



UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:)
)
BrettAllie Acquisition 1, LLC and) **Docket No. NE2203327,**
Todd Keller,) **M/V Brett Allie V**
)
Respondents.)
)

INITIAL DECISION AND ORDER

Date: December 10, 2024

Before: Michael B. Wright, 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.

I. PROCEDURAL HISTORY

On February 22, 2023, the National Oceanic and Atmospheric Administration (“NOAA” or “Agency”), on behalf of the Secretary of Commerce, issued a Notice of Violation and Assessment of Administrative Penalty (“NOVA”) to Respondents BrettAllie Acquisition 1, LLC and Todd Keller in Docket No. NE2203327, M/V Brett Allie V. The NOVA was amended on January 19, 2024. The amended NOVA alleges violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544, and the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1423h, and their implementing regulations, 50 C.F.R. pt. 224.² Specifically, NOAA alleges that “BrettAllie Acquisition 1, LLC, and Todd Keller, owner and operator of the M/V Brett Allie V,” violated 16 U.S.C. §§ 1375(a)(1), 1538(a)(1)(G) and 50 C.F.R. § 224.105(b)(1) on various dates between November 20, 2021, and April 3, 2022, “by causing M/V Brett Allie V to travel at speeds in excess of ten knots while in a Seasonal Management Area” established to protect North Atlantic right whales. The Agency proposes a \$75,000 penalty for the violations.

Respondents requested a hearing on the alleged violations in a letter dated March 20, 2023. Pursuant to the applicable procedural rules, 15 C.F.R. pt. 904 (“Rules”), on July 3, 2023, Chief Administrative Law Judge Susan L. Biro assigned herself as the Administrative Law Judge to preside over the case, at the same time issuing a Prehearing Order.

The parties’ Initial Disclosures were filed, and subsequently supplemented. By Order dated December 7, 2023, this Tribunal granted the Agency’s request to take additional discovery by serving Respondents with requests for admission as to 38 separate facts that the Agency believed were not in dispute. The Order provided Respondents with 20 days after service of the requests for admission to respond, with a failure to respond to a request for admission resulting in the matter being deemed admitted. The Respondents failed to respond to any of the 38 requests for admission.

On January 9, 2024, I was designated as the Administrative Law Judge to preside over the proceeding going forward. Shortly after, on January 22, 2024, I denied Respondents’ motion to conduct additional discovery, concluding that the information sought was overly broad, not relevant, cumulative to discovery already provided, or otherwise went beyond the scope of the defenses Respondents pursued.

A hearing in this matter was held on February 13, 2024, in Boston, Massachusetts.³ Six witnesses testified for the Agency: Dr. Caroline Good, a member of the Cetacean and Pinniped Conservation Team within NOAA Fisheries’ Office of Protected Resources; Jean Higgins, the branch chief for the Protected Species Conservation Branch within NOAA Fisheries’ Greater

² All references herein to statutes and regulations are to those in effect at the time of the alleged violations between November 20, 2021, and April 3, 2022, unless otherwise indicated.

³ A transcript of the hearing was produced with the pages numbered sequentially. Citations to the hearing transcript appear as follows: “Tr. [page number].”

Atlantic Regional Fisheries Office; David Phinney, an operations research analyst at the Department of Transportation’s Volpe National Transportation Systems Center; Jeffrey Adams, a marine resource management specialist at NOAA Fisheries’ Office of Protected Resources; Richard Chidsey, an investigative support technician at NOAA’s Office of Law Enforcement; and John Ford, a special agent with NOAA’s Office of Law Enforcement. Tr. 17-18, 18-19, 84-85, 86, 138, 138-139, 170, 171, 173, 194, 195-196, 225, 226, 228. Todd I. Keller testified for Respondents. Tr. 244-245. Also admitted into the record were eleven Agency exhibits (“AX”), nos. 1, 2 revised, 5-6, 10, 12-13, 15(a), 20-22. Tr. 272-273.

On March 5, 2024, this Tribunal emailed digital copies of the hearing transcript (later revised pursuant to an order issued March 26, 2024) to the parties and issued a Post-Hearing Scheduling Order. The Agency filed its Post-Hearing Brief on March 29, 2024, and the Respondents filed their Post-Hearing Brief on April 26, 2024. On May 10, 2024, the Agency’s Reply Brief was filed, and Respondents’ Reply Brief was filed on May 17, 2024. With that last filing, the record closed.

II. FACTUAL BACKGROUND⁴

Mr. Keller is a New York resident and the sole owner of BrettAllie Acquisition 1 LLC, which in turn owns the M/V Brett Allie V. Tr. 245, 246. He is an avid recreational boater who obtained the M/V Brett Allie V, a 68-foot cabin cruiser, in 2019 to take his family on vacation. Tr. 246-247, 248. He bought the boat used and upgraded the navigational equipment shortly after obtaining it. Tr. 249. He also went on to install other safety equipment, including an Automatic Identification System⁵ (“AIS”). Tr. 249, 251. Although Mr. Keller had previously owned several boats, the M/V Brett Allie V was the first to measure over 65-feet in length. Tr. 246, 248.

Around mid-November 2021, Mr. Keller departed, along with his family, on the M/V Brett Allie V, with the intention of travelling from New York to Charleston, South Carolina and back over the course of several months. Tr. 251. After a few days the family arrived in Charleston and spent the month of December there. Tr. 252, 268-269. Around the end of November, Mr. Keller’s father became ill, and he flew from Charleston back to New York for a brief time before flying back to Charleston. Tr. 270. At the end of December, while back in Charleston, the family decided to continue south to Fort Lauderdale in search of warmer weather and spent the next few months there. Tr. 252, 269. Mr. Keller and his family embarked from Florida in late February 2022 and returned to Charleston where they stayed until April, at which point the family sailed back to New York. Tr. 253, 270. The M/V Brett Allie

⁴ The following is a summary of the facts that I have found in this matter based on a careful and thorough review of the record and the credible evidence presented at hearing.

⁵ AIS is a navigational aide that transmits a vessel’s position to nearby ships. Tr. 141. The technology was developed to avoid vessel collisions by allowing ships to receive other vessels’ positional data and plot it on an electronic navigational system, allowing operators to see where other vessels are located. Tr. 141. AIS data includes, among other things, a vessel’s location, speed, course heading, name, and size. Tr. 148-149.

V's AIS unit was engaged and voluntarily broadcasting the ship's location throughout this period. Tr. 255.

The United States Coast Guard operates onshore facilities that collect AIS data broadcasted by nearby ships like that of the M/V Brett Allie V and store the data on servers at its Operations Systems Center ("OSC") in West Virginia. Tr. 150, 152-155. The Volpe Center, a vessel tracking operation under the United States Department of Transportation, maintains a constant, secure connection to this server which transmits the unmanipulated, raw data collected by OSC in near real time, mere seconds after being broadcasted by vessels. Tr. 155; *see AX 10*. As the data are received by the Volpe Center, the only change that occurs is the addition of a time stamp denoting when the data are received. Tr. 155-156. NOAA, for its part, hosts a server at the Volpe Center that then transmits the AIS data to a NOAA data center. Tr. 156-157; *see AX 10* at 2. As the data arrive at the NOAA data center, a computer program decodes the messages to extract pertinent information—like time; latitude; longitude; speed; and vessel information, including name, length, and type of vessel (e.g., recreational vs. commercial). Tr. 157, 180-190. This information is put into a spreadsheet alongside data fields created by NOAA after analyzing the data, such as whether a particular data entry was provided while in a Seasonal Management Area ("SMA"), which are areas with 10-knot speed limits for ships 65 feet or more to protect North Atlantic right whales from vessel collisions. Tr. 180-190.

Once the data have been put into a spreadsheet, other offices within NOAA can request access to the data for a particular vessel during a specified time period. Tr. 178-179. An investigative support technician for NOAA's Office of Law Enforcement, tasked with assisting in building cases involving potential speed violations, requested the dataset for the M/V Brett Allie V after determining it may have traveled faster than permitted through two SMAs. Tr. 196, 196-198. The technician used the data to create ten charts plotting the M/V Brett Allie V's position and speed at each data point transmitted while within an SMA as a means of visualizing the speed at which the vessel transited the areas. Tr. 200-205; *see AX 2-rev* at 6-15. The charts, along with the underlying AIS data, depict the following.

Upon commencing its trip from New York, the M/V Brett Allie V traveled south from November 20-25, 2021, through four parts of the Mid-Atlantic SMA, which consists of six distinct zones between New England and Georgia. Tr. 205, 206-207, 209-210; *AX 2-rev* at 6-8. On November 20, 2021, the vessel traveled 24.9 nautical miles through the Mid-Atlantic SMA near New York and 25.4 nautical miles through the Mid-Atlantic SMA near Delaware, averaging over 20 knots both times. Tr. 205, 206; *AX 2-rev* at 6; *AX 12* at 2-3. The vessel then made a 19.9 nautical mile transit through the Mid-Atlantic SMA near Morehead City, NC on November 24, 2021, averaging 24.7 knots. Tr. 207; *AX 2-rev* at 7; *AX 12* at 4. Finally, the vessel traveled through the Mid-Atlantic SMA off the coasts of North Carolina and South Carolina on November 25, 2021, heading south for 37.8 nautical miles before exiting the SMA for a time, reentering, and continuing an additional 61.8 nautical miles. Tr. 209-210; *AX 2-rev* at 8. During this 99.6 nautical mile stretch, the vessel never traveled slower than 22.4 knots. Tr. 209-210; *AX 2-rev* at 8; *AX 12* at 5-8.

The M/V Brett Allie V next traveled through two SMAs while en route to Florida from Charleston, SC in December 2021. Tr. 210, 210-211; AX 2-rev at 9-10. The vessel traveled 74.4 nautical miles on December 23, 2021, through the Mid-Atlantic SMA off the coast of South Carolina with speeds averaging 22.9 knots. Tr. 210; AX 2-rev at 9; AX 12 at 9-11. Then, on December 26, 2021, it traveled an additional 36.4 nautical miles through the Mid-Atlantic SMA off the Coast of Georgia, before continuing 94.8 nautical miles through an SMA that goes from north of Brunswick, GA to south of St. Augustine, FL (“Southeast SMA”). Tr. 210-211; AX 2-rev at 10. Speeds during the December 26, 2021, transits were never less than 21.4 knots. Tr. 210-211; AX 2-rev at 10; AX 12 at 12-17.

The M/V Brett Allie V returned to Charleston from Florida in February 2022, traveling through two SMAs—the Southeast SMA and the Mid-Atlantic SMA—as it did so. Tr. 211-212; AX 2-rev at 11-12. On February 24, 2022, the vessel entered the Southeast SMA near St. Augustine, FL, traveling 10.3 nautical miles while averaging 23.5 knots. Tr. 211; AX 2-rev at 11; AX 12 at 19. Mr. Keller and his family continued to Charleston on February 25, 2024, traversing the remaining 94.4 nautical miles through the Southeast SMA and an additional 92.7 nautical miles through the Mid-Atlantic SMA. Tr. 211-212; AX 2-rev at 12. The M/V Brett Allie V traveled at speeds of 22.2 knots through the Southeast SMA and 22.8 knots through the Mid-Atlantic SMA. Tr. 211-212; AX 2-rev at 12; AX 12 at 20-26.

Finally, the M/V Brett Allie V returned to New York from Charleston between April 1-3, 2022, traveling through the Mid-Atlantic SMA three different times while doing so. AX 2-rev at 13-15. On April 1, 2022, the vessel began travelling northward through the Mid-Atlantic SMA off the coasts of South Carolina and North Carolina for 29.4 nautical miles before exiting the SMA briefly and re-entering for an additional 48.5 nautical miles. Tr. 212; AX 2-rev at 13. Speeds during the two April 1, 2022, SMA transits never dipped below 20.6 knots. Tr. 212; AX 2-rev at 13; AX 12 at 27-30. Next, on April 2, 2022, the M/V Brett Allie V traveled through the Mid-Atlantic SMA near Morehead City, NC for 19.9 nautical miles with an average speed of 23.4 knots. Tr. 213; AX 2-rev at 14; AX 12 at 31. Finally, the M/V Brett Allie V traveled through the Mid-Atlantic SMA off the Chesapeake Bay for 22.4 nautical miles on April 3, 2022, averaging speeds of 23.3 knots. Tr. 213; AX 2-rev at 15; AX 12 at 32.

A special agent with NOAA’s Office of Law Enforcement opened an investigation to determine if the M/V Brett Allie V violated the 10-knot speed limit within SMAs applicable to vessels 65 feet or more in length. Tr. 228-229, 231-232. According to the agent’s testimony, NOAA sent three compliance assistance letters—dated January 11, 2022, January 27, 2022, and June 22, 2022—to Mr. Keller’s home address to inform him that the M/V Brett Allie V was not in compliance with the speed limits. Tr. 235-237. The agent also testified that, along with the letters, Mr. Keller received a compliance guide with information on SMAs. Tr. 237. On October 20, 2022, the agent spoke with Mr. Keller over the phone. Tr. 238-239. Mr. Keller acknowledged that he had received at least one of the letters but was no longer in possession of it.⁶ Tr. 239. Mr. Keller also acknowledged that he may have exceeded 10 knots as he

⁶ This aligns with Mr. Keller’s testimony during the hearing. However, his testimony included that he did not actually see the letter he received until he finally returned home from the trip in April 2022. Tr. 254.

transited through the SMAs. Tr. 240. The agent later wrote an investigation report, detailing the alleged violations and the specifics of his investigation into those violations. *See AX 1.* All three compliance assistance letters are attached to that report. AX 1 at 23-26. However, there is no verification that the letters were actually sent, nor any confirmation of their delivery.

III. LAW AND REGULATIONS APPLICABLE TO LIABILITY

A. Relevant Statutory Provisions

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 Marine Mammal Protection Act (“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, codified at 16 U.S.C. §§ 1361-1423h, 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).

The MMPA grants broad discretion to the Secretary to prescribe 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 to agencies). The MMPA then provides that “[a]ny person who violates any provision of this subchapter or of any permit or regulation issued thereunder . . . may be assessed a civil penalty by the Secretary.” *Id.* § 1375(a)(1). The MMPA defines “person” as “any private person or entity.” *Id.* § 1362(10).

In another measure aimed at conservation, Congress in 1973 enacted the Endangered Species Act (“ESA”) 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) (codified at 16 U.S.C. §§ 1531-1544). The ESA sought to protect these vulnerable species by providing the “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b).

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. 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 persons subject to the jurisdiction of the United States to violate any regulation pertaining to such species or to any threatened species . . . promulgated by the Secretary pursuant to authority provided by this chapter.” 16 U.S.C. § 1538(a)(1)(G); *see id.* § 1540(f) (“The Secretary . . . [is] authorized to promulgate such regulations as may be appropriate to enforce this chapter.”). The ESA defines the term “person” as “an individual, corporation, partnership, trust, association, or any other private entity.” *Id.* § 1532(13)

B. Relevant Regulatory Provisions

Beginning in 1970, NOAA maintained a listing for right whales under the Endangered Species Conservation Act of 1969, the precursor to the ESA. Proposed Endangered Status for N. Atl. Right Whales, 71 Fed. Reg. 77704, 77706 (Dec. 27, 2006); *see* 35 Fed. Reg. 8491 (June 2, 1970) (codified at 50 C.F.R. § 17 App. A (eff. June 3, 1970)). This listing included the Northern right whale (found in the northern hemisphere in both the Pacific and Atlantic Oceans) and carried forward to the endangered species list created pursuant to the ESA by NOAA in 1974. *Id.* at 77706.

In March 2008, finding the Atlantic and Pacific stocks of right whales to be distinct species, NOAA finalized a rule, designating the North Atlantic right whale⁷ as endangered and 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) (eff. Apr. 7, 2008); *see also* 50 C.F.R. § 17.11(h). This threat was, in large part, due to ship strikes and entanglement in fishing gear. 71 Fed. Reg. at 77709. Around the same time, in October 2008, NOAA finalized a rule (“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 [and subject to the jurisdiction of the United States] 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. 60173, 60173 (Oct. 10, 2008); *see* 50 C.F.R. § 224.105 (eff. Dec. 9, 2008); *see also* 78 Fed. Reg. 73726 (Dec. 9, 2013) (removing sunset clause from 2008 Speed Rule making the Rule permanent). The Speed Rule provides an exception when “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.” 50 C.F.R. § 224.105(b)-(c).

Pertinent to this proceeding, the Speed Rule was implemented at the following locations and times—

- (1) [Southeast SMA] Southeast U.S. (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

⁷ The scientific name for the North Atlantic right whale, and that used in the listing itself, is *eubalaena glacialis*. 50 C.F.R. §§ 17.11(h), 224.101(h).

April 15 each year in the areas bounded by the following: Beginning at 31°27'00.0" N–080°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°45'00.0" N thence east to 29°45'00.0" N–080°51'36.0" W; thence back to starting point.

(2) [Mid-Atlantic SMA] Mid-Atlantic U.S. (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°56'42.0" N–077°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°27'00.0" N; thence east to 31°27'00.0" N–080°51'36.0" W; thence to 31°50'00.0" N–080°33'12.0" W; thence to 32°59'06.0" N–078°50'18.0" W; thence to 33°28'24.0" N–078°32'30.0" W; thence to 33°36'30.0" N–077°47'06.0" W; thence back to starting point;
- (ii) Within a 20-nm (37 km) radius (as measured seaward from COLREGS delineated coast lines and the center point of the port entrance) . . . at the
 - (A) Ports of New York/New Jersey: 40°29'24.2" N–073°55'57.6" W;
 - (B) Delaware Bay (Ports of Philadelphia and Wilmington): 38°52'27.4" N–075°01'32.1" W;
 - (C) Entrance to the Chesapeake Bay (Ports of Hampton Roads and Baltimore): 37°00'36.9" N–075°57'50.5" W; and
 - (D) Ports of Morehead City and Beauford, NC: 34°41'32.0" N–076°40'08.3" W.

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

C. Burden of Proof

To establish civil liability under the Endangered Species Act and the Marine Mammal Protection Act, 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.

5 U.S.C. § 556(d); *Vo*, Docket No. SE010091FM, 2001 NOAA LEXIS 11, at *16-17 (Aug. 17, 2001) (citing 5 U.S.C. § 556(d); *Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100-03 (1981)); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). This standard requires the Agency to demonstrate that the facts it seeks to establish are more likely than not to be true. *Fernandez*, Docket No. NE970052FM/V, 1999 NOAA LEXIS 9, at *8-9 (Aug. 23, 1999) (citing *Herman & MacClean v. Huddleston*, 459 U.S. 375, 390 (1983)). To satisfy this burden of proof, the Agency may rely upon either direct or circumstantial evidence. *Vo*, 2001 NOAA LEXIS 11, at *17 (citing *Paris*, 4 O.R.W. 1058 (NOAA 1987)).

D. Determination of Liability

Mr. Chidsey credibly testified as to the M/V Brett Allie V’s speed, direction, and location at the times relevant to the violation. Tr. 194-224; *see* AX 2-rev, AX 12. Respondents elected not to cross examine Mr. Chidsey. Tr. 224. The closest the Respondents come to contesting liability is arguing that “[w]hile [they] have no reason to believe that the information [presented by the Agency] is not accurate, the untimely production of [the raw AIS data] both prolonged this matter and resulted in additional time at hearing.” Resp’ts’ Post-Hr’g Br. at 2. The Agency contests the suggestion that it did not timely provide the raw AIS data underlying its charges and notes that, regardless, the Respondents do not allege prejudice as a result. Agency’s Reply Br. at 1. But while the Respondents suggest that their failure to respond to the Agency’s requests for admissions was due to the Agency withholding certain evidence, any argument arising from this objection is a red herring that need not be addressed as ultimately “Respondents do not . . . contest the facts of the violation,” instead affirmatively “conced[ing] the speed of their vessel exceeded 10 knots on the dates and time specified.” Resp’ts’ Post-Hr’g Br. at 1-2, 9.

To satisfy its burden to establish Respondents’ liability for the charged violations, the Agency was required to show, by a preponderance of the evidence, that on or about the dates alleged in the Amended NOVA: (i) Respondents were “persons” within the meaning of the Acts; (ii) operating a vessel subject to the jurisdiction of the United States; (iii) in Seasonal Management Areas in excess of 10 knots.

I find that the Agency has met its burden and established the following facts:

- Respondents BrettAllie Acquisition 1, LLC (a private entity) and Todd Keller (an individual or private person) are both “persons” within the meaning of the MMPA and the ESA. Respondents operated the M/V Brett Allie V, a vessel subject to the jurisdiction of the United States in Seasonal Management Areas in excess of ten knots as follows:
- On or about November 20, 2021, the M/V Brett Allie V traveled 24.9 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 23.9 knots from approximately 12:16 to 13:19 UTC; and then traveled 25.4 nautical miles through the same at an average speed over ground of 24.7 knots from approximately 17:33 to 18:34 UTC.

- On or about November 24, 2021, the M/V Brett Allie V traveled 19.9 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 24.7 knots from approximately 18:13 to 19:01 UTC.
- On or about November 25, 2021, the M/V Brett Allie V traveled 37.8 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 24.3 knots from approximately 10:45 to 12:19 UTC; and then traveled another 61.8 nautical miles through the same at an average speed over ground of 24.4 knots from approximately 14:17 to 16:50 UTC.
- On or about December 23, 2021, the M/V Brett Allie V traveled 74.4 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 22.9 knots from approximately 12:32 to 15:46 UTC.
- On or about December 26, 2021, the M/V Brett Allie V traveled 36.4 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 23 knots from approximately 15:34 to 17:08 UTC; and then traveled 94.8 nautical miles through the Southeast SMA at an average speed over ground of 22.2 knots from approximately 17:09 to 21:25 UTC.
- On or about February 24, 2022, the M/V Brett Allie V traveled 10.3 nautical miles through the Southeast SMA at an average speed over ground of 23.5 knots from approximately 20:54 to 21:20 UTC.
- On or about February 25, 2022, the M/V Brett Allie V traveled 94.4 nautical miles through the Southeast SMA at an average speed over ground of 22.2 knots from approximately 11:48 to 16:03 UTC; and then traveled 92.7 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 22.8 knots from approximately 16:11 to 20:14 UTC.
- On or about April 1, 2022, the M/V Brett Allie V traveled 29.4 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 23.7 knots from approximately 17:00 to 18:14 UTC; and then traveled another 48.5 nautical miles through the same at an average speed over ground of 24 knots from approximately 19:09 to 21:11 UTC.
- On or about April 2, 2022, the M/V Brett Allie V traveled 19.9 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 23.4 knots from approximately 13:26 to 14:17 UTC.
- On or about April 3, 2022, the M/V Brett Allie V traveled 22.4 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 23.3 knots from approximately 16:10 to 17:09 UTC.

Tr. 202, 205-215; AX 2-rev; AX 12.

These occurrences constitute 10 violations of the ESA and the MMPA, along with the Acts' implementing regulations. Agency's Initial Disclosures at 4 ("[E]ach day of speeding represents a separate count."); NOVA at 1-2 (alleging violations occurring over 10 separate days); *see also* 16 U.S.C. § 1375(a)(1) ("Each unlawful taking or importation shall be a separate offense."); 16 U.S.C. § 1540(a)(1) ("Each violation shall be a separate offense.").

IV. PENALTY

A. Principles of Law Regarding Civil Penalty

The MMPA permits the Secretary to impose a civil penalty of up to \$10,000 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. It allows the Secretary to assess civil penalties of up to \$12,000 per violation to "[a]ny person who *knowingly violates* . . . any provision of any" regulation other than those issued to implement certain provisions of the ESA not at issue in this case. 16 U.S.C. § 1540(a)(1) (emphasis added). However, "[a]ny person who *otherwise violates*" any regulation promulgated under the ESA may be assessed a penalty of no more than \$500 per violation. *Id.* (emphasis added). 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 as amended 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; \$30,715 for knowing violations of the relevant ESA regulation; and \$2,103 for all other violations of the relevant ESA regulation. 15 C.F.R. § 6.3(f)(11), (14)(ii)-(iii) (eff. Jan. 15, 2024) (adjusting maximum penalties to account for inflation); *see also* 15 C.F.R. § 6.4 (eff. Jan. 15, 2024) (adjusted 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*, Docket No. NE 1503255, 2019 NOAA LEXIS 2, at *41 (July 24, 2019). 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 \$75,000 penalty (\$7,500 per violation) upon BrettAllie Acquisition 1, LLC and Todd Keller for violating 16 U.S.C. § 1375(a)(1), 16 U.S.C. § 1538(a)(1)(G), and 50 C.F.R. § 224.105(b)(1), arguing the "proposed assessment falls well below the respective maximum civil penalties authorized under the ESA and the MMPA." Agency's Post-Hr'g Br. at 17. 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. Complainant’s Penalty Arguments

The Agency contends that its proposed penalty of \$75,000 reflects the “Respondents’ multiple and grievous violations of an essential conservation measure” and will “convey the gravity of these offenses to Respondents and other mariners.” Agency’s Post-Hr’g Br. at 17. The Agency begins by arguing that the fine is authorized by the ESA because knowing violations of the Act may be fined more than \$500. Agency’s Post-Hr’g Br. at 17. It points out that someone knowingly violates the ESA by voluntarily engaging in conduct that results in a violation. *Wilson*, Docket No. AK1100576, 2013 NOAA LEXIS 11, at *15-16 (June 13, 2013). There is no requirement that the Respondent knew that the conduct would violate the law or even to have knowledge such a law exists. *Museum Shops, Ltd.*, 5 O.R.W. 240, 244 (NOAA June 29, 1988). Accordingly, the Agency maintains, Keller’s knowledge that he caused the M/V Brett Allie V to travel in excess of 10 knots is sufficient to meet the knowledge requirement. Agency’s Post-Hr’g Br. at 18.

The Agency continues that the proposed penalty is warranted based on the severity and grievous nature of the violations considering the endangered status of the North Atlantic right whale. To support its argument the Agency cites extensively to the testimony of a scientist who studies right whales for NOAA, Dr. Caroline Good. The testimony, according to the Agency, showed how important vigilant regulation 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 Post-Hr’g Br. at 19-21. Not only did Respondents, the Agency contends, disobey this important regulation by excessively speeding, but they did so over a total of 693 nautical miles, raising the risk of harm and the severity of the harm should it occur. Agency’s Post-Hr’g Br. at 22-23.

As to Respondents’ culpability, the Agency suggests that they acted “without due care.” The Agency notes that it has conducted “robust outreach and educational efforts” in an attempt to raise awareness of the Speed Rule among recreational boaters. Agency’s Post-Hr’g Br. at 28. The Agency characterizes Mr. Keller as a seasoned boater who considers himself responsible. Agency’s Post-Hr’g Br. at 24, 27. That Mr. Keller never availed himself of the numerous resources made available by the Agency reflects his lack of care, portends the Agency, as it “can only control what outreach and education it disseminates, not whether the public reads or acts on that information.” Agency’s Post-Hr’g Br. at 27. The Agency argues that

Mr. Keller’s “general apathy toward the Agency’s direct outreach” after the violations came to light, demonstrated by his either “misplac[ing]” the guidance sent by the Agency or “treat[ing] [it] as refuse,” only highlights his lack of care. Agency’s Post-Hr’g Br. 29-30.

The Agency concludes by asking that this Tribunal disregard that it “has not previously charged Respondents for violations of the Speed Rule,” arguing this fact should not be reason to mitigate the penalty. Agency’s Post-Hr’g Br. at 30. As put by the Agency, “Clemency for a first time offense would be inconsistent with the purposes of the ESA and MMPA, the right whale’s critical status, and the severity of the violations committed.” Agency’s Post-Hr’g Br. at 31 (citing *Fishing Co. of Alaska.*, Docket Nos. 316-024, 316-025, 1996 NOAA LEXIS 10, at *44 (Apr. 17, 1996) (giving little weight to lack of prior violations considering regulations’ purpose and Congress’s intent to provide harsh penalties for exceeding bycatch limits)).

C. Respondents’ Penalty Arguments

Respondents, for their part, believe “that the fine the Agency seeks is excessive and that a warning, or small fine, is all that is necessary to achieve the regulatory purpose.” Resp’ts’ Post-Hr’g Br. at 21. Respondents focus primarily on their state of mind, contesting the Agency’s position that they knowingly violated the law. They mention that “if, as the Agency has argued, they must show a knowing, intentional violation, they have fallen short and the fine should be limited to \$500 per violation.” Resp’ts’ Reply Br. at 6. Indeed, a significant portion of Respondents’ initial brief attempts to distinguish the cases that the Agency relies on to establish Respondents knowingly violated the ESA by arguing the cases all involved “some degree of commercial activity” or operating in the known presence of marine mammals. See Resp’ts’ Post-Hr’g Br. at 14-16.

Respondents go on to argue what an appropriate penalty should be under NOAA’s Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions⁸ (“Penalty Policy”). Resp’ts’ Reply Br. at 4-5. But the Penalty Policy was not introduced as an exhibit into the record nor was it subject to a motion requesting that I take official notice of it. Further, the Agency does not rely upon the Penalty Policy as a basis for imposing a \$75,000 penalty in this case, instead relying solely upon the regulatory factors found in 15 C.F.R. § 904.108. Therefore, I will not consider the Penalty Policy in my assessment of an appropriate penalty. See *McLaughlin*, Docket No. NE2003013, 2022 NOAA LEXIS 2, at *25 (July 6, 2022). I will, however, consider the Respondents’ arguments insofar as they relate to the regulatory factors as there is significant overlap. The general themes of Respondents’ arguments are that their lack of knowledge of the law should be considered a mitigating factor, and the Agency is to blame, or at least partly to blame, for not doing more to educate recreational boaters of the

⁸ The Penalty Policy can be found online at <https://www.noaa.gov/sites/default/files/2023-06/Penalty-Policy-FINAL-June24-2019.pdf>. The Policy is a guidance document meant to promote consistency, predictability, and transparency in the assessment of civil administrative penalties and permit sanctions under the statutes and regulations enforced by NOAA. Penalty Policy at 1. It is meant to assist NOAA’s Office of General Counsel “but does not, nor is it intended to create a right or benefit . . . in any person, business or other entity.” *Id.* at 2. Although the policy guides NOAA attorneys, “NOAA retains discretion to assess the full range of penalties authorized by statute in any particular case” and “[t]he Policy is not binding on administrative law judges.” *Id*

Speed Rule. Resp'ts' Post-Hr'g Br. at 16-20.

D. Analysis of Civil Penalty and Assessment

As a preliminary matter, I must address the parties' competing arguments about whether Respondents knowingly violated the ESA. As previously noted, the ESA permits a higher penalty for knowing violations, and Respondents contend that if the Agency must show the violations were knowing it has "fallen short and the fine should be limited to \$500 per violation." Resp'ts' Reply Br. at 6. But this is not so. 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*, 2013 NOAA LEXIS 11, at *18; *see also Museum Shops, Ltd.*, 5 O.R.W. at 244; *Killingsworth*, 2019 NOAA LEXIS 10, at *48. By Mr. Keller's own admissions, he intended the M/V Brett Allie V to travel in excess of 10 knots through what turned out to be active SMAs. *See* Tr. 263:8-13. That he was unaware that his actions violated the law is of no consequence. *LT Seafood, LP*, Docket No. SE0700890FM, 2013 NOAA LEXIS 5, at *41 (June 4, 2013) ("It is well settled that 'ignorance of the law will not excuse.'" (quoting *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910))).

Respondents, in an attempt to distinguish the Agency's cases establishing that knowing violations can occur regardless of knowledge of the law, point out that "[a]ll involve some degree of commercial activity, the vast majority involving compliance with commercial fishing regulations, a pervasively regulated industry." Respondents' Post-Hr'g Br. at 14. But they fail to explain why that is significant. None of the cited cases relied on the commercial nature of the actors when defining what "knowingly" means under the ESA. Indeed, scanning the cases beyond those cited by the Agency reveals at least one dealing with a recreational boater. In *Huber*, the "Respondent was on a family outing and had never seen whales before" when he harassed a pod of humpback whales by pursuing and splitting the pod. *Huber*, Docket No. 133-285, 1994 NOAA LEXIS 35, at *3 (Apr. 12, 1994). Although he was not engaging in commercial activity, Huber was held to the same standard that the Agency advances here. *Id.* at *11-12.

Respondents nonetheless insist that the Supreme Court established that "it is not enough that someone act intentionally, the action must be such that a reasonable person would know what he did was being regulated based on the nature of the act." Resp'ts' Reply Br. at 5. They point to *United States v. International Minerals & Chemical Corp.*, where the Court held that a company that failed to declare the hazardous nature of sulfuric acid and hydrofluosilicic acid on shipping papers as required by an Interstate Commerce Commission regulation could be held liable for violating the regulation despite having no knowledge of it. *See* 402 U.S. 558 (1971). The Court justified its decision in part because when one deals with dangerous devices or products, the probability of regulation is so great that anyone who knowingly possesses such items can be presumed to be aware of regulations applicable to their handling. *Id.* at 565. But this does not establish, as Respondents insist, that such a presumption would not apply to regulations of activities that are less obviously dangerous. While it is true that the Court speculated the shipping regulation as applied to more mundane

products like pencils “might raise substantial due process questions,” *id.* at 564, it never addressed such questions.

Regardless, Respondents fail to appreciate that the party in *International Minerals & Chemical Corp.* was criminally prosecuted. *See id.* at 569 (Stewart, J., dissenting) (“Yet today’s decision holds that a person who does just that is guilty of a criminal offense punishable by a year in prison.”). So even if the Court did hold that an assumption of knowledge violates due process when seeking criminal penalties for activities that are less likely to be regulated, that does not necessarily help Respondents here who are facing civil liability. *See Melendez v. City of New York*, 16 F.4th 992, 1015 (2d Cir. 2021) (“[L]aws imposing civil penalties generally require less demanding scrutiny than those with criminal consequences.”). Further, even if we accept the general proposition that parties engaged in regulated activities should be held to a higher standard, it is unclear why that would not apply here. Recreational boating, while not a commercial activity, is subject to various regulations, *see, e.g.*, 33 C.F.R. Part 175 (United States Coast Guard Regulations establishing equipment standards applicable to recreational vessels), and although he was new to the class of boat subject to NOAA’s Speed Rule, Mr. Keller testified to his extensive experience in the field, Tr. 246-247, 248. Mr. Keller also does not present himself as a casual recreational boater, having planned and executed a months-long seagoing voyage from his home in New York to South Carolina, Florida, and back to New York between November 2021 and April 2022. He has been a mariner for 42 years, taken “[e]very single boating safety course,” installed “every conceivable safety device” into the M/V Brett Allie V, and subscribes to “every conceivable . . . boating application.” Tr. 247, 251, 264. He certainly had the means to become familiar with any applicable regulations affecting his voyage.

Also unavailing is Respondents’ argument that if whales or other animals had been present, “then a different duty to act or refrain from acting, regardless of specific knowledge of the law, would have been imposed.” Resp’ts’ Post-Hr’g Br. at 16. In a litany of cases, fines were levied under the ESA against respondents that fished without the proper gear meant to protect turtles despite no allegations being made that turtles were present or otherwise injured. *See, e.g.*, *Killingsworth*, 2019 NOAA LEXIS 10. What mattered was that the respondents engaged in voluntary activities that resulted in violations of regulations. The same is true here.

On a final note, the arguments about 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. Sept. 30, 2016)). Consequently, each count is subject to a penalty up to \$35,574 under the MMPA irrespective of any violation of the ESA. *See McCeney*, 5 O.R.W. 408, 412 (NOAA 1988) (noting ESA does not override MMPA and penalties for acts violating both statutes are independently supported by the MMPA).

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

The nature of the violation involves speeding through seasonal management zones, which are critically important to the continued survival of North Atlantic right whales.

Dr. Good, an expert on North Atlantic right whales, testified extensively about the status of the whales. Because North Atlantic right whales had valuable blubber and baleen, and their coastal habitats made them easily accessible, the whales were hunted nearly to extinction. Tr. 27-28. There are currently about 360 individual North Atlantic right whales remaining. Tr. 28. Given their low reproduction rate and population, estimates suggest even a single right whale death significantly impacts their recovery. Tr. 29. These whales are particularly susceptible to vessel strikes because of the amount of time they spend at the surface: they forage near the surface, thick blubber pushes them to the surface, and mother/calf pairs spend significant time at the surface due to the calf's inability to dive for long periods. Tr. 38-40. At the surface, although they are large creatures, right whales can be very difficult to see. Tr. 41. The gravity of violating the Speed Rule is significant. The importance of following the Speed Rule cannot be overstated, as adhering to the 10-knot limit is essential in reducing lethal vessel strikes—one of the greatest threats to right whale populations. Tr. 28-24, 47-48.

The circumstances and extent of the violations also support a finding that the gravity was significant. Over the course of ten separate days, Mr. Keller sped approximately 693 nautical miles through two different SMAs averaging over double the permitted speed. Although no whales are known to have been harmed, the large distance traveled increased the odds of a strike and the significant speed increased the odds that such a strike would have been fatal. *See* Tr. 47-48, 50-51.

Respondents argue that the fact there were no whales around mitigate the gravity of the offense, likening it to speeding through a school zone when nobody is present. *See* Tr. 8, 256-257. But that is not an apt analogy. A closer analogy would be speeding through a school zone while school is in session, although no children are observed. The seasonal management areas, and the corresponding speed limits, are in effect only at those times when right whales are likely to be present. As explained above, right whales are often difficult to see, making it all the more important that mariners adhere to the required speeds. The fact that no whale was ultimately injured, as far as we know, makes no difference. *But see* Tr. 51-52: (Dr. Good testifying it can sometimes be difficult to know if a ship strikes a right whale). Respondents' luck in that regard does not mitigate the nature and gravity of the violations.

2. Respondents' Culpability

Respondents argue that Mr. Keller's lack of awareness of the Speed Rule should mitigate culpability, which they see as unintentional, especially in light of what they say is NOAA's continued failure to educate the recreational boating community of the Rule's requirements. *See* Resp'ts' Post-Hr'g Br. at 17-20. But, as mentioned earlier, ignorance of the law is no excuse. Further, Respondents' efforts to portray NOAA's outreach as ineffective is unavailing. It is not NOAA's responsibility to ensure all persons subject to its regulations are aware of those regulations. Rather, the onus is on the regulated community to ensure compliance with relevant regulations. It has long been settled "both by statute and judicial precedent that publication in the Federal Register is legally deemed notice to all interested persons." *Buckner Trucking, Inc. v. United States*, 354 F. Supp. 1210, 1219 (S.D. Tex. 1973) (citing 44 U.S.C. § 1507;

Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 68 (1947)). And the regulations at issue here were originally published in 2008, thirteen years prior to the date of Respondents' violations.

Over those intervening thirteen years, NOAA went beyond mere publication of the rule and engaged in outreach efforts to educate the public about North Atlantic right whales, the need to conserve them, and the importance of the regulations adopted for that purpose. When a right whale is sighted, the Agency issues Slow Zone alerts, which recommend areas where increased caution should be taken, often along with information related to the Speed Rule and SMAs, and they are circulated through NOAA media channels and shared with other government agencies and non-governmental entities to disseminate. Tr. 95, 115-116; AX 18 at 7-8; AX 19 at 3-5; AX 20 at 5, 9; AX 21. The Agency also coordinates with the Coast Guard to issue weekly Local Notices to Mariners online and broadcast over the air Broadcast Notices to Mariners. Tr. 105-109; *see AX 19*. Both include local information of interest to mariners including notices of SMAs as they become active and updated Slow Zones. Tr. 105-109; *see 33 C.F.R. § 72.01-5(a); AX 19 at 3-5*. Mariners operating vessels like Mr. Keller's are not required to utilize the above services, but they can sign up to receive automated alerts. Tr. 106, 109-110; 33 C.F.R. § 72.01-5(c). The Agency's website also publishes nautical charts for use by mariners along with Coast Pilot publications, which provide supplemental information to mariners about area restrictions—like information on the Speed Rule, SMAs, and measures to take while transiting whale habitat—that cannot be conveyed through navigational charts. Tr. 96-104; *see AX 18; see also 33 U.S.C. §§ 883b, 892a(a)*.

Respondents argue that these efforts were insufficient as mariners are not mandated to use any of the information so there is no guarantee it will reach them. *See Tr. 128-131*. But while the Agency cannot control how the public interacts with the information it puts out, the record shows that it provides copious amounts of information related to the Speed Rule through a variety of outlets. In support of their argument, Respondents now seek to introduce two documents into the record. The first is a letter that their attorney wrote in 2018 to NOAA detailing, as he saw it, the inadequacy of the Agency's outreach efforts. *See Resp'ts' Post-Hr'g Br. Attach. B*. The second is a page from the Atlantic Large Whale Reduction Team's March 2024 meeting report that shows that of the 44 Speed Rule violations between 2021 and 2022, 24 of the violations were by recreational vessels. *See Resp'ts' Post-Hr'g Br. Attach. A*. As I did not direct otherwise, the evidentiary record was properly closed at the conclusion of the hearing. 15 C.F.R. § 904.253. Respondents may introduce new evidence only upon a showing that the evidence is material and that there is good cause for not producing it sooner. *Id.*

As to the 2018 letter, having been written by Respondents' attorney, the letter was available to introduce at the hearing, and Respondents make no effort to explain why they failed to introduce it at that time. The request to introduce the letter is therefore denied. The Respondents have a good reason for not introducing the enforcement statistics at the February 2024 hearing as the meeting took place the following month, on March 19. However, Respondents do not explain why they waited until after the Agency filed its initial brief on March 29 to move to introduce the meeting notes. More importantly, Respondents do not provide a cogent argument for why the statistics are relevant. According to Respondents, that

recreational vessels accounted for a large share of Speed Rule violations proves that NOAA’s outreach efforts to the community are deficient. But that is sheer speculation. As noted by the Agency, “At face value, the mere number of recreational violators is no metric for the sufficiency of the Agency’s outreach efforts.” Agency’s Reply Br. at 3. Consequently, Respondents motion to introduce the meeting notes is also denied.

Respondents nonetheless argue the Agency’s outreach is still deficient because they can articulate two plans with which they believe the Agency could easily supplement its efforts. First, given the “rather small number of recreational vessels over 65 feet on the East Coast,” NOAA should undertake a direct mailing campaign to all vessel owners. Resp’ts’ Post-Hr’g Br. at 7. Second, the Agency should use its ability to monitor vessel locations in almost real time to track all vessels in SMAs and notify vessel owners immediately of potential speed violations. Resp’ts’ Post-Hr’g Br. at 6-7. Respondents have not explained how such proposals, even if technically feasible, would be practical. But even if such schemes were practical the Agency has no legal requirement to go to such lengths. *See Midgett*, 7 O.R.W. 148, 152 (NOAA 1993) (“There is not now, nor has there ever been, a duty to warn a wrong-doer of his potential violation.”). Publishing requirements in the Federal Register is all that is required. *See Williams v. Mukasey*, 531 F.3d 1040, 1043 (9th Cir. 2008) (holding publication to Federal Register did not provide insufficient notice and “the availability of an alternative method of notice, regardless of its reasonableness, does not itself impose a legal obligation”). The Agency has exceeded the minimum requirement by actively working to reach large groups of mariners wherever they are.

With so many resources available to Mr. Keller, he cannot now argue that his violations were unintentional. He negligently put his trust in only what was most easily available—i.e. his onboard third-party navigation system—rather than availing himself of the full panoply of available resources NOAA has made public. *See Maynard*, 5 O.R.W. 9, 14 (NOAA 1987) (finding respondent was negligent in failing to utilize resources made available by Agency). Respondents cannot now attempt to blame NOAA for Mr. Keller’s failure to consult those resources. *See Alba*, 2 O.R.W. 425, 433 (NOAA 1981) (“Those who cannot or choose not to avail themselves of the legal notices or the other alternative effective information sources in the community, cannot blame ‘the system.’”).

The Agency, for its part, attempts to elevate the offense beyond mere negligence, arguing that when it reached out to him directly, Mr. Keller displayed a general apathy toward complying with the Rule. The Agency notes that it sent multiple letters to his home in New York informing him of the Speed Rule and its requirements. Agency’s Post-Hr’g Br. at 29. The Agency argues that, because Mr. Keller admitted receiving at least one of the letters, it should be assumed that he received all, having been sent to the same address. Agency’s Post-Hr’g Br. at 29 (citing *Jones*, Docket No. PI1001697, 2011 NOAA LEXIS 7, at *19-20 (Dec. 20, 2011)). Even assuming Mr. Keller received only one of the letters, the Agency concludes that he “gave it short shrift” based on nothing more than Mr. Keller not being able to recall what happened to it. Post-Hr’g Br. at 30; *see* Tr. 262.

While the Agency did introduce three different letters into the record, it did not introduce any evidence that the letters were actually mailed. *See AX 1 at 23-26.* Mr. Keller testified credibly that he remembers receiving only one letter, and that he may have lost that letter does not prove his contempt for the rules. *See Tr. 260-262.* And regardless of how many letters he received there is no evidence that he received any in time to have changed his behavior. The Agency claims that two letters were sent in January 2022, “meaning he could have received any one—or all—of the letters, including those sent prior to his February and April 2022 violations.” Agency’s Post-Hr’g Br. at 29. But all of the violations occurred over a months-long trip between November 2021 and April 2022, and Mr. Keller returned home only once during that time, in November 2021, before the Agency argues the first letter was sent. *See Tr. 254; 270.* The most reasonable explanation is that Mr. Keller violated the Speed Rule not knowing about it. Mr. Keller testified that he has paid attention to the Speed Rule’s requirements ever since, and the Agency has not suggested otherwise. *See Tr. 267.* Therefore, while Mr. Keller’s error may have been negligent, it does not rise above that threshold.

3. History of Prior Violations

NOAA has represented to this Tribunal that Respondents have no prior violations. It insists this is no reason to mitigate the penalty claiming clemency would be inconsistent with the purposes of the ESA and MMPA. However, mitigation is not clemency, and taking into account an individual’s history, especially when confronted with a Respondent who has a long history of engaging in activity without running afoul of the law, can be an important consideration when crafting a penalty. *See Roberge*, Docket No. NE1300388, 2015 NOAA LEXIS 25, at *65-66 (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 and was considered in my assessment of a monetary penalty.”). *But see The Fishing Co. of Alaska*, 1996 NOAA LEXIS 10, at *44 (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”). As such, Respondent’s history is given due weight.

4. Inability to Pay

Respondents who want the ALJ’s initial decision to account for their inability to pay must, 30 days prior to hearing, submit to Agency counsel “verifiable, complete, and accurate financial information” such as “the value of respondents’ cash and liquid assets; ability to borrow; net worth; liabilities; income tax returns; past, present, and future income; prior and anticipated profits; expected cash flow; and the respondents’ ability to pay in installments over time.” 15 C.F.R. § 904.108(d), (e). Respondents did not timely submit such information. Respondents are therefore “presumed to have the ability to pay the civil penalty.” 15 C.F.R. § 904.108(c); *see Nguyen*, 2012 NOAA LEXIS 2, at *21 (same).

5. Such Other Matters as Justice May Require

The Agency claims that “[i]f the right whale is to have any chance of recovery, a substantial deterrence message must be sent to Respondents and to any other mariner who

would barrel through SMAs at speeds in excess of two times the ten-knot restriction for hundreds of nautical miles.” Agency’s Post-Hr’g Br. at 31. Respondents respond that a large fine is not necessary to deter future violations by Mr. Keller. Certainly, he does not appear to be an irresponsible boater at risk of reoffending. He has taken numerous boat safety courses, and he does not seem intent on evading the regulation in the future as he continues to operate his AIS system. Tr. 247, 255, 267. I must, however, also consider the deterrent effect on the general public as well, which could be important in raising awareness of the Speed Rule. But while general deterrence is important, a large fine is not necessarily required to achieve such a goal. *See NAT’L INST. OF JUST., U.S. DEP’T OF JUST., FIVE THINGS ABOUT DETERRENCE (2016),* <https://www.ojp.gov/pdffiles1/nij/247350.pdf> (“The *certainty* of being caught is a vastly more powerful deterrent than the punishment.” (emphasis in original)).

Finally, Respondents for the first time in their initial post-hearing brief, argue that the \$75,000 fine that NOAA seeks is “so grossly disproportionate to the violation alleged that [it] would violate the Eighth Amendment to the United States Constitution.” Resp’ts’ Post-Hr’g Br. at 16. Whatever the merits of the argument, or lack thereof, the Respondents may not bring it at this point as I am not authorized to rule on constitutional issues. 15 C.F.R. § 904.200.

Based upon all of the foregoing facts of this case, I determine that imposition of a penalty in the amount of \$45,000 is appropriate.

ORDER

IT IS HEREBY ORDERED,

That, a civil penalty in the total amount of \$45,000, is **IMPOSED** upon Respondents, BrettAllie Acquisition 1, LLC, and Todd Keller, who are found jointly and severally liable in NOAA Docket No. NE2203327;

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 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.



Michael B. Wright
Administrative Law Judge
U.S. Environmental Protection Agency

Dated: December 10, 2024
Washington, D.C.