



UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:)
)
Determination III 130 Westport, LLC, and) Docket No. SE2303316,
Gerald L. Eubanks,) M/V Determination III
)
Respondents.)
)

INITIAL DECISION AND ORDER

Date: November 5, 2024

Before: Christine Donelian Coughlin, Administrative Law Judge¹
U.S. Environmental Protection Agency

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

In this action, the National Oceanic and Atmospheric Administration (“NOAA” or “Agency”) alleges that Determination III 130 Westport, LLC, and Gerald L. Eubanks (“Respondents”), violated 16 U.S.C. § 1538(a)(1)(G), a provision of the Endangered Species Act (“ESA”), codified at 16 U.S.C. §§ 1531-1544; 16 U.S.C. § 1375(a)(1), a provision of the Marine Mammal Protection Act (“MMPA”), codified at 16 U.S.C. §§ 1361-1423h; and 50 C.F.R. § 224.105(b)(1) (“Speed Rule”), one of the Acts’ implementing regulations, by causing the M/V Determination III to exceed speed limits established to protect endangered North Atlantic right whales from collisions with ships.² For the reasons outlined below, I find Respondents liable for the two counts of violation alleged in the Agency’s October 12, 2023, Notice of Violation and Assessment of Administrative Penalty (“NOVA”). After considering the penalty factors established by the Rules applicable to this proceeding and outlined at 15 C.F.R. § 904.108(a), I further find that Respondents’ violations warrant a penalty of **\$14,250**.

I. Procedural History

On October 12, 2023, NOAA, on behalf of the Secretary of Commerce, issued a NOVA to Respondents in Docket No. SE2303316, M/V Determination III. The NOVA alleges two violations of the ESA, the MMPA, and the Speed Rule. Specifically, NOAA alleges that, on two occasions, Respondents “violate[d] the [ESA] and the [MMPA] by causing the M/V Determination III to exceed a speed limit established to protect endangered North Atlantic right whales from collisions with ships.” NOVA at 1. The Agency proposes a \$15,000 penalty for the violations. NOVA at 2.

Respondents requested a hearing on the alleged violations in a letter dated November 6, 2023. Pursuant to the applicable procedural rules, 15 C.F.R. pt. 904 (“Rules”), on November 24, 2023, Chief Administrative Law Judge Susan L. Biro assigned me as the Administrative Law Judge to preside over the case. That same day, I issued a Prehearing Order, which in part set the schedule for the parties to submit Initial Disclosures.

The Agency filed its Initial Disclosures on January 4, 2024, and Respondents followed with their own Initial Disclosures, filed January 26, 2024. Because the filings appeared to present purely legal rather than factual disputes, I ordered the parties to discuss whether a hearing on the matter was necessary or if the parties would consent to the disposition of the issues based on a stipulated record and written briefs. On April 11, 2024, the parties moved to forego an evidentiary hearing in favor of a decision based on a stipulated record. On April 19, 2024, I issued an order granting the parties’ motion, setting a deadline for filing a Joint Set of Stipulated Facts, Exhibits, and/or Testimony, and establishing a briefing schedule.

² All references herein to statutes and regulations are to those in effect at the time of the alleged violations on December 7, 2022, and December 8, 2022, unless otherwise indicated.

On April 26, 2024, the parties submitted their Joint Stipulated Facts, Expected Testimony, and Exhibits (“Jt. Stip.”).³ The Agency then filed its Initial Brief on June 13, 2024. Respondents filed their Initial Brief on July 3, 2024. The Agency and Respondents followed up with Reply Briefs filed July 26, 2024, and August 2, 2024, respectively.⁴

The Agency’s Reply Brief argued, in part, that Respondents had waived some of the arguments presented in their Initial Brief by failing to raise them in their Initial Disclosures and requested that such arguments be stricken. Agency’s Reply Br. at 3-6. On August 29, 2024, I issued a Notice Regarding Further Briefing and Supplementing Stipulated Record (“Notice”), in which I granted in part and denied in part the Government’s request. Notice at 3. Meanwhile, the Notice set a deadline of September 20, 2024, for the Agency to further brief the merits of the arguments that were deemed not waived and for the parties to augment the stipulated record with any additional evidence to facilitate future review. Notice at 4. However, on September 6, 2024, the Agency informed this Tribunal that it did not intend to provide further briefing or supplement the record.

II. Factual Summary⁵

The M/V Determination III is a 111.4-foot yacht owned by Respondent Determination III 130 Westport, LLC. Jt. Stip. ¶¶ 10-11; JX1 at 31-33. At all relevant times, Respondent Gerald L. Eubanks captained the vessel, which operated with an onboard Automatic Identification System that transmits the yacht’s real-time positional data. Jt. Stip. ¶¶ 12-14; JX1 at 39-40.

On December 7, 2022, with Respondent Eubanks operating the M/V Determination III, the vessel traveled 86.2 nautical miles north through the Southeast Seasonal Management Area (“SMA”), which spans an area off the Atlantic Coast from south of St. Augustine, Florida, to north of Brunswick, Georgia, at an average speed over ground of 18 knots. Jt. Stip. ¶ 18; JX1 at 10-13, 25; see 50 C.F.R. § 224.105(a)(1). On December 8, 2022, the vessel resumed its transit north through the Southeast SMA, this time travelling 35.9 nautical miles at an average speed over ground of 17.9 knots, before entering the Mid-Atlantic SMA, which consists of six disjointed areas along the Atlantic Coast from north of Brunswick, Georgia, to Rhode Island. Jt. Stip. ¶ 19; JX1 at 13-15, 26; see 50 C.F.R. § 224.105(a)(2). The M/V Determination III made two northward transits that day through the Mid-Atlantic SMA, traveling a total of 94.7 nautical miles at an average speed over ground of approximately 19 knots. Jt. Stip. ¶ 19; JX1 at 15-19, 26. On the dates in question, the Speed Rule required vessels of 65 feet or more to limit speeds to 10 knots or less while traveling through the two relevant SMAs, a measure meant to reduce

³ Attached to the parties’ Joint Stipulated Facts, Expected Testimony, and Exhibits were 10 joint exhibits identified as JX1 through JX10.

⁴ Respondents filed a reply brief on August 2, 2024, and later that day they filed a corrected reply brief, providing a minor correction to one of their arguments. References to Respondents’ reply brief made herein are to Respondents’ corrected brief.

⁵ The facts herein are those that I have found to be supported by credible evidence after a careful and thorough review of the parties’ joint stipulations submitted on April 26, 2024, and the exhibits attached therein.

the risk of striking and lethally injuring a North Atlantic right whale. 50 C.F.R. § 224.105(a)(1)-(2); Jt. Stip. ¶ 20; *see also* Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with N. Atl. Right Whales, 73 Fed. Reg. 60173, 60173 (Oct. 10, 2008).

NOAA’s Office of Law Enforcement opened an investigation probing whether the M/V Determination III violated the applicable speed limits while traversing the Southeast and Mid-Atlantic SMAs. Jt. Stip. ¶ 21; *see* JX1 at 1-8. After completing the investigation, NOAA issued a NOVA to Respondents on October 12, 2023, alleging the above actions violated the ESA, the MMPA, and the Speed Rule. Jt. Stip. ¶ 23; *see* NOVA; Notice of Typographical Error in the NOVA.

III. Liability

A. Principles of Law Related to Liability

1. Marine Mammal Protection Act

In 1972, Congress, finding that “certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man’s activities,” enacted the MMPA in an attempt to prevent such species and population stocks from “be[ing] permitted to diminish below their optimum sustainable population.” Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, § 2(1)-(2), 86 Stat. 1027, 1027 (1972). The stated goal of the MMPA is to “protect[] and encourage[]” marine mammals “to develop to the greatest extent feasible commensurate with sound policies of resource management.” 16 U.S.C. § 1361(6). Congress authorized the Secretary of the Department of Commerce, of which NOAA is a part, to implement and enforce the MMPA “with respect to members of the order Cetacea,” which includes the North Atlantic right whale. *Id.* §§ 1362(12)(A)(i), 1377(a), 1382(a).

The MMPA grants broad discretion to the Secretary to enact regulations that are “necessary and appropriate to carry out the purposes of [the Act],” namely the protection of marine mammals within the Secretary’s responsibility. *Id.* § 1382(a); *see generally* *Al-Bihani v. Obama*, 619 F.3d 1, 25 n.11 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of petition for rehearing en banc) (noting courts read “necessary and appropriate” as granting significant discretion). Further, the Act implores the Federal Government to immediately implement measures to replenish stocks that have fallen below their optimum sustainable population, focusing on “protect[ing] essential habitats including the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effects of man’s actions.” 16 U.S.C. § 1361(2). The MMPA then provides that “[a]ny person who violates any provision of this title or of any permit or regulation issued thereunder . . . may be assessed a civil penalty by the Secretary.” *Id.* § 1375(a)(1). The MMPA defines a person as “any private person or entity.” *Id.* § 1362(10).

2. Endangered Species Act

In another measure aimed at conservation, Congress enacted the ESA in 1973 after finding that “various species of fish, wildlife, and plants in the United States have been rendered extinct” or “so depleted in numbers that they are in danger of or threatened with extinction” as a result of “economic growth and development untampered by adequate concern and conservation” for such species. Endangered Species Act of 1973, Pub. L. 93-205, 87 Stat. 884, § 2(a)(1)-(2) (1973). This Act “represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978), by providing the “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,” 16 U.S.C. § 1531(b). This requires “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” *Id.* § 1532(3). Indeed, “every section of the statute” reflects that “[t]he plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” *Tenn. Valley Auth.*, 437 U.S. at 184.

Pursuant to the ESA, the Secretary of the Department of Commerce has the authority to list certain animals as threatened or endangered. 16 U.S.C. § 1533(a)(2)(A)(i); *see* 5 U.S.C. § 903, App. 1 Reorg. Plan 4 1970 (transferring certain functions overseeing ocean resources to NOAA as an entity within the Department of Commerce). Once a species has been listed as endangered, the ESA makes it “unlawful for any person subject to the jurisdiction of the United States to violate any regulation pertaining to such species . . . and promulgated by the Secretary pursuant to authority provided by this Act.” 16 U.S.C. § 1538(a)(1)(G). The Secretary is permitted to promulgate such regulations as are appropriate to enforce the ESA, *id.* § 1540(f), and any person that violates a duly promulgated regulation may be assessed a civil penalty, *id.* § 1540(a)(1). The ESA defines a “person” as “an individual, corporation, partnership, trust, association, or any other private entity.” *Id.* § 1532(13).

3. North Atlantic right whale regulations

In March 2008, NOAA recognized North Atlantic right whales as a distinct species and finalized a rule designating the North Atlantic right whale as endangered being at “a high risk of extinction . . . throughout its range.” Endangered Status for N. Pac. & N. Atl. Right Whales, 73 Fed. Reg. 12024, 12024, 12028 (Mar. 6, 2008); *see* 50 C.F.R. § 224.101(h); *see also* 50 C.F.R. § 17.11(h).

Around the same time, in October 2008, and after finding “existing measures [were] insufficient to reduce the likelihood of ship strikes and allow [North Atlantic right whales] to recover,” NOAA finalized the Speed Rule, “implement[ing] speed restrictions of no more than 10 knots applying to all vessels 65 ft (19.8 m) or greater in overall length in certain locations and at certain times of the year along the east coast of the U.S. Atlantic seaboard.” Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with N. Atl. Right Whales, 73 Fed. Reg. at 60173, 60174; *see* 50 C.F.R. § 224.105; *see also* Final Rule to Remove the Sunset

Provision of the Final Rule Implementing Vessel Speed Restrictions to Reduce the Threat of Ship Collisions with N. Atl. Right Whales, 78 Fed. Reg. 73726 (Dec. 9, 2013) (removing sunset clause from 2008 Speed Rule, making the Rule permanent). The Speed Rule does not apply to vessels owned or operated by, or under contract to, the Federal Government, foreign sovereign vessels engaged in joint exercises with the U.S. Department of the Navy, or law enforcement vessels of a State, or political subdivision thereof, while engaging in law enforcement or search and rescue duties. 50 C.F.R. § 224.105(a). The Speed Rule also does not apply to vessels “operat[ing] at a speed necessary to maintain safe maneuvering” but only if such deviation is “justified because the vessel is in an area where oceanographic, hydrographic and/or meteorological conditions severely restrict the maneuverability of the vessel and the need to operate at such speed is confirmed by the pilot on board.” *Id.* § 224.105(c). In such circumstances, certain information is required to be entered into the logbook of the vessel, including the reasons for the deviation and the time and duration of the deviation, and the master of the vessel is then required to attest to the logbook’s accuracy by signing and dating it. *Id.*

Pertinent to this proceeding, the Speed Rule makes it unlawful for any vessel greater than or equal to 65 feet in overall length and subject to the jurisdiction of the United States to violate the following speed restrictions, absent the limited exceptions outlined above —

- (1) [Southeast SMA] (south of St. Augustine, FL to north of Brunswick, GA): Vessels shall travel at a speed of 10 knots or less over ground during the period of November 15 to April 15 each year in the area bounded by the following: Beginning at $31^{\circ}27'00.0''$ N- $080^{\circ}51'36.0''$ W; thence west to charted mean high water line then south along charted mean high water line and inshore limits of COLREGS limit to a latitude of $29^{\circ}45'00.0''$ N thence east to $29^{\circ}45'00.0''$ N- $080^{\circ}51'36.0''$ W; thence back to starting point.
- (2) [Mid-Atlantic SMA] (from north of Brunswick, Georgia to Rhode Island): Vessels shall travel 10 knots or less over ground in the period November 1 to April 30 each year:
 - (i) In the area bounded by the following: $33^{\circ}56'42.0''$ N- $077^{\circ}31'30.0''$ W; thence along a NW bearing of 313.26° True to charted mean high water line then south along mean high water line and inshore limits of COLREGS limit to a latitude of $31^{\circ}27'00.0''$ N; thence east to $31^{\circ}27'00.0''$ N- $080^{\circ}51'36.0''$ W; thence to $31^{\circ}50'00.0''$ N- $080^{\circ}33'12.0''$ W; thence to $32^{\circ}59'06.0''$ N- $078^{\circ}50'18.0''$ W; thence to $33^{\circ}28'24.0''$ N- $078^{\circ}32'30.0''$ W; thence to $33^{\circ}36'30.0''$ N- $077^{\circ}47'06.0''$ W; thence back to starting point[.]

50 C.F.R. § 224.105(a)(1), (a)(2)(i), (b)(1).

4. Standard of Proof

To establish civil liability under the ESA and the MMPA, and their implementing regulations, the burden is on the Agency to prove an alleged violation “by a preponderance of reliable, probative, substantial, and credible evidence.” *Iakovou*, Docket No. NE1503255, 2019 NOAA LEXIS 2, at *23 (July 24, 2019) (citing *Vo*, Docket No. SE010091FM, 2001 NOAA LEXIS 11, at *16-17 (Aug. 17, 2001)); *see* 5 U.S.C. § 556(d). This standard requires the Agency to establish that the facts it relies upon “are more likely than not to be true.” *Iakovou*, 2019 NOAA LEXIS 2, at *23 (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. Determination of Liability

To satisfy its burden to establish Respondents’ liability for the charged violations, the Agency is required to show, by a preponderance of the evidence, that, on December 7-8, 2022: (1) Respondents were “persons” subject to the jurisdiction of the United States within the meaning of the ESA and the MMPA; (2) the M/V Determination III was a vessel greater than or equal to 65 feet in overall length and subject to the jurisdiction of the United States; and (3) Respondents caused the M/V Determination III to operate at a speed in excess of 10 knots through an active SMA.

I find that the following facts, stipulated to by the parties, are sufficient to establish Respondents’ liability:

- The M/V Determination III is a 111.4-foot recreational vessel subject to the jurisdiction of the United States. Jt. Stip. ¶¶ 9-10; JX1 at 33. The M/V Determination III was not owned or operated by, or under contract to, the Federal Government. Jt. Stip. ¶ 15. The M/V Determination III was not a foreign sovereign vessel engaging in joint exercises with the U.S. Department of the Navy. Jt. Stip. ¶ 16. The M/V Determination III was not a law enforcement vessel of a State, or political subdivision thereof, engaged in law enforcement or search and rescue duties. Jt. Stip. ¶ 17.
- Determination III 130 Westport, LLC is a “person” within the meaning of the ESA, 16 U.S.C. § 1532(13), and the MMPA, 16 U.S.C. § 1362(10), and subject to the jurisdiction of the United States. Jt. Stip. ¶ 7. On the relevant dates, Determination III 103 Westport, LLC owned the M/V Determination III. Jt. Stip. ¶ 11; JX1 at 31-33.
- Gerald L. Eubanks is a “person” within the meaning of the ESA, 16 U.S.C. § 1532(13), and the MMPA, 16 U.S.C. § 1362(10), and subject to the jurisdiction of the United States. Jt. Stip. ¶ 8. On the relevant dates, Gerald L. Eubanks operated the M/V Determination III as captain and was employed by Determination III 130 Westpoint, LLC to do so. Jt. Stip. ¶¶ 12-13; JX1 at 39-40.

- On December 7, 2022, between 18:12 and 23:04 Coordinated Universal Time (“UTC”),⁶ which corresponds to 1:12 p.m. EST and 6:04 p.m. EST, the M/V Determination III traveled 86.2 nautical miles through the Southeast SMA, as delineated in 50 C.F.R. § 224.105(a)(1), at an average speed over ground of 18 knots. Jt. Stip. ¶ 18; JX1 at 10-13, 25.
- On December 8, 2022, between 14:03 and 16:04 UTC (9:03 a.m. EST and 11:04 a.m. EST), the M/V Determination III traveled 35.9 nautical miles through the Southeast SMA, as delineated in 50 C.F.R. § 224.105(a)(1), at an average speed over ground of 17.9 knots. Jt. Stip. ¶ 19; JX1 at 13-15, 26.
- On December 8, 2022, between 16:04 and 17:31 UTC (11:04 a.m. EST and 12:31 p.m. EST), the M/V Determination III traveled 27.5 nautical miles through the Mid-Atlantic SMA, as delineated in 50 C.F.R. § 224.105(a)(2)(i), at an average speed over ground of 19 knots. Jt. Stip. ¶ 19; JX1 at 15-16, 26.
- On December 8, 2022, between 17:40 and 21:17 UTC (12:40 p.m. EST and 4:17 p.m. EST), the M/V Determination III traveled 67.2 nautical miles through the Mid-Atlantic SMA, as delineated in 50 C.F.R. § 224.105(a)(2)(i), at an average speed over ground of 18.6 knots. Jt. Stip. ¶ 19; JX1 at 16-19, 26.
- On December 7-8, 2022, the 10-knot speed restriction established by 50 C.F.R. § 224.105 was in effect in both the Southeast SMA and the Mid-Atlantic SMA. Jt. Stip. ¶ 20; *see* 50 C.F.R. § 224.105(a)(1), (a)(2)(i).
- The M/V Determination III’s logbook did not record any oceanographic, hydrographic, or meteorological conditions that severely restricted the vessel’s maneuverability while operating within the SMAs. Jt. Stip. ¶ 22; JX1 at 45, 47.

Respondents do not contest these facts establishing liability or argue that an exception to the Speed Rule applies in this matter. Instead, Respondents contend that the Speed Rule is unlawful, advancing two points in support: (1) The Agency lacked statutory authority under the ESA and the MMPA to enact the Speed Rule. Resp’ts’ Initial Br. at 3-11. (2) If the ESA or the MMPA authorized the Agency to enact the Speed Rule, such authorization amounts to an unconstitutional delegation of lawmaking authority by Congress to the Agency in violation of the nondelegation doctrine. Resp’ts’ Initial Br. at 11-16. However, as the parties agree, I am not authorized to decide these arguments. See 15 C.F.R. § 904.200(b) (“The Judge has no authority to rule on constitutional issues or challenges to the validity of regulations promulgated by the Agency or statutes administered by NOAA.”). Respondents may present those arguments at the relevant time to a reviewing body with the power to adjudicate such matters.

⁶ Coordinated Universal Time “is the standard time common to every place in the world” and, unlike Eastern Standard Time, does not observe daylight savings time. *See What is UTC or Z time, and how do I convert it to my local time?*, NOAA, https://www.wpc.ncep.noaa.gov/html/FAQs_1.html (last visited Sept. 30, 2024).

For now, the stipulated facts establish, by a preponderance of substantial and undisputed evidence, that Respondent Eubanks operated the M/V Determination III at speeds in excess of 10 knots through active SMAs in violation of 50 C.F.R. § 224.105(b)(1), and, in turn, 16 U.S.C. §§ 1375(a)(1), 1538(a)(1)(G). Such violations can be imputed to Respondent Determination III 130 Westport, LLC, as the owner of the M/V Determination III and having hired Respondent Eubanks for the purpose of operating the vessel. *See Kim*, Docket No. SW010208A, 2003 NOAA LEXIS 4, at *26 (Jan. 7, 2003) (“The idea behind *respondeat superior* is to subject an employer to liability for whatever is done by the employee in virtue of his employment and in furtherance of its ends.”); *Faithful Lady, Inc.*, Docket No. SE950116ES, 1996 NOAA LEXIS 33, at *9-10, 12 (Nov. 6, 1996) (applying *respondeat superior* in context of ESA violation); *O’Barry*, Docket No. SE960112FM/V, 1999 NOAA LEXIS 1, at *56 (June 8, 1999) (applying *respondeat superior* in context of MMPA violation).

IV. PENALTY

A. Principles of Law Regarding Civil Penalty

The MMPA permits the Secretary to impose a civil penalty of up to \$10,000 per violation on “[a]ny person who violates any provision of [the MMPA] or of any permit or regulation issued thereunder.” 16 U.S.C. § 1375(a)(1). Meanwhile, the ESA provides for differing penalties based on intent, such that:

Any person who *knowingly* violates . . . any provision of this Act, or any provision of any permit or certificate issued hereunder, or of any regulation issued in order to implement [certain prohibited acts found in 16 U.S.C. § 1538], may be assessed a civil penalty by the Secretary of not more than \$25,000 for each violation. Any person who *knowingly* violates . . . any provision of any other regulation issued under this Act may be assessed a civil penalty by the Secretary of not more than \$12,000 for each such violation. Any person who *otherwise* violates any provision of this Act, or any regulation, permit, or certificate issued hereunder, may be assessed a civil penalty by the Secretary of not more than \$500 for each such violation.

16 U.S.C. § 1540(a)(1). The foregoing penalties are subject to increase due to inflation. *See* Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990) (codified at 28 U.S.C. § 2461 Note). The current maximum civil penalties that may lawfully be imposed are as follows: \$35,574 for violations of the MMPA; \$63,991 and \$30,715 for knowing violations of the ESA; and \$2,103 for all other violations of the ESA. 15 C.F.R. § 6.3(f)(11), (14) (eff. Jan. 15, 2024); *see also* 15 C.F.R. § 6.4 (eff. Jan. 15, 2024) (current maximums apply to penalties assessed after Jan. 15, 2024).

Neither the MMPA nor the ESA establish specific factors to consider when assessing a civil monetary penalty. *Iakovou*, 2019 NOAA LEXIS 2, at *41. The regulations that apply to this proceeding do, however, clarify 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).

The Agency proposes the imposition of a \$15,000 penalty (\$7,500 per count) upon Respondents Determination III 130 Westport, LLC and Gerald L. Eubanks for violating the Speed Rule, arguing the “amount is well within the penalties authorized by Congress and will serve as a meaningful deterrent to improve compliance” with the Speed Rule. Agency’s Initial Br. at 9. While the Agency is free to propose a penalty, there is no presumption in favor of its proposal, and “an Administrative Law Judge is not ‘required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document.’” *Killingsworth*, Docket No. SE1705219, 2019 NOAA LEXIS 10, at *20 (Dec. 17, 2019) (quoting *Nguyen*, Docket No. SE0801361FM, 2012 NOAA LEXIS 2, at *21 (Jan. 18, 2012)); *see also* Regs. to Amend the Civ. Procs., 75 Fed. Reg. 35631, 35631 (June 23, 2010) (“The principal change removes the requirement that an Administrative Law Judge state good reason(s) for departing from the civil penalty or permit sanction assessed by NOAA.”). Instead, Administrative Law Judges must independently determine an appropriate penalty “taking into account all of the factors required by applicable law.” 15 C.F.R. § 904.204(m).

B. Agency’s Penalty Policy

“When determining an appropriate proposed civil penalty, the Agency frequently refers to its Penalty Policy,” *Princess Elena, Inc.*, Docket No. NE1305018, 2017 NOAA LEXIS 2, at *47 (May 24, 2017), which is a guidance document developed to assist NOAA attorneys in assessing proposed penalties, Nat’l Oceanic & Atmospheric Admin., Pol’y for the Assessment of Civ. Admin. Penalties & Permit Sanctions, at 2 (2019) (“Penalty Policy”).⁷ The Prehearing Order advised the parties that this Tribunal will take official notice of any “policy, guidance, or other material relating to the calculation of a penalty [that] is a reasonably available public document” absent a showing such material should not be considered. Prehr’g Order at 3 (citing 15 C.F.R. §§ 904.204(l), 904.251(g)). The Agency requested that I take official notice of its Penalty Policy in conducting my independent penalty assessment, arguing that it “incorporates the relevant statutory provisions in determining the penalty assessed, improves charging consistency at a national level, provides greater predictability for the regulated community, and promotes transparency in enforcement.” Agency’s Initial Disclosures at 6. The Respondents, for their part, do not provide any objections to the Policy’s use. Although the Penalty Policy is

⁷ The Penalty Policy is publicly available at <https://www.noaa.gov/sites/default/files/2023-06/Penalty-Policy-FINAL-June24-2019.pdf>.

not binding on administrative law judges, *Frenier*, Docket No. SE1103883, 2012 NOAA LEXIS 11, at *39 (Sept. 27, 2012), the Agency is correct that it is helpful in analyzing the appropriate penalty. With no reason provided for not doing so, I hereby take official notice of the Penalty Policy.

The calculation of penalties under the Penalty Policy is based on two criteria:

- (1) A “base penalty” calculated by adding (a) an initial base penalty amount and permit sanction reflective of the gravity of the violation and the culpability of the violator and (b) adjustments to the initial base penalty and permit sanction upward or downward to reflect the particular circumstances of a specific violation; and
- (2) an additional amount added to the base penalty to recoup the proceeds of any unlawful activity and any additional economic benefit of noncompliance.⁸

Penalty Policy at 4. The Penalty Policy includes penalty matrices for the statutes that NOAA most commonly enforces, allowing for the categorization of offenses based on two axes: the gravity of the violation and the degree of culpability. Penalty Policy at 6. Depending on the statute at issue, the gravity of the violation axis is composed of four to six different offense levels of increasing seriousness, ranging from offense level I (least serious) to offense level VI (most serious).⁹ Penalty Policy at 7. The degree of culpability axis, regardless of the statute, is composed of four levels of increasing mental culpability: unintentional activities (accident or mistake), negligence, recklessness, and intentional acts. Penalty Policy 7. Each cell of the matrix corresponds to a particular gravity of violation and culpability pairing (e.g. level III/negligence) and provides a penalty range for each pairing with the initial base penalty represented by the midpoint of the range. Penalty Policy at 5. The initial base penalty may then be adjusted upward or downward within the given range to reach the base penalty. Penalty Policy at 5. The following two factors may be considered when making this adjustment: (1) the alleged violator’s history of prior offenses, and (2) such other matters as justice may require, which may include the alleged violator’s conduct after the violation (e.g. cooperation with the investigation) and any other consideration such as a long history of compliance. Penalty Policy at 5.

C. NOAA’s Penalty Arguments

The Agency contends that its proposed penalty of \$15,000 reflects the seriousness of the violations because “[d]ue to the speeds at which they were traveling, if Respondents had hit an endangered North Atlantic right whale . . . the strike would have likely killed the animal, threatening the recovery of the remaining population.” Agency’s Initial Br. at 9. The Agency begins by arguing that the fine is authorized by the ESA because Respondents knowingly

⁸ This second criterion is irrelevant here as the Agency makes no allegation that Respondents received proceeds or other economic benefits from their noncompliance with the Speed Rule.

⁹ Both the MMPA and ESA include four offense levels.

operated the M/V Determination III in excess of 10 knots, thereby knowingly violating the Act, and knowing violations may be fined over \$500. Agency's Initial Br. at 9-10 (citing various sources). Even if I were to find that the violations were not knowingly committed, the Agency maintains, "the MMPA provides an independent basis to impose a \$15,000 penalty and does not require proof of a knowing violation to assess the Agency's recommended penalty." *Id.* at 10 (citing 16 U.S.C. § 1375(a)(1); 15 C.F.R. § 6.3(f)(11)).

The Agency continues that the proposed penalty is warranted based on the nature, circumstances, extent, and gravity of the violations considering the endangered status of the North Atlantic right whale. Agency's Initial Br. at 11-15. To support its argument, the Agency cites extensively to the stipulated testimony of a scientist who studies right whales for NOAA, Dr. Caroline Good, found at JX9. The testimony, according to the Agency, shows how important vigilant enforcement of the Speed Rule is because vessel strikes account for one of the greatest perils to the species, which can ill afford to lose even a single individual in a year. Agency's Initial Br. at 11-12 (citing JX9). The Agency maintains that Respondents' violations were serious because of the significant risk their actions posed to right whales. Not only did Respondents speed over a total of 216.8 nautical miles, the Agency argues, but they traveled at speeds that substantially increased the risk of mortality should the M/V Determination III have struck a whale. Agency's Initial Br. at 14 (citing JX9 ¶ 28). The Agency also urges that a reduction in the penalty is not warranted because of any voluntary measures that Respondents may have taken – which Respondent Eubanks described in a letter he subsequently submitted to the NOAA Office of Law Enforcement, JX1 at 40 – given that such measures "had questionable efficacy and are not a substitute for compliance with the law." Agency's Initial Br. at 14-15.

As to Respondents' culpability, the Agency suggests that the evidence shows "Respondents were not familiar with the Speed Rule's requirements and negligently violated the Rule." Agency's Initial Br. at 16. The Agency says this is apparent from the letter sent by Respondent Eubanks to the NOAA Office of Law Enforcement. Agency's Initial Br. at 16 (citing JX1 at 39-40). The Agency first points out Respondent Eubanks's assertion that the M/V Determination III typically is not operated in the subject SMAs at that time of year. Agency's Initial Br. at 16 (citing JX1 at 39). The Agency then notes that while the letter explained that the M/V Determination III performs best at the speeds Respondents traveled at, Respondents made no attempt to show the vessel's maneuverability was severely restricted by prevailing conditions at the time of the violations. Agency's Initial Br. at 16-17 (citing JX1 at 39-40, 45, 47; Jt. Stip. ¶ 22). Because Respondent Eubanks's letter failed to raise the only exception to the Speed Rule that could be applicable, relying instead on justifications not enumerated by the Rule, it goes to show Respondents were unaware of the Speed Rule's mandates. Agency's Initial Br. at 17.

Finally, the Agency concludes by arguing that Respondents' lack of prior violations of the Speed Rule is not a good reason to mitigate the penalty. Agency's Initial Br. at 17. According to the Agency, "Leniency for a first time offense would be inconsistent with the purposes of the ESA and MMPA," which the Agency insists are singularly focused on bringing species back from the brink of extinction. Agency's Initial Br. at 17-18 (citing various sources). Given the North

Atlantic right whale's critically endangered status, any violation of the Speed Rule significantly impairs the statutes' goals, and the whale's "continued existence hinges on the Agency's ability to deter conduct that increases the risk of lethality." Agency's Initial Br. at 18. Any reduction in the penalty would "send the wrong message to the regulated community," and in particular to operators of recreational vessels, which "have some of the lowest rates of compliance with the Speed Rule." Agency's Initial Br. at 18.

D. Respondents' Penalty Arguments

Respondents, for their part, believe that the penalty should be reduced "to \$7,500, given the captain's concern for human and animal life, his low level of culpability, the low risk posed by the violation, and his status as a first-time offender of any NOAA-enforced law or regulation." Resp'ts' Initial Br. at 16-17.

In his letter, Respondent Eubanks explained to an investigating officer at NOAA that the M/V Determination III "optimally performs between 12 and 17 knots (1700 rpms) to maintain maximum stability, due to its fin stabilization system, in the prevailing weather conditions to reduce the roll for the safety of all aboard. Anything less than this speed, in the open ocean, reduces maneuverability of the vessel." JX1 at 39. According to Respondent Eubanks, he nonetheless took actions demonstrating a concern for the safety of right whales: (1) He "[p]rovided training to the crew on the identification of the northern right whale; such as, the unique pattern of callosities on their heads, the lack of dorsal fin, and distinctive V pattern spray from their blowhole." (2) He "[p]osted additional lookout on the bridge to assist in spotting the northern right whale." (3) He "[t]ransited the Seasonal Management Area during daylight hours only; in order to mitigate any close encounters with the northern right whale." JX1 at 40.

Respondents' second argument is that the penalty should be reduced because "critically, no North Atlantic right whale was injured or killed during [the M/V Determination III's] excursion." Resp'ts' Initial Br. at 17. Respondents stress that the Agency overstates the risk created by their violations, saying, "And even assuming that mortality would likely result 'if Respondents had hit an endangered North Atlantic right whale,' the probability of a strike was exceedingly low." Resp'ts' Initial Br. at 18 (citation omitted). According to Respondents, "the probability of striking a right whale in an SMA is less than one in 4 million nautical miles transited." Resp'ts' Initial Br. at 18 (citing JX7 at 34-35, 61). Respondents bolster this assertion by claiming the record shows "in the only year for which the record includes data on noncompliant transit, noncompliant vessels transited 195,282 nautical miles in violation of the Speed Rule, and there is no evidence of strikes occurring in that year." Resp'ts' Initial Br. at 18 (citing JX7 at 34-35, 68). Having "exceeded 10 knots for only slightly more than 200 nautical miles . . . the overall risk posed by Respondents' actions was extremely low." Resp'ts' Initial Br. at 18.

Respondents' third and final argument for why the penalty should be mitigated is that "Respondents are first-time offenders, not only of the Speed Rule but of *any* NOAA-sanctioned offense." Resp'ts' Initial Br. at 18. That recreational vessels in general have low compliance

rates with the Speed Rule “should not be a reason to levy a more severe penalty against merely negligent first-time offenders who conscientiously posted lookouts to spot right whales and trained the crew to conduct such lookouts.” Resp’ts’ Initial Br. at 18. Instead, Respondents contend that “[a] lower penalty would be sufficient to deter any future violation by Respondents. Furthermore, a lower penalty would serve general deterrence by demonstrating the difference in liability between an offender who diligently took steps to protect right whales and one who did not.” Resp’ts’ Initial Br. at 18.

E. Analysis of Civil Penalty and Assessment

I begin with whether Respondents knowingly violated the ESA. The ESA permits a higher penalty for knowing violations, and it is well established that to knowingly violate the ESA “does not necessarily mean that the person intended to break the law. Rather, it means that the person knowingly engaged in the actions which resulted in the law being broken.” *Wilson*, Docket No. AK1100576, 2013 NOAA LEXIS 11, at *18 (June 13, 2013); *see also Museum Shops, Ltd.*, 5 O.R.W. 240, 244 (NOAA 1988); *Killingsworth*, 2019 NOAA LEXIS 10, at *23. As such, there is no requirement that Respondents knew that the conduct would violate the law or even to have knowledge such a law exists. *Museum Shops, Ltd.*, 5 O.R.W. at 244. In essence, knowledge turns on whether Respondents “voluntarily intended to cause the acts that constitute the violation.” *Wilson*, 2013 NOAA LEXIS 11, at *16.

The M/V Determination III’s logbooks, kept by Respondents, confirm that they were aware that they were traveling at speeds greater than 10 knots while in the SMAs. *See JX1* at 45, 47. Even if Respondents did not know they were located within SMAs, they were voluntarily traveling at speeds over 10 knots through them. That is sufficient to hold Respondents liable for knowingly violating the ESA.

Regardless, whether any potential penalty under the ESA should be restricted to \$500 per violation appears to be irrelevant. Respondents are also liable for violating the MMPA, which is a strict liability statute lacking any sort of scienter requirement found in the ESA. *Iakovou*, 2019 NOAA LEXIS 2, at *27 (citing *Pac. Ranger, LLC v. Pritzker*, 211 F. Supp. 3d 196, 214 (D.D.C. 2016)). Consequently, each count is subject to a penalty up to \$35,574 under the MMPA irrespective of any violation of the ESA. *See Kuhn*, 5 O.R.W. 408, 412 (NOAA 1988) (noting the ESA does not override the MMPA and penalties for acts violating both statutes can be independently supported by the MMPA).

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

The Agency has demonstrated the severity of the violations, involving speeding through SMAs, which, as the weight of the evidence reflects, are critically important to the continued survival of North Atlantic right whales. The parties, as part of their joint stipulations, submitted a declaration from Dr. Good, who identified herself as an expert on North Atlantic right whales and head of NOAA’s large whale vessel strike reduction efforts and who extensively detailed the status of the whales and the importance of vessels adhering to the Speed Rule. *See JX9*. The evidence provided by Dr. Good is compelling. In particular, Dr. Good avers that North

Atlantic right whales were the target of extensive hunting in the past, and approximately 360 individuals remain today, of which fewer than 70 are reproductively active females. JX9 ¶ 6. NOAA has determined that if North Atlantic right whales are to reach or maintain an optimal sustainable population, then no more than 0.7 whales can be removed from the population each year due to human causes. JX9 ¶ 8. This means that, for the species to recover, not a single whale can be killed due to humans each year on average. JX9 ¶ 8. The 29 recorded deaths due to ship strikes alone since 1999, however, exceeds this amount. JX9 ¶ 11. Crucially, NOAA estimates that these recorded deaths account for only approximately 36 percent of all mortalities. JX9 ¶ 11. However, although Dr. Good says that some number of vessel strikes go unreported and that some strikes may occur without the vessels recognizing the impact, JX9 ¶¶ 17-18, there is no indication how many of the unreported deaths might be due to vessel strikes.

Despite the need to reduce the number of whales being killed by vessel strikes each year, vessel collisions remain one of two primary causes of premature death among North Atlantic right whales (the other being entanglement with fishing gear). JX9 ¶ 10. Adherence to the Speed Rule can help in two regards. First, right whales can be difficult to see due to their lack of a dorsal fin, and slower speeds allow the vessel operator more time to detect the presence of a whale and take evasive action. JX9 ¶¶ 14, 20. Second, should a vessel over 65 feet, like the M/V Determination III, strike a right whale, the encounter is likely to be fatal. JX9 ¶ 15. The risk of lethality, however, is significantly reduced when vessels slow to no more than 10 knots, which reduces the force of any impact. JX9 ¶¶ 20, 24.

For the foregoing reasons, Respondents' violations of the Speed Rule are severe. This finds support in the Penalty Policy. For both the ESA and the MMPA, the Policy categorizes violations of the Speed Rule as level IV offenses, the most severe gravity of violation for the statutes. Penalty Policy at 52, 58.

I am not convinced by Respondents' insistence that this risk is overstated, and the chance of striking a whale during their excursion was exceedingly low. Respondents calculate the chance of striking a North Atlantic right whale in an SMA as one in four million nautical miles transited, but this calculation appears flawed. First, Respondents count only two of the eight recorded strikes between 2008 and 2019 because those were the only strikes for which NOAA ran a hindcast model, which allowed the Agency to better project the exact locations where the strikes likely occurred.¹⁰ See JX7 at 34-35. To Respondents, this apparently means that only those strikes have sufficient evidence demonstrating that they occurred within an SMA. But hindcast modeling can be conducted only under certain circumstances, JX7 at 34 n.4, and despite the lack of hindcast modeling for all eight vessel strikes, there is other evidence to suggest that at least some additional strikes occurred within an SMA. See, e.g., JX7 at 34 (noting a collision resulting in a serious injury occurred off Ossabaw Island, Georgia, which is within the Mid-Atlantic SMA, on December 7, 2012, while the Mid-Atlantic SMA was active).

¹⁰ As explained in the stipulated record, "The term 'hindcast modeling' refers to the process of modeling back in time where a dead whale may have drifted from using information on oceanographic and weather conditions." JX7 at 34 n.4.

Second, Respondents' calculation fails to account for the fact that many deaths and serious injuries go unaccounted for. *See JX9 ¶ 11.* While we may not know exactly how many unaccounted deaths there are, or how many are due to vessel strikes, there is evidence that a number of vessel strikes go unreported, and Respondents' failure to account for this uncertainty undercuts their estimated risk.

Further, Respondents' argument that their violations of the Speed Rule were not that serious since they "exceeded 10 knots for only slightly more than 200 nautical miles," making the likelihood of a whale strike low, is based on conjecture and is unconvincing. The Speed Rule was developed to reduce the likelihood of ship strikes and allow recovery of a species that is at high risk of extinction by imposing a limitation on speed within an active SMA where North Atlantic right whales are likely to be present. The number of nautical miles in which Respondents violated that rule – whether they exceeded 10 knots for slightly more, or less, than 200 nautical miles – is immaterial and does not make their violations less serious or grave. The fact that Respondents did not happen to strike a North Atlantic right whale during this excursion likewise does not diminish the severity of the violations.

Evidence in the stipulated record shows that violations of the Speed Rule by pleasure vessels, such as the M/V Determination III, are indeed common. JX7 at 20. The goal of the Speed Rule is to spur vessel operators as a whole to act in a way that reduces the risk that a North Atlantic right whale will be severely injured or killed in a proactive effort to reduce the cumulative risk posed by those vessels.¹¹ The Rule would be rendered ineffectual if the penalty assessed in the run of cases depended primarily on whether a whale was ultimately injured. I am therefore unconvinced by Respondents' attempts to downplay the severity of their violations.

2. Respondents' Culpability

The Respondents' apparent lack of familiarity with the Speed Rule suggests that they acted negligently. *See* Penalty Policy at 9 ("The failure to know of applicable laws/regulations . . . may itself be evidence of negligence."). This is despite the Agency developing "a broad suite of initiatives" to inform and educate vessel operators. JX7 at 40. To start the Agency makes information about right whale sightings and SMAs available to the public through both its website and a smartphone app developed jointly with several interested organizations. JX7 at 43-44. Additionally, the Agency "work[s] closely with government partners to ensure that details regarding the speed rule, SMAs, and DMAs are integrated" into navigational aids available to the maritime community such as nautical charts and notices to mariners. JX7 at 42. By failing to familiarize themselves with this available information, Respondents failed to

¹¹ Respondents argue that it is this very prospective nature of the Speed Rule, in part, that makes it unlawful, as the statutory authority the Rule was enacted under establishes liability for actions that result in, or almost always result in, harm to an individual animal. *See* Resp'ts' Initial Br. at 5-10. According to Respondents, the MMPA and ESA do not permit the use of prophylactic measures imposing liability for a generalized risk of harm that would result in injury to an animal only in the most exceptional of cases. Resp'ts' Initial Br. at 9-10. While I acknowledge Respondents have made such an argument, I do not address it here because, as explained above, I am not permitted to decide arguments attacking the validity of the Speed Rule.

exercise an appropriate degree of care. See Penalty Policy at 9 (“Negligence is the failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances.”).

Respondents do not contest that they acted negligently, but they do argue that their negligence should be mitigated to a certain extent by Respondent Eubanks’s concern for human and animal life. Whether the M/V Determination III needed to travel at the speeds it did in the interest of the safety of those aboard remains uncertain. The only evidence is Respondent Eubanks’s bald assertion that the vessel “optimally performs” between 12 and 17 knots. This explanation suffers from two flaws. First, having acknowledged that the M/V Determination III could have operated at 12 knots, Respondents do not explain why they consistently traveled at average speeds close to 20 knots while traveling through SMAs on the dates in question. Second, the only exception to the Speed Rule that could potentially absolve Respondents from liability is when conditions “severely restrict” the maneuverability of the vessel and the logbook includes the following information: (1) the reasons for the deviation; (2) the speed at which the vessel operated; (3) the latitude and longitude of the area; (4) the time and duration of the deviation; and (5) the master of the vessel’s signature attesting to the accuracy of the logbook. 50 C.F.R. § 224.105(c). The exception does not permit deviation for the optimal performance of vessels, and regardless, the logbooks here are missing much of the information required for the exception to apply.

As to Respondent Eubanks’s concern for North Atlantic right whales, this assertion fares only slightly better. Respondent Eubanks recounted to the investigating officer, without corroboration, the steps that he took to prevent encounters with North Atlantic right whales, including training his crew on “the unique pattern of callosities on their heads, the lack of dorsal fin, and distinctive V pattern spray from their blowhole,” posting additional lookouts, and traveling during daylight hours when visibility was best. But the very reason that the Speed Rule exists is because North Atlantic right whales are difficult to detect, and “[r]educing vessel speed . . . remains the best mechanism we have to reduce mortality and serious injury from vessel strikes.” JX9 ¶¶ 14, 26.

While I take Respondent Eubanks’s actions into consideration when assessing the penalty, ultimately taking ineffective action, no matter how well intentioned, while negligently failing to take beneficial and required actions, is deserving of little weight. See Penalty Policy at 9 (“Negligence may arise where someone exercises as much care as he or she is capable of, yet still falls below the level of competence expected of him or her in the situation.”).

3. History of Prior Violations

The parties’ joint stipulations indicate that Respondents have not previously been sanctioned for violations of the Speed Rule. Jt. Stip. ¶ 23. NOAA insists that this is no reason to mitigate the penalty from its proposed \$15,000, arguing that doing so would be inconsistent with the high importance Congress put on recovering critically imperiled species like the North Atlantic right whale when it passed the ESA and MMPA. See Agency’s Initial Br. at 17-19. Respondents, in arguing for a lower penalty, emphasize that they “are first-time offenders, not

only of the Speed Rule but of *any* NOAA-sanctioned offense.” Resp’ts’ Initial Br. at 18 (citing Jt. Stip. ¶ 23).

“An alleged violator’s previous violation . . . is evidence of an intentional disregard for NOAA’s statutes or regulations or a reckless or negligent attitude toward compliance with them,” providing a basis for adjusting the penalty upward. Penalty Policy at 10. Conversely, taking account of an individual’s history of compliance can be an important consideration when crafting a penalty and provides a basis for a downward adjustment. *See Roberge*, Docket No. NE1300388, 2015 NOAA LEXIS 25, at *65 (July 14, 2015) (“The fact that Mr. DiMaio has no history of prior violations amidst a lengthy career in the industry weighs in his favor.”). That being said, reductions for violation-free histories typically result in cases where the respondent has an extensive history of compliance. *See, e.g., Roberge*, 2015 NOAA LEXIS 15, at *65 (holding respondent’s history of being in the fishing industry “all [] his life” with no violations weighed in his favor); *Frenier*, 2012 NOAA LEXIS 11, at *40 (finding “noteworthy” respondent’s 11-year career in commercial fishing without a violation); *see also* Penalty Policy at 13 (noting “a long history of compliance” may mitigate a penalty).

The record in this case is bereft of the requisite extensive history, with no indication that Respondents possess any boating experience beyond that with the M/V Determination III, which was purchased less than one year prior to the conduct leading to the violations at issue. JX1 at 31 (bill of sale showing Determination III 130 Westport, LLC purchased the M/V Determination III on January 20, 2022).¹² Additionally, an otherwise violation-free history is entitled to less weight where Congress has indicated that strong measures be taken to halt and reverse species extinction. *See The Fishing Co. of Alaska*, Docket Nos. 316-024, 316-025, 1996 NOAA LEXIS 10, at *44 (Apr. 17, 1996) (giving little weight to respondent’s clean history “in light of the purpose of the regulations at hand, and the Congressional intent to provide harsh penalties for violations”); *see also Tenn. Valley Auth.*, 437 U.S. at 184 (“The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.”); *Fed’n of Japanese Salmon Fisheries Coop. v. Baldridge*, 679 F. Supp. 37, 46 (D.D.C. 1987) (noting that the MMPA is not a “balancing Act” but primarily focused on protecting marine mammals with other interests “served only after protection of the animals is assured”). With the preceding in mind, I find that Respondents’ histories are entitled to little weight in considering the appropriate penalty to assess.

4. Inability to Pay

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

¹² Since 2012, title to the vessel has passed between four different entities with a sale price of \$1 each time. Perhaps Respondents had an interest in the entities that previously owned the M/V Determination III, suggesting greater experience. But the record does not include confirmation of this.

5. Such Other Matters as Justice May Require

The parties dispute whether the need to deter future violations necessitates a higher penalty or not, with the Agency taking the position that “a substantial deterrence message must be sent to Respondents and to any other mariners who would speed through SMAs,” noting that pleasure vessels like the M/V Determination III have some of the lowest rates of compliance with the Speed Rule. Agency’s Initial Br. at 18. Respondents reply that the relatively low rates of compliance achieved by recreational vessels as a class does not warrant a high penalty. Resp’ts’ Initial Br. at 18. Rather, they argue that a \$7,500 penalty “would be sufficient to deter any future violation by Respondents . . . [and] would serve general deterrence by demonstrating the difference in liability between an offender who diligently took steps to protect right whales and one who did not.” Resp’ts’ Initial Br. at 18.

I find the Agency’s arguments compelling. It is apparent from this record that the need for deterrence exists, not only to prevent repeat behavior by Respondents, specifically, but also to deter others from violating the Speed Rule, generally. *See JX7 at 21* (“Across all SMAs, pleasure vessels and passenger vessels . . . were often the least compliant with particularly high percentages of high speed (> 15 knots) transit distance.”). I also note that the Agency’s proposed penalty of \$15,000 is well below the maximum authorized by statute.

I do, however, find that the fine should be reduced slightly to account for Respondents’ cooperation during the investigation. The Penalty Policy allows for a reduction in the penalty if an alleged violator “provid[es] helpful information to investigators, and cooperat[es] with investigators in any on-going investigation.” Penalty Policy at 12-13. But it appears no such reduction was contemplated by NOAA when proposing the penalty. Under the Penalty Policy, penalties for a violation of the Speed Rule should generally be assessed using the ESA matrix. Penalty Policy at 52 n.69. Meanwhile, the ESA matrix suggests a penalty between \$5,000 and \$10,000 per negligent, level IV violation.¹³ Penalty Policy at 27. That the proposed penalty of \$15,000 (\$7,500 per violation) is at the midpoint of the Penalty Policy’s range, suggests that the Agency did not apply any adjustments. *See Frenier*, 2012 NOAA LEXIS 11, at *27 (holding that the “Agency appears not to have found any adjustments based upon the particular

¹³ This penalty range is for violations involving threatened species. Penalty Policy at 27. The Penalty Policy provides a higher penalty range (\$15,000 to \$25,000) for violations involving endangered species but dictates that penalty ranges for threatened animals should be used “unless the regulation is one implementing subsection (a)(1)(A), (B), (C) . . . of section 9 of the Endangered Species Act.” Penalty Policy at 27 n.18. I note that Respondents’ argument that the Speed Rule is unlawful relies in part on the premise that the Speed Rule implements 16 U.S.C. § 1538(a)(1)(B) & (C)’s prohibition against taking endangered species. *See* Resp’ts’ Initial Br. at 4-10. However, such a finding would expose Respondents to potential penalties far in excess of those considered by either party in this case. *See* 16 U.S.C. § 1540(a)(1) (authorizing a penalty of \$25,000, adjusted to \$63,991 for inflation, for knowing violations of regulations implementing the ESA’s prohibition on taking endangered species); Penalty Policy at 27 (suggesting a penalty between \$15,000 and \$25,000 for each such violation). Given this, and because I am otherwise not permitted to decide Respondents’ argument, I assume, without deciding, that the Speed Rule does not implement ESA’s prohibition on taking endangered species.

circumstances of the alleged violation . . . necessary,” as proposed penalty was at the midpoint of penalty range).

The record supports a finding here that Respondents were cooperative in this case. Respondent Eubanks emailed the investigating officer a letter in which, while he offered an explanation for the violations and requested an exception, he did not otherwise deny wrongdoing. JX1 at 39-40. Indeed, throughout this process, Respondents have accepted fault, seeking to only challenge the legality of the regulation they were charged with violating. Respondent Eubanks also timely provided the investigating officer with requested documentation, which the officer acknowledged to be accurate. JX1 at 6-7, 43, 45, 47, 49, 51. Such actions do not warrant a significant reduction in penalty, but they should nonetheless be encouraged.

Based upon the foregoing findings, I determine that imposition of a penalty in the amount of **\$14,250** is appropriate in NOAA Docket No. SE2303316.

ORDER

IT IS HEREBY ORDERED,

That, a civil penalty in the total amount of \$14,250, is **IMPOSED** upon Respondents, Determination III 130 Westport, LLC, and Gerald Eubanks, who are found jointly and severally liable in NOAA Docket No. SE2303316;

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

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

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

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

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

SO ORDERED.



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

Dated: November 5, 2024
Washington, D.C.