

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
WASHINGTON, D.C. 20230

_____)	
IN THE MATTER OF:)	Docket Number:
)	SE303316
Determination III 130 Westport, LLC, and)	
Gerald L. Eubanks)	Vessel Name:
)	M/V <i>Determination III</i>
Respondents.)	
_____)	

**ORDER DENYING RESPONDENTS' PETITION FOR
ADMINISTRATIVE REVIEW**

This order addresses a petition for administrative review filed by Determination III 130 Westport, LLC, the owner of M/V *Determination III*, and Gerald L. Eubanks, who captained the vessel at all times relevant to this case (collectively “Respondents”). Respondents seek administrative review of an Initial Decision issued by an Administrative Law Judge (“ALJ”), which found that Respondents had violated the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*; the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. §§ 1361 *et seq.*; and the North Atlantic Right Whale Ship Strike Reduction Rule (“Speed Rule”), 50 C.F.R. § 224.105. For the reasons stated below, Respondents’ Petition for Review is **DENIED**.

PROCEDURAL HISTORY

On October 12, 2023, the National Oceanic and Atmospheric Administration (“NOAA” or “Agency”), on behalf of the Secretary of Commerce, issued a Notice of Violation (“NOVA”) to Respondents, alleging violations of the ESA, the MMPA, and the Speed Rule, a regulation implementing these two acts. NOAA promulgated the Speed Rule in 2008 to reduce the likelihood of deaths and serious injuries to endangered North Atlantic Right Whales that result from collisions with ships. 73 Fed. Reg. 60173 (Oct. 10, 2008).¹ The Speed Rule prohibits vessels greater than or equal to 65 ft in overall length and subject to U.S. jurisdiction, with some exceptions, from exceeding speeds of 10 knots while transiting active Seasonal Management Areas (“SMAs”) during certain times of the year.

Upon receipt of the NOVA, Respondents requested a hearing before an ALJ pursuant to 15 C.F.R. § 904.201. However, after filing their Initial Disclosures, the parties agreed to “forego an evidentiary hearing in favor of a decision based on a stipulated record.” Initial Decision at 2. The

¹ The Speed Rule was originally set to expire after five years, *see* 73 Fed. Reg. 60173, 60188; however, NOAA amended the Speed Rule to remove this expiration date in 2013, 78 Fed. Reg. 73726 (Dec. 9, 2013); *see also* 79 Fed. Reg. 34245 (June 16, 2014) (correcting Dec. 9, 2013 amendment).

parties submitted joint stipulated facts, expected testimony, and exhibits on April 26, 2024, and briefing before the ALJ concluded by September 6, 2024. Initial Decision at 3.

The ALJ issued the Initial Decision on November 4, 2024. In it, the ALJ found that the stipulated record was sufficient to establish Respondents' liability; specifically, that Respondents transited more than 200 nautical miles within active SMAs at average speeds higher than 10 knots, in violation of the Speed Rule. Initial Decision at 7–9. The ALJ assessed a civil monetary penalty in the amount of \$14,250.

In their briefing before the ALJ, Respondents argued, as a defense, that the Speed Rule was unlawful on two grounds: first, that NOAA lacked statutory authority under the ESA and the MMPA to enact the Speed Rule; and second, that if either the ESA or the MMPA did authorize NOAA to enact the Speed Rule, such authorization would be an unconstitutional delegation of lawmaking authority by Congress in violation of the nondelegation doctrine. Initial Decision at 8. The parties agreed, however, that the ALJ did not have the authority to decide these arguments under the regulations governing the proceeding, which provide that the ALJ “has no authority to rule on constitutional issues or challenges to the validity of regulations promulgated by the Agency or statutes administered by NOAA.”² Initial Decision at 8. The ALJ accordingly did not reach Respondents' arguments regarding the lawfulness of the Speed Rule. Initial Decision at 8.

On December 5, 2024, Respondents filed a timely Petition for Review with the NOAA Administrator. In the Petition, Respondents do not challenge any of the ALJ's legal or factual determinations in the Initial Decision. Instead, Respondents contend that administrative review is warranted so that their arguments regarding the lawfulness of the Speed Rule—which they agreed the ALJ had no authority to decide—may be considered. Petition at 4. The Enforcement Section of NOAA's Office of General Counsel filed an Answer on behalf of the Agency in opposition to the Petition on December 19, 2024.

DECISION ON DISCRETIONARY REVIEW

The NOAA Administrator has broad discretion in deciding whether to grant or deny a petition for discretionary review.³ Two criteria guide the decision: “(1) [w]hether the Initial Decision contains significant factual or legal errors that warrant further review by the Administrator; and (2) [w]hether fairness or other policy considerations warrant further consideration by the Administrator.”⁴ Types of cases that fall within these criteria include, but are not limited to, those in which:

- The Initial Decision conflicts with one or more other NOAA administrative decisions or federal court decisions on an important issue of federal law;
- The ALJ decided an important federal question in a way that conflicts with prior rulings of the Administrator;

² 15 C.F.R. § 904.200(b).

³ See 15 C.F.R. 904.273(c) (“Review by the Administrator of an Initial Decision is discretionary and is not a matter of right.”); see also 15 C.F.R. § 904.273(i) (“The Administrator need not give reasons for denying review.”).

⁴ 15 C.F.R. § 904.273(c).

- The ALJ decided a question of federal law that is so important that the Administrator should pass upon it even absent a conflict; or
- The ALJ so far departed from the accepted and usual course of administrative proceedings as to call for an exercise of the Administrator's supervisory power.⁵

Applying these criteria to the issues presented in Respondents' Petition, I find no significant factual or legal errors in the Initial Decision and no fairness or other policy considerations have been identified that would warrant further review. Therefore, Respondents' Petition for Discretionary Review is **DENIED**.

⁵ *Id.*

CONCLUSION

The ALJ's Initial Decision will become effective as the final agency decision⁶ on the date this Order is served on Respondents.

1/12/2025

Dated



Richard W. Spinrad, Ph.D.
NOAA Administrator and Under Secretary of
Commerce for Oceans and Atmosphere

⁶ Per the Administrative Procedure Act, final agency decisions are subject to judicial review. 5 U.S.C. § 704.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Order Denying Respondents' Petition for Administrative Review was sent to the individuals listed below on this 13th day of January, 2025:

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