy, and "he explained that there is someone who handles that for him before he takes the fishing vessel underway." AX 1 at 74.

After BO Klenke had confirmed that the *F/V Ocean Hunter's* GPS was in error as to siting the vessel's location, Mr. Hayslett stated that "he had watched other fishing vessels pass by and wondered why they were not fishing in the area he was in" and "that another vessel nearby had much smaller scallops than he had caught." AX 1 at 71, 76.

During the boarding officers' inspection, they observed various containers filled with scallops on the deck and a crewmember informed BO Deluca and BO Guinn that a further 81 fifty-pound bags of scallops were stored in the fish hold. AX 1 at 71, 76, 77; see AX 7 ¶ 6. BO

⁴ Radar, the acronym for "radio detection and ranging," is a land-based system which uses radio waves to determine the distance and velocity of the system's target. NOAA, How radar works, <https://www.noaa.gov/jetstream/doppler/how-radar-works> (last visited Aug. 1, 2024).

⁵ The evidence confirms that it was the CGC *Sanibel's* equipment, and not the *F/V Ocean Hunter's*, that correctly sited the vessel's position. Before departing on its patrol on March 2 and after returning on March 3, the CGC *Sanibel's* crew verified the accuracy of its equipment. AX 9 ¶ 5; AX 1 at 83 (GPS Verification Form for CGC *Sanibel*, dated March 2–3, 2022). This involved checking whether the onboard GPS was functioning and whether the ship's radar was communicating the USCG ship's position accurately. AX 9 ¶ 5. The review returned a Horizontal Dilution of Precision (error measurement) of 1.6 at the trip's outset and 1.5 upon its return, which measurements are "considered excellent, and indicate a high confidence in the location being measured by the GPS unit during this patrol." AX 9 ¶ 5; AX 1 at 83.

Deluca and BO Guinn photographed the catch and advised Mr. Hayslett to return any live catch back to the ocean and exit the area immediately. AX 1 at 74–75, 76, 78. BO Deluca did not seize any unlawful catch and allowed the vessel to continue fishing outside of the HMA. AX 1 at 5–6, 66.

C. Respondent's Subsequent Engagement with Investigators

When the *F/V Ocean Hunter* returned to port on March 6, 2022, Officer Fiske and OLE Special Agent (“SA”) Timothy Wilmarth met the vessel at the dock. AX 1 at 64 (report of SA Wilmarth). The officers then interviewed Mr. Hayslett, who reiterated that he was unaware that he was fishing inside the HMA before the boarding occurred because his chart plotter was in error. AX 1 at 7, 65–66. Mr. Hayslett informed the officers that “Chris’s Electronics” had “installed the coordinates on Friday of last week.” AX 1 at 7, 66. He also claimed to only have caught 68 or 69 bags of scallops while fishing in the GSC HMA. AX 1 at 7, 10; AX 7 ¶ 6.

The officers requested that the part of the catch that had been caught in the closed area be weighed separately, however Mr. Hayslett advised them that the trip’s whole catch had been commingled. AX 1 at 65. The officers then permitted the vessel’s crew to offload and sell the entire catch. AX 1 at 65.

On March 7, 2022, Officer Fiske and SA Wilmarth met with David Frank, the owner of Chris’s Electronics. AX 1 at 8, 67. He stated that his business provides updates only for “WinPlot” plotters, not for “ECC-GLOBE” chart plotters. AX 1 at 8. The investigators then spoke to Mr. Hayslett again. They asked about his WinPlot plotter, and when he showed them the screen the investigators observed that the WinPlot plotter did not include any “closed area” lines to indicate the ship had entered an HMA. AX 1 at 8. Mr. Hayslett also reiterated his belief that Chris’s Electronics had recently updated the *F/V Ocean Hunter*’s ECC-GLOBE plotter. AX 1 at 8.

D. The *F/V Ocean Hunter*’s Catch from the GSC HMA

The *F/V Ocean Hunter* landed a total of 10,938 lbs of scallops from its February 28–March 7 trip. AX 1 at 33 (federal dealer report for the *F/V Ocean Hunter*, showing that on March 7, 2022, the vessel landed 10,938 lbs of sea scallops); AX 7 ¶ 9 (describing same); Rs’ Disclosures 2 (conceding quantity of scallops). The scallops sold for an average of \$24.45/lb, for an ex-vessel value of \$267,392. AX 1 at 33 (federal dealer report); AX 7 ¶ 9 (describing same); Rs’ Disclosures 2 (conceding value of scallops). This included 5,778 lbs of U10 (10 and under count) scallops sold for \$183,852 and 5,160 lbs of 11-20 count scallops sold for \$83,540. AX 5; AX 8 ¶¶ 20–21.⁶

⁶ Per Mr. Ford, who offered testimony on the Agency’s behalf regarding the Atlantic sea scallop fishery: “Shucked scallops are categorized by the size of scallop meats; specifically, how many are needed to make up a pound. ‘U10’

VMS data from the fishing trip shows that the *F/V Ocean Hunter* entered the GSC HMA at approximately 5:05 p.m., EST, on February 28, 2022, and near-continuously remained there traveling at fishing speeds (less than 5 knots) before it was boarded at around 4:30 p.m., EST, on March 2, 2022. AX 1 at 126–129 (maps plotting VMS data using vTrack software to show vessel’s position and speeds); AX 1 at 137–140 (raw VMS data, showing vessel’s position and speeds throughout disputed fishing trip, with locations within HMA highlighted in yellow); AX 10 ¶ 12 (OLE Instigative Support Program Manager noting that he reviewed and approved the report designated as AX 1 at 126–41); AX 1 at 17 (map overview of fishing trip, with blue arrows indicating speeds less than 3 knots and red arrows indicating speeds between 3 and 6 knots); AX 7 ¶ 7 (describing map on AX 1 at 17).⁷ More specifically, after accounting for the amount of time the vessel ceased fishing during boarding, the *F/V Ocean Hunter* was travelling at fishing speeds within the GSC HMA 8% of the time it was underway on February 28, 2022, 94% on March 1, 2022, and 80% on March 2, 2022. AX 1 at 11–12.⁸

During the fishing trip, Respondent prepared daily catch reports for the *F/V Ocean Hunter*. The reports submitted for the dates the vessel was fishing within the GSC HMA show the vessel’s total “Scallop Meats Kept” as 660 lbs for February 28, 2022; 2475 lbs for March 1, 2022; and 1820 lbs for March 2, 2022, for a total of 4,955 lbs. AX 1 at 143. Respondent also used the vessel’s VMS to email a more specific breakdown of each day’s catch count to an external account. RX 6 at 5–10 (emails from “ohunter@skymate.com” to “Hampton Office”). Those emails state that in the “first 18 hours” of the trip (beginning at an unspecified time on February 28, 2022, and ending before noon on March 1, 2022), the vessel caught 1870 lbs of scallops, with 1705 of those lbs being U/10 scallops, and the remainder being U/12 scallops. RX 6 at 5; see also AX 1 at 143 (catch report for the *F/V Ocean Hunter*, reporting catch beginning Feb. 28, 2022). For the remainder of March 1, 2022, until roughly noon on March 2, 2022, the vessel caught 2610 lbs of scallops, with 2390 lbs of those being U/10 scallops, and the remainder U/12 scallops. RX 6 at 7.

scallops are the largest and highest grade; ten scallop meats of the U10 size equal one pound. ‘11-20 count’ scallops are medium-sized; between eleven and twenty scallop meats equal one pound.” AX 8 ¶ 7.

⁷ Automatic Identification System (“AIS”) data from the fishing trip further confirms that the *F/V Ocean Hunter* entered the GSC HMA. AX 10 ¶ 12. “AIS is a maritime collision avoidance system that certain vessels must carry . . . which broadcasts information about the vessel, including its location, speed, and heading.” AX 10 ¶ 12; see AX 1 at 130 (map plotting AIS data using Proteus software to show vessel position).

⁸ The vessel also travelled at fishing speeds *outside* the GSC HMA for approximately 38% of the time it was underway on February 28, 2022. See AX 1 at 140–41 (spreadsheet of raw VMS data, highlighted to show locations inside GSC HMA, showing vessel travelled at speeds below 5 knots for 19 of 49 positions recorded on Feb. 28, 2022).

IV. Liability

A. Principles of the Law Related to Liability

1. The Magnuson-Stevens Act

The Magnuson-Stevens Act was passed in 1976 “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, § 2(b)(1), 90 Stat. 331, 332 (codified at 16 U.S.C. § 1801 *et seq.*). The Act, as amended, aims to “promote domestic commercial and recreational fishing under sound conservation and management principles.” 16 U.S.C. § 1801(b)(3).

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” may be “any individual, . . . any corporation, partnership, association, or other entity.” 16 U.S.C. § 1802(36). Magnuson-Stevens Act violations are strict liability offenses, and therefore state of mind is irrelevant in determining whether a violation occurred. *McLaughlin*, Docket No. NE2003013, 2022 NOAA LEXIS 2, at *23 (July 6, 2022) (citing *Alba*, 2 O.R.W. 670, 673 (NOAA App. 1982)); *see also Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999) (holding that scienter is not required to impose civil penalties for violations of the Magnuson-Stevens Act and the implementing regulations); *Nguyen*, Docket No. SE0801361FM, 2012 NOAA LEXIS 2, at *11–12 (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.”).

2. Protections for Habitat Management Areas

The Act established eight Regional Fishery Management Councils, 16 U.S.C. § 1852(a), which it tasked with creating fishery management plans that, among other things, identify and describe “essential fish habitat” for the fishery and “minimize to the extent practicable adverse effects on such habitat caused by fishing.” 16 U.S.C. § 1853(a)(7). Essential fish habitats are “those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity.” 16 U.S.C. § 1802(10).

Under this authority, the Agency has decreed that “no fishing vessel or person on a fishing vessel may fish with bottom-tending mobile gear in [] areas” that include the GSC HMA. 50 C.F.R. § 648.370(h) (June 18, 2020). “Bottom-tending mobile gear” “means gear in contact with the ocean bottom, and towed from a vessel, which is moved through the water during fishing in order to capture fish, and includes otter trawls, beam trawls, hydraulic dredges, non-hydraulic dredges, and seines (with the exception of a purse seine).” 50 C.F.R. § 648.2. The Agency’s regulations further specify that, for Atlantic sea scallops, “[i]t is unlawful for any person to,” “[f]ish for scallops in, or possess or land scallops from, the Habitat Management Areas specified in § 648.370,” which include the GSC HMA. 50 C.F.R. § 648.14(i)(1)(vi)(A)(1).

3. Default and Its Consequences

The Agency's regulations establish the following procedures and consequences in the event a party fails to appear at hearing:

If, after proper service of notice, any party appears at the hearing and an opposing party fails to appear, the Judge is authorized to:

(2) Where the respondents have failed to appear, find the facts as alleged in the NOVA, NOPS and/or NIDP and enter a default judgment against the respondents.

15 C.F.R. § 904.211(a). When this occurs, "[t]he Judge will place in the record all the facts concerning the issuance and service of the notice of time and place of hearing." 15 C.F.R. § 904.211(c). The presiding Judge may then also "deem a failure of a party to appear after proper notice a waiver of any right to a hearing and consent to the making of a decision on the record." 15 C.F.R. § 904.211(d).

Service of a NOVA "may be made by certified mail (return receipt requested), electronic transmission, or third party commercial carrier to an addressee's last known address or by personal delivery. Service of a notice under this subpart will be considered effective upon receipt." 15 C.F.R. § 904.3(a). Service of all other documents "may be made by first class mail (postage prepaid), electronic transmission, or third party commercial carrier, to an addressee's last known address or by personal delivery." 15 C.F.R. § 904.3(b). Service of these documents "will be considered effective upon the date of postmark (or as otherwise shown for government-franked mail), delivery to third party commercial carrier, electronic transmission, or upon personal delivery." *Id.*

4. Standard of Proof

To prevail, the Agency must prove facts constituting the charged violations by a preponderance of reliable, probative, substantial, and credible evidence. *McLaughlin*, 2022 NOAA LEXIS 2, at *20 (citing 5 U.S.C. § 556(d); *Vo*, Docket No. SE010091FM, 2001 NOAA LEXIS 11, at *20 (Aug. 17, 2001)); *Cloud*, Docket No. AK1202525, 2017 NOAA LEXIS 7, at *10 (Oct. 16, 2017) (citing 5 U.S.C. § 556(d); *Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 277–78 (1994); *Steadman v. SEC*, 450 U.S. 91, 100–03 (1981)); see 15 C.F.R. § 904.251(a)(2). This standard requires the Agency to demonstrate that the facts it seeks to establish are more likely than not to be true. *McLaughlin*, 2022 NOAA LEXIS 2, at *20 (citing *Fernandez*, Docket No. NE970052FM/V, 1999 NOAA LEXIS 9, at *8–9 (Aug. 23, 1999)). To satisfy this burden of proof, the Agency may rely upon either direct or circumstantial evidence. *Id.* (citing *Vo*, 2001 NOAA LEXIS 11, at *17).

B. Discussion of Liability

1. Default Judgment Was Properly Entered Against Respondent

As stated at hearing, I have made the following findings of fact related to the issuance and service of the Notice of Time and Place of Hearing upon Mr. Hayslett:

- The NOVA was served via UPS on OCI on July 20, 2023, and received July 21, 2023, at the following address:

Ocean Hunter, Inc.
48 Water Street
Hampton, VA
Tracking No. 1ZX07W80A296832456

AX 4 at 1.

- The Agency also attempted to serve Mr. Hayslett via UPS on July 20, 2023; however, the packet was returned unopened. AX 4 at 2.
- On July 26, 2023, the Agency emailed a copy of the NOVA to Mr. Hayslett at the following email address: [REDACTED]. AX 4 at 2. Mr. Hayslett had previously communicated with Agency staff from this email address, including, at a minimum, using the email address to send notes regarding his fishing activity during the at-issue fishing trip to Jed Fiske on May 10, 2022. AX 7 ¶ 13.
- On September 20, 2023, counsel for OCI and Mr. Hayslett responded to the NOVA and requested a hearing on behalf of both clients. Hr'g Request. No issue of service was raised in that response. Hr'g Request.
- On October 20, 2023, David N. Ventker, Esq. and Marissa M. Henderson, Esq. of Ventker Henderson Stancliff, PLLC, entered an appearance on behalf of OCI and Mr. Hayslett. Respondents' Notice of Appearance & Prelim. Statement (Oct. 20, 2023). Starting on that date, all filings and orders were served to Mr. Hayslett at:

David N. Ventker
Marissa M. Henderson
Ventker Henderson Stancliff, PLLC
256 West Freemason Street
Norfolk, VA 32510
dventker@ventkerlaw.com
mhenderson@ventkerlaw.com

- On December 19, 2023, a Notice of Hearing Order was served on Respondents' counsel, setting the hearing in this matter for April 16–18, 2024, in Norfolk, VA. The Notice stated that "RESPONDENTS ARE WARNED THAT FAILURE TO APPEAR AT THE

HEARING, WITHOUT GOOD CAUSE BEING SHOWN, MAY RESULT IN DEFAULT JUDGMENT BEING ENTERED AGAINST THEM.” Notice of Hr’g Order 2.

- On March 26, 2024, Attorneys Ventker and Henderson filed a motion for leave to withdraw as counsel to Mr. Hayslett, representing that he had ceased to respond to their communications. Mot. for Leave to Withdraw as Counsel. The motion was denied based on counsel’s failure to indicate they had notified Mr. Hayslett of the planned withdrawal. Order Den. Mot. for Leave to Withdraw as Counsel.
- On March 27, 2024, counsel filed an Amended Motion for Leave to Withdraw, this time certifying that they had served Mr. Hayslett with the Motion at the following address (his residence) and electronically at [REDACTED]:

Richard T. Hayslett, Jr.
[REDACTED]

- On April 1, 2024, Respondent Hayslett was served at the above physical and electronic addresses with an Order Postponing Hearing and Setting Response Deadline, which postponed the scheduled hearing pending resolution of the Amended Motion for Leave to Withdraw and two other motions (the Agency’s Motion to Amend the NOVA and the Agency’s Motion for Virtual hearing), and which set a uniform response deadline of April 19, 2024, for the pending motions.
- On April 23, 2024, Respondent was served with an order granting the three pending motions: (1) granted the Agency’s request for leave to amend the NOVA to remove Ocean Hunter, Inc. as a party and to revise the proposed penalty to \$3,000; (2) granted the Agency’s motion for a virtual hearing; and (3) granted the Amended Motion for Leave to Withdraw as Counsel. Order Granting Pending Mots. Counsel’s appearance on Mr. Hayslett’s behalf was deemed withdrawn, and thereafter all filings and orders were served to Mr. Hayslett via regular mail at:

Richard T. Hayslett, Jr.
[REDACTED]

AND via electronic mail at [REDACTED].

- Also on April 23, 2024, Respondent was served with an order that rescheduled the hearing to occur remotely via videoconference on June 6, 2024. Order Rescheduling Hr’g. The Order Rescheduling Hearing noted that information for joining the virtual hearing would be provided at a later date. Order Rescheduling Hr’g 2. The Order reiterated the Notice of Hearing Order’s warning that Respondent’s failure to appear without good cause being shown could result in a default judgment against him. Order Rescheduling Hr’g 2.

- On May 22, 2024, Respondent was served with an Order Updating Hearing Location and Setting Prehearing Conference, which provided him with a link through which he could appear at the videoconference hearing and procedural information for a prehearing conference. That same day, a staff attorney for the Tribunal forwarded two electronic meeting invitations to Respondent at his last known email address ([REDACTED]), which contained links to join the prehearing conference and the June 6th hearing.

As stated at hearing, I find that these facts establish that Mr. Hayslett received proper service and notice of the prehearing conference and the time and place of hearing, in accordance with 15 C.F.R. § 904.250(a). Tr. 7. Mr. Hayslett having nevertheless failed to appear at either proceeding, I entered default judgment against Mr. Hayslett. Tr. 7. I further found that Mr. Hayslett had waived his right to a hearing and consented to a decision on the record. Tr. 7.

2. Determination of Liability

To satisfy its burden to establish Respondent Hayslett's liability for the charged violation, the Agency was required to show, by a preponderance of the evidence, that, on or about March 2, 2022: (i) Respondent was a "person" within the meaning of the Act; and (ii) Respondent either fished for scallops in, or possessed or landed scallops from, a Habitat Management Area. 50 C.F.R. § 648.14(i)(1)(vi)(A)(1).

By virtue of the default judgment entered against Respondent, the facts as alleged in the Amended NOVA are deemed to be true. *See* 15 C.F.R. § 904.211(a)(2). In particular, the Amended NOVA alleges as part of the "Facts Constituting Violation" section that:

On or around March 2, 2022, respondent Richard T. Hayslett, Jr., operator of the *F/V Ocean Hunter*, acting by and through himself, his agents, employees, or representatives, and a person subject to the jurisdiction of the United States, did fish for Atlantic sea scallops in, or possess or land scallops from, a Habitat Management Area

Am. NOVA 1.

These facts, coupled with the findings of fact that I made in the Factual Background section of this decision, amply support the elements of the charged violation against Mr. Hayslett, and thus, a finding of liability against him. Of particular significance:

- Mr. Hayslett is a person subject to the jurisdiction of the United States within the meaning of the Act, 16 U.S.C. § 1802(36). Am. NOVA 1.

- From February 28, 2023, until March 7, 2023, the *F/V Ocean Hunter* was engaged in a declared scallop fishing trip, during which Mr. Hayslett served as the vessel's operator and captain. Am. NOVA 1.
- Data from the *F/V Ocean Hunter's* VMS shows that from approximately 5:05 p.m., EST, on February 28, 2023, at least until the USCG boarded the vessel at 4:30 p.m., EST, on March 2, 2022, the *F/V Ocean Hunter* was located inside the GSC HMA. AX 1 at 131–41 (*F/V Ocean Hunter's* VMS data, highlighted to show positions inside the GSC HMA).
- During this period, Mr. Hayslett fished for Atlantic sea scallops in, or possessed or landed scallops from, a Habitat Management Area. Am. NOVA 1.
- More specifically, VMS data confirm that the vessel near-continuously travelled at speeds consistent with fishing while in the GSC HMA, and when the USCG boarded the vessel on March 2, 2022, the *F/V Ocean Hunter* had two scallop dredges deployed in the water in the GSC HMA. AX 1 at 73 (boarding officers observed dredges in the water); AX 1 at 131–41 (VMS data showing vessel speeds). These dredges were hauled back in connection with the boarding and the scallop catch therein then shucked on board. AX 1 at 76.
- The *F/V Ocean Hunter* caught at least 3,820 lbs of scallops while it was fishing in the GSC HMA, using a scallop dredge. RX 6 at 5–7 (Respondent's notes, reporting that the vessel caught a total of 4,480 lbs of scallops from the trip's start through noon on March 2, 2022); AX 1 at 143 (*F/V Ocean Hunter's* daily catch reports, showing 660 lbs of scallop meats kept on February 28, 2022); AX 1 at 140 (reflecting limited time spent fishing in GSC HMA on February 28, 2022); AX 1 at 50 (vessel trip report for disputed trip, showing fishing gear "DRS").

In sum, I conclude that the preponderance of substantial and undisputed evidence presented establishes that Respondent fished for scallops in, and possessed or landed scallops from, the GSC HMA, thereby violating 50 C.F.R. § 648.14(i)(1)(vi)(A)(1), and, in turn, 16 U.S.C. § 1857(1)(A).

V. CIVIL PENALTY

Having found Respondent liable for the charged violation, I must next determine the appropriate amount of a civil monetary penalty to be imposed, if any, for that violation.

A. Principles of Law as to Civil Penalties

The Magnuson-Stevens Act provides that any person who violates any provision of the Act or its implementing regulations 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).

The Magnuson-Stevens Act identifies various factors that must be considered to determine an appropriate civil penalty. Specifically:

[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 provide that:

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

15 C.F.R. § 904.108(a).

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

B. Party Arguments as to Civil Penalty

Through the Amended NOVA, the Agency proposed a total penalty of \$3,000 for the charged violation. Am. NOVA 2. The Agency outlined its rationale for this penalty in its Post-Hearing Brief, namely that:

- Respondent inflicted severe, long-term damage to a protected habitat, including lasting damage to breeding and nursery habitats relied upon by cod populations that are overfished and subject to overfishing, Agency Br. 6;
- Excusing Respondent's misconduct would be unfair to compliant vessels, Agency Br. 6–7;
- The “true economic gain” to OCI and Mr. Hayslett is greater than the Agency identified in the NOVA, which did not account for the fact that the vessel caught the vast majority of the trip's U10 scallop haul while in the GSC HMA, Agency Br. 7–9;
- Respondent's dredging in the GSC HMA was negligent, in that he (i) failed to manually confirm the HMA's location instead of relying on his chart plotter and/or (ii) failed to double-check his GPS's accuracy after noticing that other vessels appeared to be avoiding the area and taking on smaller scallops, Agency Br. 10–11;
- Respondent intentionally lied to investigators to downplay the extent of the violation, specifically by misrepresenting the amount of his catch from the GSC HMA, Agency Br. 12; and
- Respondent's failure to appear at hearing constitutes a failure to cooperate that should be held against him, Agency Br. 12.

Mr. Hayslett did not appear at hearing to present his position on civil penalties. However, he did raise several arguments in favor of a reduced penalty through the Initial Disclosures that he submitted jointly with OCI. Specifically, he argued that the Agency's proposed penalty:

- Overestimated the economic benefit he and OCI received from the sale of the scallops they caught in the closed area, Rs' Disclosures 2–3;
- Incorrectly assumed he knowingly or negligently fished in a closed area, Rs' Disclosures 8;
- Did not account for the fact that he was fully cooperative with the Agency's investigation, Rs' Disclosures 8; and
- Did not account for the fact that he had no prior violations, Rs' Disclosures 1, 4.

As I am, in any event, not bound by the Agency's penalty calculations, I have assessed the appropriate penalty amount *de novo*, giving due consideration to the parties' arguments.

C. Penalty Analysis

1. Nature, Circumstances, Extent, and Gravity of the Violation

I have considered the substantial evidence of record regarding the nature, circumstances, extent, and gravity of the violation in this matter in making my penalty assessment. In general, I have found many of the Agency's arguments persuasive in my review of these penalty factors.

Administrative tribunals have routinely treated fishing activities in closed areas as serious violations. *DaSilva*, Docket No. PI1100830, 2015 NOAA LEXIS 17, *37 (Sept. 10, 2015); *see also, e.g., Diep*, Docket No. PI1201802, 2015 NOAA LEXIS 12, at *70–72 (June 5, 2015) (finding fishing inside closed areas “to be particularly grave infractions By establishing the [closed area] and restricting activities within its boundaries, the Federal government clearly recognized the significance of the region and found that it was worthy of protection.”); *Lobsters, Inc.*, Docket No. NE980310, 2001 NOAA LEXIS 8, at *33–34 (Dec. 5, 2001) (“[E]ntry into a closed area to fish is by its very nature a most serious undermining of the efforts to protect these precious resources If [others] believe that insignificant cost of doing business penalties would be assessed then potential wholesale violations of the closed areas would abound.”); *Roche*, Docket No. NE990055, 2001 NOAA LEXIS 12, at *17–18 (Aug. 15, 2001) (“There is no[] doubt that incursion into a closed area is a particularly serious violation.”).

Likewise, the record here establishes the significance of the Agency's prohibitions on scallop fishing and the use of bottom-tending mobile gear in the GSC HMA. As Mr. Chiarella testified, the GSC HMA was established and closed to bottom-tending mobile gear specifically to protect critical habitat for cod and other groundfish. AX 6 ¶¶ 13–14. Mr. Chiarella further testified that “Atlantic cod stocks” in particular “are still[] considered overfished, meaning that the population size is too small to be sustainable, and overfishing is occurring, meaning the annual catch rate of these fish is also too high to be sustainable.” AX 6 ¶ 9. And he explained that scallop dredges can quickly destroy the “hardbottom” habitat preferred by these species, effectively scraping flat the various crevasses and concealed areas the fish require for breeding and nursery grounds. AX 6 ¶ 15 (“Essentially, dragging a scallop dredge through the Great South Channel HMA destroys the habitat because it eliminates the features that make it conducive to fish survival.”).

Respondent's violation, Mr. Chiarella explained, almost certainly caused this kind of destruction: “Three days of dredging by twin scallop dredges such as the ones used by the F/V Ocean Hunter would have caused total removal of all epifauna within the path of the dredges and caused smoothing of gravel and cobble areas reducing their ability to serve as habitat conducive to cod survival.” AX 6 ¶ 18. The affected areas, he opined, “could take up to ten years to fully recover their epifauna,” meaning, that the areas “have likely lost up to ten years of productivity as [essential fish habitat].” AX 6 ¶ 19. This is a significant loss, and I have considered the seriousness of Respondent's violation and the likely harm therefrom in setting an appropriate penalty here.

2. Respondent's Culpability

With respect to Respondents' culpability, the Agency asserts that Respondent acted negligently when he committed the alleged violation. I disagree.⁹

The Agency argues that Mr. Hayslett failed to take reasonable steps to ensure that the *F/V Ocean Hunter* was fishing outside the GSC HMA. Agency Br. 10–11. While the Agency does not meaningfully contest the fact that Mr. Hayslett's chart plotter showed the vessel as remaining outside the line depicting the HMA, it asserts that "[h]e does not get to blindly follow and then blame his equipment." Agency Br. 11. Instead, the Agency claims, Mr. Hayslett should have re-checked the HMA's location before leaving port. Agency Br. 11 ("He could have easily created a straight boundary line using the coordinates published in the regulations to verify its location."). In this respect, the Agency argues, this case is similar to *Captain Kevin T&V, LLC*, Docket No. PI1305092, 2017 NOAA LEXIS 4 (Sept. 29, 2017) (*Captain Kevin*), in which the Tribunal found that the respondent operator acted negligently when he fished in a protected area, even though he had done so in reliance on an inaccurate chart plotter. Agency Br. 10.

The Agency's reliance on *Captain Kevin* is misplaced. The Agency is correct that in *Captain Kevin*, as here, the respondents fished inside an HMA with unauthorized gear. *Captain Kevin*, 2017 NOAA LEXIS 4, at *59. And, as in this case, the *Captain Kevin* respondents relied on a chart plotter to show the HMA's location. *Id.* at *23. There, however, the similarities between the cases end. Unlike Mr. Hayslett, the *Captain Kevin* respondents failed to take *any* steps to assure themselves that they were not fishing in a closed area. *Id.* at *96–100. This included the respondent vessel owner's failure to instruct the respondent operator (i) that he needed to monitor for closed areas, (ii) where those closed areas were, (iii) how to use the vessel's chart plotter, or even (iv) that he should expect the plotter to display the closed areas' boundaries. *Id.* at *96–98. Nor did the operator take it upon himself to learn any of this information. *Id.* at *97–98. As a result, during the disputed fishing trip, the operator in *Captain Kevin* failed to notice that the closed area was not depicted *anywhere* on the vessel's chart plotter. *Id.* at *98. Subsequent investigation revealed that the relevant file had been deleted. *Id.* When an Agency investigator asked the operator to point out the closed area on the plotter, the investigator noted that, on sight, "it was obvious" that the operator's attempt "was not the closed area." *Id.* The respondents' negligence, therefore, rested not on a failure to manually confirm the chart plotter's accuracy before the trip, as the Agency supposes, but to maintain

⁹ The Agency also argues that Mr. Hayslett acted "intentionally" in that he misrepresented catch counts to the Agency's investigators in an apparent attempt to downplay the severity of his violation. I address this argument below. *Infra* Part V.C.5.

any awareness of the closed area's location—including by checking that the plotter included any information whatsoever about the HMA. *Id.* at *99–100.¹⁰

In contrast, in this case, the Agency no longer disputes that Mr. Hayslett had his chart plotter updated just two days before departing on the trip at issue. *See generally* Agency Br.; *see also* AX1 at 7, 8 (Mr. Hayslett twice insisted that Chris's Electronics had performed this update). The evidence likewise demonstrates not only that the *F/V Ocean Hunter's* chart plotter displayed an HMA boundary—already an improvement over *Captain Kevin*—but also that when USCG BO Klenke tried to test the system's accuracy by entering the correct HMA coordinates into the plotter, *the same boundary appeared*. AX 1 at 74 (“The points we input into to the GLOBE concurred with the points he had already plotted.”). That this was BO Klenke's first attempt at verification is instructive. First, it demonstrates the first step an experienced mariner took to confirm the HMA's location. And second, while the Agency is correct that the record includes no evidence that Mr. Hayslett attempted to confirm the HMA's location in this way, the results of BO Klenke's attempt demonstrate that doing so would have made no difference, because the error was in the GPS's receipt and calculation of the contemporaneous location data for *the vessel*, not in Mr. Hayslett (or another individual's) entry of the HMA's boundaries into the system. At best, then, the Agency is left to argue that a reasonable operator would have independently verified the GPS's ability to accurately locate the vessel's position before setting out. While the evidence indicates that this is possible—the USCG undertakes such a confirmation before beginning patrols, AX 9 ¶ 5—in the circumstances presented here, where Mr. Hayslett had reason to believe a third party had just completed an update of the vessel's electronic chart plotters, and with no evidence to suggest that this separate confirmation is commonplace among and/or within the typical skillset of fishing captains, I am unwilling to find that his failure to perform this GPS confirmation was so unreasonable as to constitute negligence.

The Agency goes on to argue that, regardless of the plotter's status, Mr. Hayslett should have taken additional steps to confirm the HMA's location after he became aware that he was having unusual fishing success and that other vessels were avoiding the area. Agency Br. 11. I again disagree. The evidence in the record, which includes multiple consistent accounts from USCG boarding officers, is that Mr. Hayslett expressed an understanding that if he strayed into the HMA, he would receive a notice to that effect from the Agency, and that another vessel had received such a communication. AX 1 at 74, 77. The Agency does not address this statement, which, taken together with the fact that Mr. Hayslett had reason to believe his chart plotter had recently been calibrated, explains why the facts the Agency highlights would not have raised a red flag for Mr. Hayslett.

¹⁰ This distinction resolves the Agency's fear that if Respondent's conduct here is not considered negligent, “it is not a stretch to expect closed-area lines on chart plotters to begin disappearing.” Agency Br. 11.

For the foregoing reasons, I find that Mr. Hayslett's violation was unintentional rather than negligent, and I have taken his minimal culpability into account in calculating an appropriate penalty.

3. History of Violations

The Agency has not alleged a history of violations on the part of Respondent, and Respondent has argued that the lack of such history is a basis on which the penalty should be reduced. Rs' Disclosures 1, 4. While a history of past violations may serve as a basis to increase a penalty, a few administrative tribunals have conversely determined that the absence of prior violations may support the assessment of a lower penalty. *See, e.g., Frenier*, Docket No. SE1103883, 2012 NOAA LEXIS 11, at *39 (Sept. 27, 2012) ("[T]he absence of any prior or subsequent offenses can serve as a mitigating factor and support the assessment of a lower civil penalty under certain circumstances."); *Straub*, Docket No. SE1100711, 2012 NOAA LEXIS 1, at *24 (Feb. 1, 2012) ("The absence of prior offenses . . . tends to favor a low civil monetary penalty."); *Fishing Co. of Alaska*, Docket No. 316-030, 1996 NOAA LEXIS 11, at *43-44 (Apr. 17, 1996) ("In an industry that is so heavily regulated, this absence of prior violations by any of the Respondents has been taken into consideration as a mitigating factor in the penalty assessment.").

Here, the record contains no evidence to countermand Respondent's representation that for the whole of his 25 years engaged in the fishing industry, he has maintained a clean record. Rs' Disclosures 1. However, it also contains no evidence substantiating the length of time in which Mr. Hayslett has participated in the fishing industry, creating a lack of context for his compliance history. I have therefore considered Respondent's history of compliance in calculating an appropriate penalty, but I have given this factor limited weight.

4. Ability to Pay

A respondent who wants the ALJ's initial decision to account for the respondent's inability to pay must, 30 days prior to hearing, submit to Agency counsel "verifiable, complete, and accurate financial information" such as "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." 15 C.F.R. § 904.108(d), (e). Respondent did not timely submit such information. Respondent is therefore "presumed to have the ability to pay the civil penalty." 15 C.F.R. § 904.108(c); *see Nguyen*, 2012 NOAA LEXIS 2, at *21 (same).

5. Other Matters as Justice May Require

In considering other matters as justice may require in determining the penalty amount, I find that is appropriate to account for (i) the economic benefit Respondent received because of the violation and (ii) Respondent's degree of cooperation with the Agency's investigation. In contrast, I decline to further increase Respondent's penalty based on his failure to appear at hearing.

**a. Justice Requires Consideration of Part of the Economic Benefit
Respondent Received from the Violation**

The Agency argues that Mr. Hayslett's penalty must account for the economic benefit he obtained from the *F/V Ocean Hunter's* unlawful catch. Agency Br. 7. Indeed, the Agency suggests that I should depart upward from the penalty it first proposed, because the "true economic gain" to OCI and Mr. Hayslett is greater than the Agency identified in preparing the NOVA. Agency Br. 7–9. In support of this argument, the Agency notes that it calculated the NOVA's proposed penalty before it became aware of Mr. Hayslett's daily catch emails, which confirm that the *F/V Ocean Hunter* took on nearly all of the disputed fishing trip's U10 scallop catch from the GSC HMA. Agency Br. 8 (citing RX 6). In the absence of this information, the Agency conservatively assumed that the vessel caught scallops of all sizes at a constant rate throughout the trip, resulting in an estimated economic gain of \$90,905.10. Agency Br. 8 (citing AX 1 at 33). The Agency argues that Mr. Hayslett's emails revealed its initial assumption to be in error and that correcting this assumption reveals the total economic benefit from the violation to be \$136,509.60. Agency Br. 9.

I agree with the Agency that, in general, respondents should be denied the economic benefit of their violations. "This is not for punitive reasons, but rather to reinforce the notion that the cost of violations cannot become a part of doing business." *DaSilva*, 2015 NOAA LEXIS 17, at *53. "It is also important to demonstrate to other fishers that they will not be disadvantaged when they comply with regulations their competitors ignore." *Id.* at *54. However, "[t]he goal of deterring future violations by 'alter[ing] the economic calculus' of violating the rules presumes some intentionality on a respondent's part." *Id.* at *61–62 (citing *Black*, Docket No. PI0904340, 2013 NOAA LEXIS 6, at *115–16 (Aug. 22, 2013)). Where, as here, the record demonstrates that a respondent bears minimal culpability for the violation, "there is less urgency in deterring a future violation because there is less concern the respondent will continue to engage in misconduct into which they incorporate the penalty as a business cost." *Id.* at *62. Therefore, while justice requires that, to some degree, I take economic benefit from the violation into account in setting an appropriate penalty here, I do not deem recovering economic benefit from this respondent to have the same import in determining the penalty as it might otherwise.¹¹

¹¹ Mr. Hayslett has represented that, out of the total gross proceeds from the trip of \$267,392, his share was \$8,500. See Rs' Disclosures 3 (stating that Mr. Hayslett's "share of proceeds from the sale amounted to \$8500"). The Agency provided no alternative calculation of the benefit to Mr. Hayslett, and it acknowledged that a proper accounting would, at a minimum, require knowing trip costs that are not in evidence. See AX 8 ¶ 23 (captain and crew shares are distributed only after deducting trip costs). The record does not reveal what portion of Mr. Hayslett's admitted payment may be attributed to the violation here at issue. The Agency's two attempts to calculate what percentage of the *F/V Ocean Hunter's* catch came from the GSC HMA both include errors, with the latter error resulting from uncertainty in the record about when the vessel began fishing. See Agency Br. 9 (stating that that Agency's initial economic benefit estimate was in error because it failed to account for the fact that most of the vessel's U10 scallop catch was caught between February 27 and March 2, 2022); see also Agency Br. 8–9 (assuming without support that the vessel did not begin fishing until it entered the GSC HMA on February 28,

b. Justice Requires Consideration of Mr. Hayslett's Degree of Cooperation with Investigators

The Agency next argues that Mr. Hayslett's penalty should be increased because he lied to investigators in an apparent attempt to downplay the extent of his violation. Agency Br. 12. Specifically, the Agency asserts that Mr. Hayslett provided investigators with an undercount of the *F/V Ocean Hunter's* scallop catch up to the time of boarding, representing that the vessel had caught just 3400 lbs of scallops by that point, rather than the roughly 4500 lbs he had, himself, recorded. See Agency Br. 12 (citing AX 1 at 10). The Agency asserts that this undercuts Mr. Hayslett's argument that he was fully cooperative with investigators and necessitates a heightened penalty. Agency Br. 12.

The evidence indicates that in emails sent on March 1 and 2, 2022, Mr. Hayslett recorded that the vessel caught a total of 4,480 lbs of scallops through noon of March 2nd. RX 6 at 5–7. However, when investigators interviewed Mr. Hayslett after the vessel returned to port, he reported catching only 3400 lbs of scallops in the GSC HMA. AX 1 at 10. Even assuming Mr. Hayslett did not consider the 660 lbs of scallops the vessel caught on February 28 as part of his assessment—not entirely unreasonable, given the minimal time the vessel spent in the HMA on that date—that still would not account for the remaining 420-lb difference between the value he gave the investigators and his own contemporaneous records of the vessel's catch. See RX 6 at 5–7.

The Agency's explanation for this discrepancy is that Mr. Hayslett was deflating the pre-boarding catch count to muddy the waters as to which scallops were unlawfully caught. Mr. Hayslett's failure to appear at hearing deprives the Tribunal of an alternative, perhaps even innocent, explanation for his erroneous estimate. I note that the Agency does not contest the fact that Mr. Hayslett was otherwise extremely cooperative and truthful during boarding and the Agency's subsequent investigation. Therefore, I consider all these opposing facts to essentially negate each other, warranting neither an increase nor decrease in the penalty based upon Mr. Hayslett's cooperation or lack thereof.

c. Justice Does Not Require Further Penalizing Respondent's Failure to Appear

I also disagree with the Agency's position that Mr. Hayslett's failure to appear at hearing should be held against him in setting a penalty for this matter. See Agency Br. 12. Mr. Hayslett has already accrued significant sanctions for his failure to appear, namely the Tribunal's finding of default and the one-sided evidentiary record created in his absence. While Mr. Hayslett would have done well to appear at hearing, I am unwilling to impose an additional monetary penalty against a *pro se* individual for his failure to do so. Furthermore, the Agency itself posits

2022); *supra* note 8 (finding that the vessel travelled at fishing speeds outside the GSC HMA for 38% of the time it was underway on February 28, 2022). Furthermore, there is no indication in the record whether OCI's settlement with NOAA accounted for some or all of the economic benefit of the violation.

reasons Mr. Hayslett may have ceased participating in this case that have nothing to do with uncooperativeness. Agency Br. 12 (suggesting Mr. Hayslett was practicing avoidance). I have, therefore, not considered Mr. Hayslett's failure to appear in assessing the appropriate penalty in this case.

Upon consideration of all the foregoing, including the aforementioned consideration of the factors listed in 16 U.S.C. § 1858(a) and 15 C.F.R. § 904.108(a), I assess a civil penalty in the amount of **\$3,000** for Respondent's liability for the charged violation in this case.

VI. DECISION AND ORDER

Respondent is liable for the charged violation in this case. A civil monetary penalty of **\$3,000** is imposed for the charged violation. Once this Initial Decision becomes final under the provisions of 15 C.F.R. § 904.271(d), Respondent will be contacted by NOAA with instructions as to how to pay the civil penalty imposed herein.

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

PLEASE TAKE FURTHER NOTICE, that any petition to have this Initial Decision reviewed by the NOAA Administrator must be filed with the Administrator within 30 days after the date this Initial Decision is served and in accordance with the requirements set forth at 15 C.F.R. § 904.273. A copy of 15 C.F.R. §§ 904.271-273 is attached.

PLEASE TAKE FURTHER NOTICE, that this Initial Decision becomes effective as the final Agency action 60 days after service, unless the undersigned grants a petition for reconsideration or the Administrator reviews the Initial Decision. 15 C.F.R. § 904.271(d).

PLEASE TAKE FURTHER NOTICE, that upon failure to pay the civil penalty to the Agency within 30 days from the date on which this decision becomes final Agency action, the Agency may request the U.S. Department of Justice to recover the amount assessed, plus interest and costs, in any appropriate district court of the United States or may commence any other lawful action. 15 C.F.R. § 904.105(b).

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge

U.S. Environmental Protection Agency¹²

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

¹² The Administrative Law Judges of the U.S. 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. This agreement was entered into under a statutory loan program that allows administrative law judges at one federal agency to perform the duties of administrative law judges at another federal agency. See 5 U.S.C. § 3344.