UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	)	DOCKET NUMBER:
Clint B. Fahey, and	)	**AK1102931**
David Anderson,	)	**F/V Clipper Surprise**
Respondents.	)	

INITIAL DECISION AND ORDER

Date: May 23, 2013

Before: Susan L. Biro, Chief Administrative Law Judge, U.S. EPA[1]

Appearances:

For the Agency:

Susan K. Auer, Esquire
Office of the General Counsel, Enforcement Section, Alaska Region
National Oceanic and Atmospheric Administration
U.S. Department of Commerce
P.O. Box 21109
Juneau, Alaska 99802

For the Respondents:

None

[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.

I. PROCEDURAL HISTORY

On August 29, 2012, counsel for the National Oceanic and Atmospheric Administration ("NOAA" or "Agency"), on behalf of the Secretary of Commerce, instituted this action by issuing a Notice of Violation and Assessment of Administrative Penalty ("NOVA") to Clint B. Fahey and David Anderson ("Respondents"). The NOVA charges Respondents with one count of violating the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A) and (L), and Agency regulations at 50 C.F.R. § 679.7(g)(1) and (5), and proposes a total assessed penalty of $4,500. Respondents were advised therein of their right to respond to the NOVA and request "a hearing (like a trial) before an Administrative Law Judge (ALJ)" and that "[i]f no Respondent responds within 30 days of service of [the NOVA], [the NOVA] (including the assessed penalty) becomes final in accordance with 15 C.F.R. 904.104."

Upon issuance, the Agency sent the NOVA by certified mail to Respondent Clint B. Fahey at 8251 S. 114th Street, Seattle, Washington 98178 and to Respondent David Anderson at 1235 NE 4th Street, Redmond, Oregon 97756.

On October 10, 2012, the Agency filed a letter with this Tribunal stating that it had received a request for a hearing from Respondent Anderson on October 3, 2012. The Agency's letter indicated that Respondent Anderson "appears for himself in this matter" and that Respondent Fahey "has not yet appeared." Attached to the Agency letter was a copy of Respondent Anderson's signed hearing request which states in full as follows: "I David Anderson request a hearing for File NO: AK1102931." Respondent Anderson's forwarded hearing request constitutes the entirety of Respondents' contacts with this Tribunal during this proceeding.

On October 23, 2012, the undersigned issued an Assignment of Administrative Law Judge and Order to Submit Preliminary Positions on Issues and Procedures (PPIP) ("PPIP Order"). In the PPIP Order, the undersigned set forth various prehearing filing deadlines and procedures, and ordered the parties to submit their respective PPIPs in accordance with 15 C.F.R. § 904.240(a) no later than November 30, 2012. The PPIP Order listed the addresses that this Tribunal had on file for Respondent Anderson and Respondent Fahey, and stated "[i]f this information is inaccurate or incomplete, please contact the undersigned's staff attorney, Edward Kulschinsky, at (202) 564-4133 or Kulschinsky.Edward@epa.gov." The PPIP Order advised that failure to comply with the requirements in the PPIP Order "may result in the exclusion of the non-compliant party's evidence and/or the issuance of an adverse ruling against the non-compliant party."

The Agency filed its PPIP on November 30, 2012. On December 7, 2012, not having received a PPIP from either Respondent, the undersigned issued an Order to Show Cause, requiring therein that each Respondent file a document on or before December 28, 2012 explaining why there was good cause for his failure to submit a PPIP and why an order adverse to his interests should not be issued. Copies of the Order to Show Cause were sent by regular mail to the addresses on file for Respondents.

Neither Respondent submitted a document in response to the undersigned's Order to Show Cause. On January 8, 2013, the undersigned issued a Decision on Response to Order to Show Cause and Hearing Order ("Hearing Order"). Consistent with 15 C.F.R. § 904.212(a) and § 904.204(f), based upon their failure to respond to the PPIP or Show Cause Order, the undersigned held that Respondents "shall not be permitted to introduce any defenses, offer any evidence, call any witnesses, or otherwise introduce matters at hearing that they were required to identify in a PPIP." The Hearing Order set forth prehearing filing deadlines and scheduled the hearing for March 4, 2013 in Anchorage, Alaska. The Hearing Order also set deadlines for the filing of discovery motions, joint stipulations, and prehearing briefs, listed this Tribunal's various addresses, and explained the filing and service requirements set forth in the rules that govern this proceeding, 15 C.F.R. Part 904 ("Rules of Practice"). Finally, the Hearing Order warned Respondents that "failure to appear at the hearing, without good cause being shown, may result in default judgment being entered against them." The Hearing Order was sent via regular mail to each Respondent at the address on file with this Tribunal.

On January 30, 2013 the Agency filed a Motion for Admission of Telephonic Testimony seeking to introduce the testimony of Matthew Srsich via telephone in lieu of his personal appearance at hearing in Anchorage, AK. The undersigned granted the Agency's motion on February 26, 2013, however Mr. Srsich ultimately was not called to testify at the hearing.

On February 25, 2013, the Hearing Clerk of this Tribunal issued both a Notice of Hearing Location and an Amended Notice of Hearing Location to correct a minor clerical error (collectively "Hearing Notices") advising the parties that the hearing in this matter would be held on March 4, 2013 at Accu-Type Depositions, Suite 200, 310 K Street, Anchorage, Alaska 99516. The Hearing Notices advised Respondents that "failure to appear at the hearing, without good cause having been shown, may result in the entrance of default judgment against [them]." The Hearing Notices were sent via regular mail to each Respondent at the address on file with this Tribunal.

In accordance with the Hearing Order and Amended Notice of Hearing Location, the hearing in this matter was held on March 4, 2013 at Accu-Type Depositions, Suite 200, 310 K Street, Anchorage, Alaska 99516. Counsel for the Agency appeared at hearing, however neither Respondent appeared nor did any person appear on their behalf. Finding that Respondents had been given proper notice, had waived the right to a hearing, and had consented to a decision on the record, the undersigned entered a default judgment against Respondents in accordance with 15 C.F.R. § 904.211. Tr. 6.[2] During its case, the Agency introduced nine exhibits into the record, but no witness testimony.[3] A transcript of the hearing was received on April 30, 2013. No post hearing briefs were submitted and the record closed as of the date of hearing.

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[2] Citations herein to the transcript are made in the following format: "Tr. [page] at [line]" or "Tr. [page]." A digital copy of the transcript of the hearing in this matter was e-mailed to Agency counsel on May 7, 2013. On May 13 2013, this office mailed paper copies of the transcript to Respondents at their last known addresses via regular mail.

[3] Citations herein to the Agency's exhibits are made in the following format: "Gov't Ex. [exhibit number] at [page]".

II. FACTUAL BACKGROUND

On or about June 9, 2011 and at all times relevant to this proceeding, Respondents Clint B. Fahey and David Anderson were crewmembers aboard the Fishing Vessel ("F/V") Clipper Surprise, a "catcher/processor vessel." Gov't Ex. 1 at 1 (Investigative Report); Gov't Ex. 2 at 1 (Memorandum of Interview with Clint B. Fahey); Gov't Ex. 3 at 1 (Memorandum of Interview with David Anderson). Matthew Srsich was an employee of Saltwater, Inc., a contracting company that supplies certified observers to NOAA for sampling and observation of the commercial fishing fleet in the Dutch Harbor of Alaska. Gov't Ex. 4 at 1 (Memorandum of Interview with Matthew Srsich). From May 25, 2011 to June 27, 2011, Mr. Srsich was assigned as a NOAA contract observer to the F/V Clipper Surprise. *Id.* at 1.

On or about June 8, 2011,[4] Respondent Fahey advised Mr. Srsich that he and Respondent Anderson planned on "play[ing] a practical joke" on a newly hired fellow crewmember by detonating a seal bomb taped to a full carton of milk close to the crewmember.[5] Gov't Ex. 5 at 1 (Written Statement of Matthew Srsich); Gov't Ex. 4 at 2; Gov't Ex. 2 at 1–2. In his written statement, Mr. Srsich indicated that Respondent Fahey told him of their plan so that he could be away from the site of the incident when it occurred. Gov't Ex. 5 at 1.

The following morning, Mr. Srsich was working at his sampling station. Gov't Ex. 4 at 2; Gov't Ex. 5 at 1. He left his sampling station temporarily and reported that he saw the crewmember targeted for the incident ascend the stairs to the hauling deck. Gov't Ex. 5 at 1. Mr. Srsich indicated that he "assumed the prank was off and went back out onto the deck to finish sampling the haul." *Id.* When he returned to his sampling station, Mr. Srsich saw a carton of milk attached to a line "drop over the rail from the weather deck into [his] sample station." *Id.* Within seconds, the "carton exploded approximately 4 feet from [him] at eye level." *Id.*; Gov't Ex. 4 at 2.

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[4] Gerry Shanahan, a NOAA Enforcement Officer, indicated in his Memorandum of Interview with Matthew Srsich that the incident serving as the basis of the NOVA occurred on June 9, 2011. Gov't Ex. 4 at 1. The Agency also uses this date in its PPIP. Agency PPIP at 2. In Mr. Srsich's written statement, however, he indicates that the incident took place on June 6, 2011. Gov't Ex. 5 at 1.

[5] "**Error! Main Document Only.**A seal bomb is a firecracker type device with a waterproof fuse which allows it to explode under water. It is almost 3-4 inches long and looks like the "ash can" firecrackers available some years ago." *In re Purcell,* 5 O.R.W. 493, 493 n. 1; 1989 NOAA LEXIS 11, at *1 n. 1 (ALJ, Apr. 11, 1989). *See also*, National Marine Fisheries Service; Receipt of Application for a General Permit, 51 Fed. Reg. 4950, 4951 (Feb. 10, 1986) ("Sea[l] bombs are a flash explosive . . . packed so that they sink below the surface before detonating. They usually explode at a depth of two to three meters. . . . The sound levels at distances closer than 100 meters were roughly estimated to be about 168dB at 25 meters and 178dB at five meters.").

Mr. Srsich reported that he fell to his hands and knees upon the explosion and that he "lost complete hearing" in both ears for a period of approximately thirty seconds. Gov't Ex. 5 at 2; *See* Gov't Ex. 4 at 2. He stated that his hearing slowly returned but that he was plagued by "constant ringing and sharp pain." Gov't Ex. 5 at 2. Mr. Srsich completed his sampling duties and advised the vessel's mate that he would not be sampling for the remainder of the night. *Id.*; Gov't Ex. 4 at 2. The following day, Mr. Srsich states that he reported the incident to the vessel's captain, Todd Jacobsen. Gov't Ex. 4 at 2; Gov't Ex. 5 at 2. Mr. Srsich remained onboard the F/V Clipper Surprise until June 27, 2011, but he was unable to complete his sampling duties for the remainder of his assignment. Gov't Ex. 4 at 3; Gov't Ex. 5 at 2; Gov't Ex. 6 at 2. Mr. Srsich reported that he suffered "serious headaches, earaches, loss of hearing, sensitivity to sound, and dizziness" throughout the rest of the trip. Gov't Ex. 5 at 2.

Mr. Srsich indicated that Respondent Anderson admitted his guilt in the incident and that both Respondents apologized for their actions. Gov't Ex. 4 at 3. Respondent Fahey stated that he "apologized right away" and "didn't intend to hurt anyone." Gov't Ex. 2 at 2. Respondent Anderson also stated that "[w]e didn't mean for anyone to get hurt in any way." Gov't Ex. 3 at 2. Both Respondents allege that Srsich was on Vicodin, a prescription narcotic medication, during the trip and that he slept a lot, suggesting that his inability to complete his observation duties was not caused by the seal bomb incident. Gov't Ex. 2 at 2–3; Gov't Ex. 3 at 2–3.

Upon disembarking on June 27, 2011, Mr. Srsich visited the Unalaska Health Clinic and was diagnosed with "hearing/[]ear drum damage." Gov't Ex. 4 at 3; *see also* Gov't Ex. 7 at 2 (Letter from Dr. James C. Rockwell). Dr. James C. Rockwell's report from Mr. Srsich's follow-up visit states that Mr. Srsich suffered from "significant acoustic trauma with now moderate to moderately sever sensorineural hearing loss bilaterally" and that he believed "on a more probable than not basis that this hearing loss is directly related to the acoustic trauma event that occurred June 9, 2011." Gov't Ex. 7 at 2. Dr. Rockwell reported that Mr. Srsich had combined hearing loss of 26.255% and advised Mr. Srsich not to return to work for ninety days. *Id.* at 1–2.

III. APPLICABLE LAW AND REGULATIONS

A. Liability

In 1976, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act ("Act" or "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 establishing . . . a fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish, except highly migratory species . . . ." Pub. L. No. 94-265, § 2, 90 Stat. 331 (1976) (codified, as amended, at 16 U.S.C. § 1801(b)(1)).

In 1990, finding that the "collection of reliable data is essential to the effective conservation, management, and scientific understanding of the fishery resources of the United States," Congress enacted the Fishery Conservation Amendments of 1990. Pub. L. 101-627 § 101, 104 Stat. 4436, 4437 (1990) (amending 16 U.S.C. § 1801). To that end, the Fishery

Conservation Amendments amended the Magnuson-Stevens Act by adding protections for observers from certain treatment and health or safety conditions on vessels operating in regulated fisheries. *Id.* §§ 109, 113 (amending 16 U.S.C. §§ 1853, 1857).

The Magnuson-Stevens Act, as amended, makes it unlawful "for any person . . . to forcibly assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with any observer on a vessel . . . ." 16 U.S.C. § 1857(1)(L). Further, the Act also makes it unlawful "for any person . . . to violate any provision of [Chapter 38, Fishery Conservation and Management] or any regulation or permit issued pursuant to this chapter." *Id.* § 1857(1)(A). The Act defines "person" to include "any individual (whether or not a citizen or national of the United States)." *Id.* § 1802(36). An observer is defined as "any person required or authorized to be carried on a vessel for conservation and management purposes by regulations or permits under this chapter." *Id.* § 1802(31).

Reflecting the prohibitions in the Magnuson-Stevens Act, the regulations implementing the Groundfish and Halibut Observer Program in the fisheries of the Exclusive Economic Zone of Alaska state that it is unlawful for any person to "forcibly assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with an observer." 50 C.F.R. § 679.7(g)(1). Further, the regulations make it unlawful for any person to "[h]arass an observer by conduct that has sexual connotations, has the purpose or effect of interfering with the observer's work performance, or otherwise creates an intimidating, hostile, or offensive environment." *Id.* § 679.7(g)(5). The regulations state that in determining whether certain conduct amounts to 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." *Id.*; *see also In re Chan Song Kim*, NOAA Docket No. SW010208A, 2003 WL 22000639, at *8 (ALJ, Jan. 7, 2003) (citing *Evans*, NOAA Docket No. 316-319, 1996 WL 1352610 (ALJ, Apr. 10, 1996); *In re Palmer*, NOAA Docket No. 311-287, 1996 WL 1352611 (ALJ, Apr. 10, 1996)).

The regulations implementing the Magnuson-Stevens Act state that "[h]arass means to unreasonably interfere with an individual's work performance, or to engage in conduct that creates an intimidating, hostile, or offensive environment." 50 C.F.R. § 600.10. To "forcibly interfere" is to "use strength, energy or power to come into opposition, especially with the effect of hampering action or procedure." *Palmer*, 1996 WL 1352611, at *6. Further, the use of force "does not have to be directed at a person, nor does it require actual physical confrontation. *Id.* (citing *In re Lovgren*, 3 O.R.W. 43, 1984 WL 60193 (ALJ, Feb. 28, 1984)).

Further, regulatory offenses do not require scienter when the regulation "is silent as to state of mind." *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999) (citing *Tart v. Massachusetts*, 949 F.2d 490, 502 (1st Cir. 1991)). Offenses related to conservation under the Magnuson-Stevens Act are strict liability offenses and scienter is "not an element of a civil defense" under the Act. *Id.* (citing *In re Whitney*, 6 O.R.W. 479, 483, 1991 WL 288718, at *4 (ALJ, July 3, 1991)).

B. Penalty

The Act provides, in pertinent part, that "[a]ny person who is found . . . to have committed an act prohibited by section 1857 of this title shall be liable to the United States for a civil penalty." 16 U.S.C. § 1858(a). The maximum civil penalty for each violation is $140,000, as adjusted for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, amended by the Debt Collection and Improvement Act of 1996, Pub. L. 104-134. 15 C.F.R. § 6.4(f)(14). The Act states that "[i]n determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require." 16 U.S.C. § 1858(a); *see also* 15 C.F.R. § 904.108(a) (listing the factors that may be taken into account when assessing a civil penalty).

IV. DISCUSSION

A. Default Judgment

The Rules of Practice provide that the Agency may serve a NOVA "by certified mail (return receipt requested), facsimile, electronic transmission, or third party commercial carrier to an addressee's last known address or by personal delivery." 15 C.F.R. § 904.3(a). Service is considered effective upon receipt. *Id.* After the NOVA is served and a hearing is requested, all other documents must be served on the respondent "by first class mail (postage prepaid), facsimile, electronic transmission, or third party commercial carrier, to an addressee's last known address or by personal delivery." *Id.* § 904.3(b). Service for these documents is considered effective "upon the date of postmark . . . , facsimile transmission, delivery to third party commercial carrier, electronic transmission, or upon personal delivery." *Id.*

The Agency mailed the NOVA to each Respondent at his last known address by certified mail, return receipt requested, in accordance with 15 C.F.R. § 904.3. The Investigative Report submitted by the Agency identifies the last known address for Clint B. Fahey as 8251 S. 114th Street, Seattle, Washington 98178; and for David Anderson as 1235 NE 4th Street, Redmond, Oregon 97756. Gov't Ex. 1 at 2. The Agency submitted copies of the Domestic Return Receipt ("Green Cards"), verifying that the NOVA was signed and received by someone at the last known address for each Respondent. Gov't Ex. 9. Respondent Anderson's receipt of the NOVA is evidenced by his subsequent written request for a hearing forwarded to this Tribunal in the Agency's letter, dated October 10, 2012. Respondent Fahey neither signed for the NOVA nor requested a hearing. *Id.* at 2. The Domestic Return Receipt addressed to Respondent Fahey indicates that it was received by "E-m Rystrom." *Id.* at 2. However, "service" of the NOVA does not require that Respondent Fahey personally sign the Domestic Return Receipt provided that it was sent to his last known address. *See Gonzalez v. NOAA*, 420 Fed. Appx. 364, 368 (5th Cir. 2011) (stating that under the Rules of Practice, NOAA may serve the NOVA by certified mail to the respondent's last known address "regardless of who signs for receipt") (citing *United States v. Robinson*, 434 F.3d 357, 366 (5th Cir. 2005) ("Due process does not require actual notice or actual receipt of notice.")). Based upon the Investigative Report and the Domestic

Return Receipts, it is concluded that the Respondents were served with a copy of the NOVA at their last known address on September 4, 2012. Gov't Ex. 1 at 2, Gov't Ex. 9.

The Judge in an administrative proceeding is required by the Rules of Practice to "promptly serve on the parties notice of the time and place of hearing," which "will not be held less than 20 days after service of the notice of hearing . . . ." 15 C.F.R. § 904.250(a). On January 8, 2013, the undersigned issued a Hearing Order in this matter notifying the parties that the hearing would take place on March 4, 2013 in Anchorage, Alaska. On February 25, 2013, the Hearing Clerk issued a Notice of Hearing Location and an Amended Notice of Hearing Location to correct a minor clerical error, notifying the parties of the precise address where the hearing would take place on March 4, 2013. The Hearing Order, Notice of Hearing Location, and Amended Notice of Hearing Location were sent via regular mail to each Respondent at the addresses on file with this Tribunal. When mail is properly addressed and proper postage has been affixed, there is a strong presumption that it was delivered in the ordinary course of mail and was received by the addressee. *Ark. Motor Coaches, Ltd. v. CIR*, 198 F.2d 189, 191 (8th Cir. 1952). Thus, the undersigned finds that Respondents were properly notified of the time and place of the hearing in accordance with the Rules of Practice, 15 C.F.R. § 904.250(a).

The Rules of Practice provide that "[i]f, after proper service of notice, any party appears at the hearing and an opposing party fails to appear, the Judge is authorized . . . [w]here the respondents have failed to appear, [to] find the facts as alleged in the NOVA . . . and enter a default judgment against the respondents." 15 C.F.R. § 904.211(a). Further, the Judge "may 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." *Id.* § 904.211(d).

Having been properly served with the NOVA, duly notified of the time and place of the hearing, and served effectively throughout this proceeding, Respondents failed to appear and thereby waived the right to further contest the alleged violations. Thus, default judgment was properly entered against Respondents at the hearing on March 4, 2013.

B. <u>The Agency's Burden of Proof</u>

Default judgment having been entered, all facts alleged in the NOVA are deemed true. 15 C.F.R. § 904.211(a)(2). To prevail on its claims that Respondents violated the Act and regulations, the Agency must prove each alleged violation by the preponderance of the evidence. *In re Vo*, NOAA Docket No. SE010091FM, 2001 WL 1085351, at *6 (ALJ, Aug. 17, 2001) (citing 5 U.S.C. § 556(d); *Dept. of Labor v. Greenwich Colleries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100–03 (1981)). "Preponderance of the evidence means the Agency must show it is more likely than not a respondent committed the charged violation." *In re Nguyen*, NOAA Docket No. SE0801361FM, 2012 WL 1497024, at *4 (ALJ, Jan. 18, 2012) (citing *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 (1983)). A sanction may not be imposed "except on consideration of the whole record . . . and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also* 15 C.F.R. § 904.251 ("All evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing."); 15 C.F.R. § 904.270 (stating that the exclusive record of decision consists of the official transcript of testimony; exhibits admitted into

evidence; briefs; pleadings; documents filed in the proceeding; and descriptions or copies of matters, facts, or documents officially noticed in the proceeding). Direct and circumstantial evidence may establish the facts constituting a violation of law. *Vo*, 2001 WL 1085351, at *6.

C. Ultimate Findings of Fact and Conclusions of Law as to Liability

Having imposed default judgment against Respondent, and the facts having been stated in detail above, it is appropriate to set forth abbreviated findings of fact and conclusions of law. Upon thorough and careful review of the documentary and testimonial evidence in the record of this proceeding, I find that the Agency has proven by a preponderance of the evidence the following:

1. Respondent Clint B. Fahey is a "person" as defined by the Magnuson-Stevens Fishery Conservation and Management Act, and is subject to the jurisdiction of the United States. 16 U.S.C. § 1802(36).

2. Respondent David Anderson is a "person" as defined by the Magnuson-Stevens Fishery Conservation and Management Act, and is subject to the jurisdiction of the United States. 16 U.S.C. § 1802(36).

3. On or about June 9, 2011 and at all times relevant to this proceeding, Respondents Clint B. Fahey and David Anderson were crewmembers aboard the F/V Clipper Surprise. Gov't Ex. 2 at 1; Gov't Ex. 3 at 1; Gov't Ex. 1 at 1.

4. On June 9, 2011 and at all times relevant to this proceeding, Matthew Srsich was an "observer" as defined by the Magnuson-Stevens Fishery Conservation and Management Act. 16 U.S.C. § 1802(31).

5. On or about June 9, 2011 and at all times relevant to this proceeding, Matthew Srsich was an employee of Saltwater, Inc., a contracting company that supplies certified observers to NOAA. Gov't Ex. 4 at 1.

6. Matthew Srsich was assigned as a NOAA contract observer to accompany the F/V Clipper Surprise on a fishing trip from May 25, 2011 to June 27, 2011. Gov't Ex. 4 at 1.

7. On or about June 8, 2011, Respondent Fahey informed Observer Srsich that he intended to detonate a seal bomb, an explosive pest control device, attached to a milk carton close to a fellow crewmember. Gov't Ex. 5 at 1; Gov't Ex. 4 at 2; Gov't Ex. 2 at 2.

8. On or about June 9, 2011 Observer Srsich was working at his sampling station aboard the F/V Clipper Surprise. Gov't Ex. 4 at 2; Gov't Ex. 5 at 1.

9. Observer Srsich briefly left his sampling station and returned to his station when he saw the fellow crewmember meant to be the target of Respondents' seal bomb device ascend the stairs to the hauling deck, away from the planned location of the incident. Gov't Ex. 5 at 1.

10. When Observer Srsich returned to his sampling station, Respondents caused the seal bomb attached to a milk carton to explode approximately four feet from Observer Srsich. Gov't Ex. 5 at 1; Gov't Ex. 4 at 2.

11. After the explosion, Observer Srsich experienced loss of hearing, ringing of the ears, headaches, earaches, sensitivity to sound, and dizziness. Gov't Ex. 4 at 2; Gov't Ex. 5 at 2; Gov't Ex. 6 at 2.

12. On the following day, Observer Srsich reported the incident to the F/V Clipper Surprise captain, Todd Jacobsen. Gov't Ex. 4 at 2; Gov't Ex. 5 at 2.

13. Observer Srsich was unable to complete his sampling duties for the remainder of the assignment and disembarked from the F/V Clipper Surprise on June 27, 2011. Gov't Ex. 4 at 3.

14. After disembarking, Observer Srsich was diagnosed with "acoustic trauma" and combined hearing loss of 26.255%. Gov't Ex. 7.

15. On or about June 9, 2011, Respondents Fahey and Anderson did forcibly impede and interfere with Observer Srsich, in violation of 50 C.F.R. § 679.7(g)(1). Gov't Ex. 4 at 3; Gov't Ex. 6 at 2; Gov't Ex. 7; Gov't Ex. 8.

16. On or about June 9, 2011, Respondents Fahey and Anderson did harass Observer Srsich by conduct that had the effect of interfering with Observer Srsich's work performance, in violation of 50 C.F.R. § 679.7(g)(5). Gov't Ex. 4 at 3; Gov't Ex. 6 at 2; Gov't Ex. 7; Gov't Ex. 8.

17. There is no evidence in the record to support Respondents' assertion that Mr. Srsich was not able to perform his duties because he was taking Vicodin, a prescription narcotic.

18. Because Respondents Fahey and Anderson violated regulations promulgated under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A), Respondents are liable to the United States for a civil penalty, 16 U.S.C. § 1858(a).

D. Civil Penalty Assessment

Considering the nature, circumstances, extent, and gravity of the violation; Respondents' degree of culpability and history of prior offenses; and other matters as required by justice, a total civil penalty in the amount of $4,500 is imposed on Respondents, jointly and severally.

There is no presumption that the Agency's proposed penalty is appropriate, or that the Agency's penalty analysis is accurate. *In re Nguyen*, NOAA Docket No. SE0801361FM, 2012 WL 1497024, at *8 (ALJ Jan. 18, 2012); *see also* 15 C.F.R.§ 904.204(m) (stating that the Judge has the authority to assess a civil penalty after taking into account all of the factors required by law). An Administrative Law Judge is not required to "state good reasons for departing from the civil penalty . . . that NOAA originally assessed in its charging document." *Nguyen*, 2012 WL 1497024, at *8; 75 Fed. Reg. 35,631, 35,631 (June 23, 2010). An Administrative Law Judge

must assess a civil penalty "taking into account all of the factors required by the applicable law." 15 C.F.R. § 904.204(m). When assessing a civil penalty, the Magnuson-Stevens Act requires that the presiding Judge account for "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." 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108 (enumerating factors that may be considered in assessing a civil penalty).

Additionally, the Act allows consideration of a respondent's inability to pay a civil penalty. 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(b)–(h). According to the Act, a respondent who wishes to have inability to pay considered by the Administrative Law Judge must provide relevant information no fewer than thirty days prior to hearing. 16 U.S.C. § 1858(a). The burden is on the respondent to prove "such inability by providing verifiable, complete, and accurate financial information to NOAA." 15 C.F.R. § 904.108(c); *Nguyen*, 2012 WL 1497024, at *8. In this case, Respondents have not claimed an inability to pay the penalty and have not provided any information concerning financial conditions. Respondents are therefore "presumed to have the ability to pay the civil penalty." 15 C.F.R. § 904.108(c).

i. The Agency's Penalty Analysis

In its PPIP, the Agency submitted a Penalty Assessment Worksheet ("Worksheet"), which states that the penalty proposed "is based on a review and application of the facts that comprise the violation(s) charged, penalty schedules, penalty matrixes, adjustment factors, and economic considerations set forth in NOAA's Policy for Assessment of Penalties and Permit Sanctions" ("Penalty Policy").[6] The Agency, in its PPIP, argued that "the evidence shows that the culpability level is 'negligent' because the Respondents failed to exercise the degree of care that a reasonably prudent person would exercise in like circumstances." Agency PPIP at 4. The Agency explained that the civil penalty was originally assessed at $5,000 but that the penalty was reduced by $500 because Respondents cooperated with the investigation. *Id.* Further, the Agency noted that "[n]o prior violations have been taken into account in this matter." *Id.*

At the hearing, counsel for the Agency requested that the Penalty Policy be entered as an exhibit. The Penalty Policy was not, however, provided to the Respondents prior to the hearing nor were Respondents present at the hearing. The undersigned therefore declined to enter the Penalty Policy as an exhibit. The Agency's proposed penalty is thus assessed in accordance with the factors set out in the Act, 16 U.S.C. § 1858(a), and the Rules of Practice, 15 C.F.R. § 904.108(a).

ii. Nature, Circumstances, Extent and Gravity of the Alleged Violation

The Groundfish and Halibut Observer Program in the fisheries of the Exclusive Economic Zone of Alaska is of tantamount importance to achieving the Act's purpose of collecting reliable data to further the "effective conservation, management, and scientific understanding of the fishery resources." *See* 16 U.S.C. § 1801(a)(8). The protection of

[6] The Agency Penalty Policy is accessible to the public at the following URL: http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf.

observers from harassment and interference as they carry out their duties is integral to the success of observer programs. *See* 16 U.S.C. §§ 1853(b)(8), 1857(1)(L).

Respondents' actions unreasonably and forcibly interfered with Observer Srsich's ability to carry out his duties while onboard the F/V Clipper Surprise. Gov't Ex. 4 at 3; Gov't Ex. 6 at 2; Gov't Ex. 8. Respondents' use of an explosive in such close proximity to an observer evidences a disregard for Observer Srsich's safety. Gov't Ex. 5 at 1; Gov't Ex. 4 at 2. Further, the gravity of the incident is evidenced by the severity of Observer Srsich's injuries. Doctor Rockwell, who examined Observer Srsich after he disembarked on June 27, 2011, stated that Observer Srsich had lost over 26% of his combined hearing and that it was "more probable than not . . . that this hearing loss is directly related to the acoustic trauma event that occurred on June 9, 2011." Gov't Ex. 7 at 2. Additionally, after the incident, Observer Srsich was unable to complete any of his sampling duties, thereby depriving NOAA of any data and information he would have collected over the remaining nearly eighteen days of the fishing trip. Gov't Ex. 4 at 3; Gov't Ex. 6 at 2.

Considering the importance of observer protection to achieving the purposes of the Act, Respondents' use of explosives, and the severity of Observer Srsich's injuries, the Respondents' violations are of significant gravity.

iii. Respondents' Degree of Culpability, Any History of Prior Violations, Ability to Pay

The Agency asserts that Respondents were "negligent" in violating the Act and the observer regulations because Respondents "failed to exercise the degree of care that a reasonably prudent person would exercise in like circumstances." Gov't Ex. 9 at 10 (Penalty Assessment Worksheet); Agency PPIP at 4. The Agency further indicated that "[n]o prior violations have been taken into account in this matter" and there is no evidence in the record to suggest that Respondents have a history of violations. Agency PPIP at 4.

The duty to know and follow the law falls squarely on Respondent. *In re O'Neil*, NOAA Docket No. 315-189, 1995 WL 1311365, at *3 (ALJ, June 14, 1995) ("[C]ommercial fishing is regulated and those engaged in it for profit activities are required to keep abreast of and abide by the laws and regulations that affect them."); *In re Peterson*, 6 O.R.W. 486, 490, 1991 WL 288720, at *4 (ALJ, July 19, 1991)("When one engages in a highly regulated industry, that person bears the responsibility of knowing and interpreting the regulations governing that industry."). Moreover, publication of regulations in the Federal Register gives legal notice of their contents regardless of actual knowledge. *O'Neil*, 1995 WL 1311365, at *3 (noting that this legal presumption is now codified at 44 U.S.C. § 1507). It is well settled that "ignorance of the law will not excuse." *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910); *In re Taormina*, 6 O.R.W. 249, 251, 1990 WL 322735, at *3 (N.O.A.A. App. 1990).

A reasonably prudent person in like circumstances would not have planned and executed an immature prank involving an explosive device with or without an observer onboard. Although Respondents expressed remorse at having caused the seal bomb to explode near Observer Srsich, indicating that they never intended to injure Observer Srsich, intent is not a necessary element of the statutory and regulatory violations at issue in this matter. Gov't Ex. 4

at 3; Gov't Ex. 2 at 2; Gov't Ex. 3 at 2; *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999) (citing *Tart v. Massachusetts*, 949 F.2d 490, 502 (1st Cir. 1991)). Detonating a seal bomb within close proximity of any human being is incredibly foolish, especially when the targeted person is not expected to be wearing hearing protection. Just because the intended target of Respondents' moronic prank avoided becoming the victim of it, and the Respondents showed remorse for unintentionally victimizing Observer Srsich, does not make the Respondents' actions any less reprehensible. Being experienced commercial fishermen, familiar with seal bombs, and at their respective ages of 37 and 28, Respondents Fahey and Anderson should have known better. They should have never attempted such a dangerous prank. The weight of evidence thus supports the Agency's finding that Respondents were *at least* "negligent."

The Rules of Practice state that if a respondent wants the presiding judge to consider his inability to pay the penalty, he must submit "verifiable, complete, and accurate financial information" to the Agency in advance of the hearing. 15 C.F.R. § 904.108(e). No evidence of Respondents' inability to pay was submitted at any time during this proceeding. As such, no adjustment based on Respondents' inability to pay shall be made.

iv. Such Other Matters as Justice May Require

The Agency indicates that Respondents were cooperative in the investigation and "provided information regarding the circumstances of the alleged violation." Gov't Ex. 9 at 10. Cooperation with NOAA officers during an investigation is a mitigating factor in assessing a civil penalty. *See In re Straub*, NOAA Docket No. SE1100711, 2012 WL 1497025, at *9 (ALJ, Feb. 1, 2012) (" . . . Respondents' truthfulness and cooperation throughout this process tends to favor a low civil monetary penalty"). Respondents' cooperation therefore merits a downward adjustment to the base penalty. The undersigned finds that the Agency's proposed reduction of the penalty by $500 is appropriate.

ORDER

IT IS HEREBY ORDERED that a civil penalty in the total amount of $4,500 is jointly and severally imposed on Respondents Clint B. Fahey and David Anderson.

PLEASE TAKE NOTICE, that this Initial Decision becomes effective as the final Agency action **60 days** after service on **July 22, 2013**, 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 a failure to pay the civil penalty to the Department of Commerce/NOAA within **30 days** from the date on which this decision becomes final Agency action will result in the total penalty becoming due and payable, and interest being charged at the rate specified by the U.S. Treasury regulations and an assessment of charges to cover the cost of processing and handling of the delinquent penalty. Further, in the event the penalty, or any portion thereof, becomes more than 90 days past due, Respondent may also be assessed an additional penalty charge not to exceed 6 percent per annum.

PLEASE TAKE FURTHER NOTICE, that any petition for reconsideration of this Initial Decision must be filed 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 is filed, any other party to this proceeding may file an answer in support or in opposition. 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.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency[7]

Dated: May 23, 2013
Washington, DC

[7] As stated above, the Administrative Law Judges of the U.S. EPA are authorized to hear cases pending before the Agency pursuant to an agreement effective September 8, 2011.

TITLE 15 -- COMMERCE AND FOREIGN TRADE
SUBTITLE B -- REGULATIONS RELATING TO COMMERCE AND FOREIGN TRADE
CHAPTER IX -- NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE
SUBCHAPTER A -- GENERAL REGULATIONS
PART 904 -- CIVIL PROCEDURES
SUBPART C -- HEARING AND APPEAL PROCEDURES
DECISION

15 CFR 904.271-273

§ 904.271 Initial decision.

(a) After expiration of the period provided in § 904.261 for the filing of reply briefs (unless the parties have waived briefs or presented proposed findings orally at the hearing), the Judge will render a written decision upon the record in the case, setting forth:

(1) Findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law, or discretion presented on the record;

(2) An order as to the final disposition of the case, including any appropriate ruling, order, sanction, relief, or denial thereof;

(3) The date upon which the decision will become effective; and

(4) A statement of further right to appeal.

(b) If the parties have presented oral proposed findings at the hearing or have waived presentation of proposed findings, the Judge may at the termination of the hearing announce the decision, subject to later issuance of a written decision under paragraph (a) of this section. In such cases, the Judge may direct the prevailing party to prepare proposed findings, conclusions, and an order.

(c) The Judge will serve the written decision on each of the parties, the Assistant General Counsel for Enforcement and Litigation, and the Administrator by certified mail (return receipt requested), facsimile, electronic transmission or third party commercial carrier to an addressee's last known address or by personal delivery and upon request will promptly certify to the Administrator the record, including the original copy of the decision, as complete and accurate.

(d) An initial decision becomes effective as the final administrative decision of NOAA 60 days after service, unless:

(1) Otherwise provided by statute or regulations;

(2) The Judge grants a petition for reconsideration under § 904.272; or

(3) A petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative under § 904.273.

§ 904.272 Petition for reconsideration.

Unless an order or initial decision of the Judge specifically provides otherwise, any party may file a petition for reconsideration of an order or initial decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. Petitions must be filed within 20 days after the service of such order or initial decision. The filing of a petition for reconsideration shall operate as a stay of an order or initial decision or its effectiveness date unless specifically so ordered by the Judge. Within 15 days after the petition is filed, any party to the administrative proceeding may file an answer in support or in opposition.

§ 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision within 30 days after the date the decision is served. The petition must be served on the Administrator by registered or certified mail, return receipt requested at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Copies of the petition for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel for Enforcement and Litigation at the following address: Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse, modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

(c) Review by the Administrator of an initial decision is discretionary and is not a matter of right. If a party files a timely petition for discretionary review, or review is timely undertaken on the Administrator's own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator or until the initial decision becomes final pursuant to paragraph (h) of this section.

(d) A petition for review must comply with the following requirements regarding format and content:

(1) The petition must include a concise statement of the case, which must contain a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the petition;

(2) The petition must set forth, in detail, specific objections to the initial decision, the bases for review, and the relief requested;

(3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statutes, regulations, and principal authorities. Petitions may not refer to or incorporate by reference entire documents or transcripts;

(4) A copy of the Judge's initial decision must be attached to the petition;

(5) Copies of all cited portions of the record must be attached to the petition;

(6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and

(7) Issues of fact or law not argued before the Judge may not be raised in the petition unless such issues were raised for the first time in the Judge's initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content

requirements in paragraph (d) of this section without further review.

(f) No oral argument on petitions for discretionary review will be allowed.

(g) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. An answer must comport with the format and content requirements in paragraphs (d)(5) through (d)(7) of this section and set forth detailed responses to the specific objections, bases for review and relief requested in the petition. No further replies are allowed, unless requested by the Administrator.

(h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective date 150 days after the petition is served.

(i) If the Administrator issues an order denying discretionary review, the order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final agency decision. The Administrator need not give reasons for denying review.

(j) If the Administrator grants discretionary review or elects to review the initial decision without petition, the Administrator will issue an order to that effect. Such order may identify issues to be briefed and a briefing schedule. Such issues may include one or more of the issues raised in the petition for review and any other matters the Administrator wishes to review. Only those issues identified in the order may be argued in any briefs permitted under the order. The Administrator may choose to not order any additional briefing, and may instead make a final determination based on any petitions for review, any responses and the existing record.

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an

Administrator's decision to remand the initial decision to the Judge is not final agency action.

(l) An initial decision shall not be subject to judicial review unless:

(1) The party seeking judicial review has exhausted its opportunity for administrative review by filing a petition for review with the Administrator in compliance with this section, and

(2) The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the Judge's initial decision has become the final agency decision under paragraph (h) of this section.

(m) For purposes of any subsequent judicial review of the agency decision, any issues that are not identified in any petition for review, in any answer in support or opposition, by the Administrator, or in any modifications to the initial decision are waived.

(n) If an action is filed for judicial review of a final agency decision, and the decision is vacated or remanded by a court, the Administrator shall issue an order addressing further administrative proceedings in the matter. Such order may include a remand to the Chief Administrative Law Judge for further proceedings consistent with the judicial decision, or further briefing before the Administrator on any issues the Administrator deems appropriate.