

<sup>1</sup> The Administrative Law Judges of the U.S. Environmental Protection Agency are authorized to hear cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011. This agreement was entered into under a statutory loan program that allows administrative law judges at one federal agency to perform the duties of administrative law judges at another federal agency. See 5 U.S.C. § 3344.

## I. PROCEDURAL HISTORY

This matter commenced with the issuance of a Notice of Violation and Assessment of Administrative Penalty (NOVA), dated September 14, 2023, to Respondent Joseph Urbinati.<sup>2</sup> In the NOVA, the National Oceanic and Atmospheric Administration (“Agency” or “NOAA”) alleged in three counts that Respondent violated the Marine Mammal Protection Act, 16 U.S.C. § 1361 *et seq.*, the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, and the regulation found at 50 C.F.R. § 224.105, by violating a speed restriction in North Atlantic right whale Seasonal Management Areas (SMAs) at various times from November 19, 2022, through November 21, 2022. NOVA at 1-2. Alleging that each day was a separate count, the NOVA assessed a penalty of \$7,500 for each count, for a total penalty of \$22,500. NOVA at 2. The NOVA stated that Respondent could “[r]equest a hearing before an Administrative Law Judge (ALJ) to deny or contest all, or any part, of the violation(s) charged and/or the civil penalty assessed.” NOVA at 3.

On October 3, 2023, Respondent, through his attorney, requested a hearing. On October 16, 2023, the hearing request was forwarded to the Office of Administrative Law Judges, in accordance with 15 C.F.R. § 904.201(a).<sup>3</sup> On October 31, 2023, the undersigned was designated to preside over this matter. *See* Order of Designation (Oct. 31, 2023). Also on that date, a Prehearing Order was issued. The Prehearing Order set filing deadlines and ordered the parties to prepare and file their Initial Disclosures in accordance with 15 C.F.R. § 904.240. *See* Prehearing Order at 1-3 (Oct. 31, 2023). On December 15, 2023, the Agency timely filed its Initial Disclosures, listing six witnesses and fourteen exhibits. On January 5, 2024, Respondent timely filed his Initial Disclosures, listing only himself as a witness. On March 20, 2024, the hearing in this matter was scheduled to begin on May 29, 2024. *See* Notice of Hearing Order (Mar. 20, 2024).

On May 1, 2024, the parties filed a Joint Motion for Initial Decision Based on a Stipulated Record (“Motion”). The Motion stated that “[a]fter discussions and the exchange of documents and draft stipulations, the parties have agreed that an evidentiary hearing is not necessary.” Mot. at 1. The Motion also asserted that the parties agreed (i) to forgo the hearing scheduled to begin on May 29, 2024; (ii) to submit Joint Stipulated Facts and Exhibits; and (iii) to reserve their right to supplement the evidentiary record to the extent new or additional claims or defenses are made. Mot. at 1. The parties also suggested a briefing schedule. Mot. at 1. That Motion was granted by Order soon thereafter. *See* Order Granting Motion for Initial Decision Based on a Stipulated Record (May 2, 2024). The Order cancelled the hearing. In addition, the Order adopted the parties’ proposed briefing schedule, but also set a deadline for the parties to raise new or additional claims or defenses.

On May 29, 2024, the parties filed their Joint Stipulated Facts and Exhibits (“Joint

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<sup>2</sup> Some filings from Respondent’s counsel and Agency counsel have been captioned as “Joseph Urbinati, Jr.” Since the NOVA was directed to “Joseph Urbinati,” the Tribunal will be utilizing that moniker.

<sup>3</sup> This matter is governed by the Civil Procedures found at 15 C.F.R. Part 904.

Stipulations”). Attached to the document were 25 Joint Exhibits (JX) whose authenticity and admissibility were stipulated to. The Joint Stipulations also included 72 factual stipulations and one stipulation of expected testimony.

On August 12, 2024, Respondent submitted a Notice of New or Additional Claims or Defenses (“Notice”). In the Notice, Respondent explicitly raised various precedents and legal principles that he believes undercuts the Agency’s authority to issue the speed restriction.

The Agency filed its Initial Brief (NOAA Init. Br.) on August 30, 2024. Respondent filed his Initial Brief (Resp’t Init. Br.) on September 27, 2024. The Agency then filed its Reply Brief (NOAA Reply Br.) on October 10, 2024. Respondent filed his Reply Brief (Resp’t Reply Br.) on October 25, 2024. This matter is ready for decision.

## **II. LAW AND REGULATIONS**

### **Statutory Provisions**

Both the Marine Mammal Protection Act (MMPA) and Endangered Species Act (ESA) are cited by NOAA as authorization for the speed restriction. See JX 9<sup>4</sup> at 10 (“NOAA is issuing these regulations pursuant to its rulemaking authority under MMPA section 112(a) (16 U.S.C. 1382(a)) and ESA section 11(f) (16 U.S.C. 1540(f)).”).

The MMPA’s overarching purpose is “[t]o protect marine mammals.” Pub. L. 92-522; 86 Stat. 1027, 1027 (1972). The stated declaration of policy of the MMPA, as applicable to the allegations at hand, is, in part:

The Congress finds that—

- (1) 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;
- (2) such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. Further measures should be immediately taken to replenish any species or population stock which has already diminished below that population. In particular, efforts should be made to protect essential habitats, including the rookeries, mating grounds, and areas of similar significance for each species of marine mammal

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<sup>4</sup> JX 9 is NOAA’s publication of the final rule at issue here: Endangered Fish and Wildlife; Final Rule To Implement Speed Restrictions to Reduce the Threat of Ship Collisions With North Atlantic Right Whales, 73 Fed. Reg. 60,173 (Oct. 10, 2008) (codified at 50 C.F.R. § 224.105).

- from the adverse effect of man's actions; . . . and
- (6) marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.

16 U.S.C. § 1361. "To that end, the [MMPA] generally prohibits any individual from 'taking' a marine mammal. The MMPA defines to 'take' as 'to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.'" *Ctr. for Biological Diversity v. Raimondo*, 610 F. Supp. 3d 252, 259 (D.D.C. 2022) (some internal quotation marks omitted) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008); 16 U.S.C. § 1362(13) (definition of "take")). To effectuate the MMPA, "[t]he Secretary [of Commerce], in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this title." 16 U.S.C. § 1382(a).

In a similar vein, the ESA was enacted "[t]o provide for the conservation of endangered and threatened species of fish, wildlife, and plants[.]" Pub. L. 93-205, 87 Stat. 884, 884 (1973). In the ESA, Congress declares that some extant "species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction[.]" 16 U.S.C. § 1531(a)(2). In enacting the ESA, Congress aimed "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species[.]" *Id.* § 1531(b). The ESA directs the Secretary of Commerce to "determine whether any species is an endangered or a threatened species" due to factors like habitat loss, disease, or overutilization, among others; these lists of species are published in the Federal Register. *Id.* § 1533. "One way the [ESA] protects covered species is by making it unlawful to 'take' those species." *Ctr. for Biological Diversity v. Nat'l Marine Fisheries Serv.*, No. 22-5295, 2024 U.S. App. LEXIS 15153, at \*2 (D.C. Cir. June 21, 2024) (citing 16 U.S.C. § 1538(a)(1)(B)). To implement the ESA, "[t]he Secretary . . . [is] authorized to promulgate such regulations as may be appropriate to enforce this Act[.]" 16 U.S.C. § 1540(f).

Both statutes have enforcement provisions that allow the Agency to assess penalties for violations of their respective regulations. Specifically, the MMPA provides that:

Any person who violates any provision of this title or of any permit or regulation issued thereunder, except as provided in [a section related to commercial fishing operations and not relevant here], may be assessed a civil penalty by the Secretary of not more than \$10,000 for each such violation. No penalty shall be assessed

unless such person is given notice and opportunity for a hearing with respect to such violation. Each unlawful taking or importation shall be a separate offense.

*Id.* § 1375(a)(1). The ESA, in turn, prohibits “any person” “with respect to any endangered species of fish or wildlife” from “violat[ing] any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to [section 1533] of this Act and promulgated by the Secretary pursuant to authority provided by this Act.” *Id.* § 1538(a)(1)(G). The ESA also states that:

Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who 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 subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d) (other than regulation relating to recordkeeping or filing of reports), (f) or (g) of [section 1538] of this Act, may be assessed a civil penalty by the Secretary of not more than \$25,000 for each violation. Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who 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.

*Id.* § 1540(a)(1). The ESA also guarantees alleged violators the opportunity for a hearing. *Id.*

Finally, the ESA commands that “[e]xcept as otherwise provided in this Act, no provision of this Act shall take precedence over any more restrictive conflicting provision of the [MMPA].” *Id.* § 1543.

### **Regulatory Provisions**

The regulation promulgated under the authorities of the MMPA and ESA that Respondent is alleged to have violated is found at 50 C.F.R. § 224.105, “Speed restrictions to protect North Atlantic Right Whales” (hereinafter, “Speed Rule”). That regulation reads as follows:

- (a) The following restrictions apply to: All vessels greater than or equal to 65 ft (19.8 m) in overall length and subject to the jurisdiction of the United States, and all other vessels greater than or equal to 65 ft (19.8 m) in overall length entering or departing a port or place subject to the

jurisdiction of the United States. [The regulation lists exemptions that are omitted as not relevant to this matter.]

- (1) 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 April 15 each year in the area bounded by the [given coordinates].<sup>5</sup>
- (2) 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 [given coordinates, roughly north of Brunswick, GA, to Wilmington, NC];
  - (ii) Within a 20-nm (37 km) radius . . . at the
    - (A) Ports of New York/New Jersey;
    - (B) Delaware Bay (Ports of Philadelphia and Wilmington);
    - (C) Entrance to the Chesapeake Bay (Ports of Hampton Roads and Baltimore); and
    - (D) Ports of Morehead City and Beaufort, NC; and
  - (iii) In Block Island Sound.
- (3) Northeast U.S. (north of Rhode Island) [The regulation delimits the Northeast SMA and outlines seasonal speed restrictions; those specifics are omitted as not relevant to this matter.]

(b) Except as noted in paragraph (c) of this section, it is unlawful under this section:

- (1) For any vessel subject to the jurisdiction of the United States to violate any speed restriction established in paragraph (a) of this section; or
- (2) For any vessel entering or departing a port or place under the jurisdiction of the United States to violate any speed restriction established in paragraph (a) of this section.

(c) A vessel may operate at a speed necessary to maintain safe maneuvering speed instead of the required ten knots only if 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 or, when a vessel is not carrying a pilot, the master of the vessel. If a deviation from the ten-knot speed limit is necessary,

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<sup>5</sup> As noted in the text, the latitude and longitude coordinates delimiting the boundaries of all the SMAs are omitted. The regulation as presented in the Federal Register also includes figures (maps); they are omitted here, as are references to them in the text. See JX 9.

the reasons for the deviation, the speed at which the vessel is operated, the latitude and longitude of the area, and the time and duration of such deviation shall be entered into the logbook of the vessel. The master of the vessel shall attest to the accuracy of the logbook entry by signing and dating it.

50 C.F.R. § 224.105.

The original Speed Rule had a sunset provision which would have allowed the rule to expire as of December 9, 2013. *See* JX 9 at 1, 16. However, in 2013, NOAA removed the sunset provision. *See* Correction; Restatement of Final Rule To Remove the Sunset Provision of the Final Rule Implementing Vessel Speed Restrictions To Reduce the Threat of Ship Collisions With North Atlantic Right Whales, 79 Fed. Reg. 34,245 (June 16, 2014); *see also* JX 11 (Endangered Fish and Wildlife; Final Rule to Remove the Sunset Provision of the Final Rule Implementing Vessel Speed Restrictions To Reduce the Threat of Ship Collisions With North Atlantic Right Whales, 78 Fed. Reg. 73,726 (Dec. 9, 2013)).

### **Burden of Proof**

Under the Administrative Procedure Act, the Agency, as “the proponent of a rule or order,” has the burden of proof. 5 U.S.C. § 556(d). As has been explained previously:

To prevail on its claim that Respondent violated the Endangered Species Act, or alternatively, the Marine Mammal Protection Act and its implementing regulations, the Agency must prove facts constituting the violation by a preponderance of reliable, probative, substantial, and credible evidence. This standard requires the Agency to demonstrate that the facts it seeks to establish are more likely than not to be true. To satisfy this burden of proof, the Agency may rely upon either direct or circumstantial evidence.

*Iakovou*, No. NE1503255, 2019 NOAA LEXIS 2, at \*25 (NOAA July 24, 2019) (internal citations omitted). “After the Agency proves the allegations contained in the NOVA by a preponderance of reliable, probative, substantial, and credible evidence, the burden shifts to the respondent to produce evidence to rebut or discredit the Agency’s evidence.” *Wagner*, No. PI11003559, 2015 NOAA LEXIS 19, at \*27 (NOAA Sept. 21, 2015) (quotation marks, alteration, and citations omitted).

The MMPA is a strict liability statute, and evidence concerning specific intent is unnecessary to prove a civil offense. *Creighton*, No. SW030133, 2005 NOAA LEXIS 2, at \*39 (NOAA Apr. 20, 2005). “Whether a respondent appreciates the consequences of his or her actions is irrelevant since voluntary actions are sufficient to constitute a violation of the MMPA.” *Id.* (citation omitted). However, with respect to the ESA, “for civil penalties in excess of \$500, the violation must be ‘knowingly’ committed.” *Ptak*, 5 O.R.W. 530, 1989 NOAA LEXIS

21, at \*9-11 (NOAA July 28, 1989) (referencing 16 U.S.C. § 1540(a)). “The term ‘knowingly’ has been construed . . . to require only the commission of voluntary acts which cause or result in the violation.” *Fournier*, No. PI1100409, 2015 NOAA LEXIS 18, at \*46-47 (NOAA Sept. 21, 2015) (quoting *Huber*, No. 133-285, 1994 NOAA LEXIS 35 (NOAA Apr. 12, 1994)). Moreover, as the Tribunal in *Ptak* reasoned, under the ESA, “only a showing that the acts involved were voluntary and intentional need be made. There being no specific requirement for a showing of a criminal type ‘mens rea’, awareness of the particular provision of the law or regulation allegedly violated or other concept of actual knowledge of wrongdoing.” *Ptak*, 1989 NOAA LEXIS 21, at \*10 n.3 (citation omitted).

### III. STIPULATED FACTUAL BACKGROUND

The parties have stipulated to facts that are sufficient to demonstrate Respondent’s liability. The relevant facts are reproduced below. The facts are accompanied by specified citations to joint exhibits that the parties have stipulated to include in the record of this matter:

- 1) On March 17, 2021, Respondent Joseph Urbinati, Jr. (Respondent) purchased *M/V Michele My Belle*. JX 2.<sup>6</sup>
- 2) At all relevant dates and times, Respondent owned *M/V Michele My Belle*. JX 1,<sup>7</sup> JX 2.
- 3) At all relevant dates and times, Respondent has been and remains a United States citizen and a resident of the State of New York, with a permanent residence of [REDACTED]. JX 1, JX 2.
- 4) Respondent is a “person” within the meaning of the Endangered Species Act (ESA), 16 U.S.C. § 1532(13), and the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1362(10), and is subject to the jurisdiction of the United States.
- 5) *M/V Michele My Belle* is a United States Coast Guard (Coast Guard) documented vessel subject to the jurisdiction of the United States. JX 2.
- 6) *M/V Michele My Belle* has an overall length of 73.6 feet, as documented by the Coast Guard. JX 2.
- 7) Respondent is listed as the owner of *M/V Michele My Belle* on the Coast Guard’s Certificate of Documentation for this vessel. Respondent’s listed address is [REDACTED]. JX 2.
- 8) *M/V Michele My Belle* (Coast Guard Official Number 1295365) is a “vessel,” as that term is defined at 50 C.F.R. § 222.102. JX 2.
- 9) At all relevant dates and times, *M/V Michele My Belle* was equipped with an operational Automatic Identification System (AIS) unit onboard the vessel. JX 1, JX 3.<sup>8</sup>

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<sup>6</sup> JX 2 is the U.S. Coast Guard Certificate of Documentation for *M/V Michele My Belle*.

<sup>7</sup> JX 1 is NOAA Office of Law Enforcement’s Investigative Report. The “date generated” is May 19, 2023.

<sup>8</sup> JX 3 is the official AIS records for *M/V Michele My Belle*. All the entries included in the spreadsheets are for dates and times when a violation of the Speed Rule is alleged.



- 10) At all relevant dates and times, *M/V Michele My Belle* operated the AIS unit onboard the vessel and transmitted real-time positional data from that unit. The accuracy and reliability of this data is not subject to reasonable dispute. JX 1, JX 3.
- 11) Respondent hired a captain to operate *M/V Michele My Belle* from New York to Florida on November 19, 2022, November 20, 2022, and November 21, 2022. JX 1.
- 12) On or about November 19, 2022, *M/V Michele My Belle* traveled at speeds in excess of 10 knots within a North Atlantic right whale Seasonal Management Area (SMA), as defined in 50 C.F.R. § 224.105(a). Specifically, this vessel transited 18.7 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 23.6 knots from approximately 15:57 to 16:45 UTC. JX 1, JX 3.
- 13) On or about November 20, 2022, *M/V Michele My Belle* traveled at speeds in excess of 10 knots within an SMA, as defined in 50 C.F.R. § 224.105(a). Specifically, this vessel transited 28.6 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 14.4 knots from approximately 00:54 to 3:02 UTC; and then traveled 10.2 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 16.5 knots from approximately 10:20 to 11:05 UTC; and, finally, traveled 28.8 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 23.9 knots from approximately 18:02 to 19:17 UTC.<sup>9</sup> JX 1, JX 3.
- 14) On or about November 21, 2022, *M/V Michele My Belle* traveled at speeds in excess of 10 knots within an SMA, as defined in 50 C.F.R. § 224.105(a). Specifically, this vessel traveled 149.5 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 23.4 knots from approximately 11:23 to 17:50 UTC; and then traveled 47.6 nautical miles through the Southeast SMA at an average speed over ground of 23.4 knots from approximately 20:31 to 22:32 UTC. JX 1, JX 3.
- 15) On November 19-21, 2022, pursuant to 50 C.F.R. § 224.105, a 10-knot speed restriction was in effect in the Southeast SMA, described at 50 C.F.R. § 224.105(a)(1), and the Mid-Atlantic SMA, described at 50 C.F.R. § 224.105(a)(2).
- 16) At all relevant dates and times, the captain operated *M/V Michele My Belle* on behalf of Respondent and within the scope of the employment arrangement.
- 17) At all relevant dates and times, the captain was in control of *M/V Michele My*

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<sup>9</sup> The times given in Jt. Stips. ¶¶ 12-14, JX 1, and JX 3 are UTC, or coordinated universal time. When converted to Eastern Standard Time, the local time zone in which the violations are alleged to have occurred, it is revealed that the violation that was recorded as occurring at 00:54 to 3:02 UTC on November 20, 2022, actually occurred at 19:54 to 22:02 EST on November 19, 2022. The dates of none of the other violations change by converting their times to Eastern Standard Time.

For simplicity, and because *each day* that a violation is alleged to have occurred is a separate count, and because the time conversion does not add additional dates of alleged violations (such as November 18, 2022), this Tribunal will rely on the Joint Stipulations as written and will not adjust the times the violations are alleged to have occurred.

- Belle's* speed and location, and maintained vessel speeds in excess of 10 knots through waters within active SMAs of his own volition.
- 18) Respondent was not piloting *M/V Michele My Belle* and was not on board the vessel during the alleged violations.
  - 19) During the periods described in paragraphs 12-14, *M/V Michele My Belle* was not in an area where oceanographic, hydrographic and/or meteorological conditions severely restricted the maneuverability of the vessel. JX 1.
  - 20) The captain did not enter information within the vessel's logbook to support any deviation from the 10-knot speed restriction while *M/V Michele My Belle* transited active SMAs.
  - 21) The National Oceanic and Atmospheric Administration (NOAA) Office of Law Enforcement (OLE) completed an investigation related to the alleged violations described in paragraphs 12-14. The investigation is described in an Investigative Report prepared by Special Agent Aaron Lyle. JX 1.
  - 22) NOAA issued a Notice of Violation and Assessment of Administrative Penalty (NOVA) to Respondent on September 14, 2023, and served it upon Respondent in accordance with 15 C.F.R. § 904.3(a). The NOVA alleges violations of the ESA, MMPA, and 50 C.F.R. § 224.105 for the incidents described in paragraphs 12-14. JX 23.<sup>10</sup> Prior to receiving this NOVA, Respondent had not previously been issued a civil monetary penalty by NOAA.

#### IV. PARTIES' ARGUMENTS ON LIABILITY

##### Agency's Arguments

The Agency asserts that "[t]he record is clear. . . . [O]n November 19-21, 2022, *M/V Michele My Belle* transmitted AIS data showing the vessel traveling a total of 283.4 nautical miles through the Mid-Atlantic and Southeast SMAs at average speeds over ground far exceeding the 10-knot restriction." NOAA Init. Br. at 10. The Agency claims that "Respondent has not asserted, nor offered any evidence, that it was necessary to exceed the 10-knot restriction because oceanographic, hydrographic, or meteorological conditions 'severely restrict[ed] the maneuverability of the vessel' at any point during any one of the charged violations." NOAA Init. Br. at 10 (citing 50 C.F.R. § 224.105(c)).

The Agency anticipates that "Respondent may try to dispute liability by claiming he 'was not piloting *M/V Michele My Belle* and was not onboard the vessel during the alleged violations.'" NOAA Init. Br. at 10. The Agency counters by invoking the doctrine of respondeat superior, explaining that "the actions of the captain of a vessel are imputed to the vessel owner." NOAA Init. Br. at 11. According to the Agency, since "the Captain operated *M/V Michele My Belle* on behalf of Respondent" and "[a]t all relevant times, the Captain operated within the scope of his employment arrangement with Respondent," then "Respondent is responsible for the underlying violations." NOAA Init. Br. at 11.

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<sup>10</sup> JX 23 is a copy of the NOVA.

The Agency argues it has “met its burden by proving by a preponderance of the evidence that (1) Respondent, through his captain, caused a vessel greater than 65 feet in overall length (2) subject to the jurisdiction of the United States (3) to travel at speeds in excess of 10 knots over ground (4) through active SMAs.” NOAA Init. Br. at 11. It concludes that “Respondent contested none of these elements and offered no evidence rebutting the Agency’s proof.” NOAA Init. Br. at 12.

### **Respondent’s Arguments**

Respondent states that “Respondent’s violation of the Speed Rule is not in dispute.” Resp’t Init. Br. at 3. Instead, Respondent argues that NOAA did not have statutory authority to promulgate the Speed Rule at all, and that the MMPA and ESA violate the nondelegation doctrine. Resp’t Init. Br. at 3-15.

Respondent first asserts that the Agency’s reliance on § 1382(a) of the MMPA to justify the Speed Rule is misplaced. Resp’t Init. Br. at 3-4. Instead, Respondent contends, § 1373(a), the MMPA statutory section concerning “Regulations on taking of marine mammals,” should have been used to justify the Speed Rule.<sup>11</sup> Resp’t Init. Br. at 4-5. Respondent explains that § 1382(a), the “general rulemaking provision,” cannot be used to support the Speed Rule because “this general provision cannot supersede the MMPA’s specific, limited authority for rules pertaining to the taking of marine mammals under § 1373.” Resp’t Init. Br. at 4. Citing the precept that “the specific governs the general,” Respondent suggests that, even though the text of § 1382(a) may be broad enough to cover a regulation like the Speed Rule, only § 1373 applies. Resp’t Init. Br. at 4 (citing *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204 (1932)). Respondent proffers that “[b]ecause § 1382(a) does not authorize the Secretary to regulate the taking of marine mammals, and because the Speed Rule is a regulation on the taking of marine mammals, the Speed Rule must be justified under § 1373, not § 1382(a).” Resp’t Init. Br. at 5. Respondent also notes that § 1373 “provides a detailed framework for regulating the taking of

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<sup>11</sup> Section 1373(a) reads, in full:

The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, shall prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of individuals within population stocks) as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in [section 1361] of this Act.

16 U.S.C. § 1373(a).

marine mammals, including specific factors the Secretary must consider.”<sup>12</sup> Resp’t Init. Br. at 4. Respondent then declares that “[b]y invoking § 1382(a) instead, the Agency improperly circumvents these statutory limitations” and “renders the carefully crafted limitations in § 1373 superfluous.” Resp’t Init. Br. at 4.

Respondent goes on to argue that “§ 1373 cannot retroactively support the Speed Rule[.]” Resp’t Init. Br. at 5. Since the Agency cited § 1382(a) as its authorization when promulgating the Speed Rule, Respondent declares that it “must defend its actions based on the reasons it gave when it acted.” Resp’t Init. Br. at 5 (quoting *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 591 U.S. 1 (2020)). Respondent also notes that the Agency “failed to conduct the required analysis” concerning the specific factors outlined in § 1373 when it issued the Speed Rule, “further invalidating any post hoc reliance on § 1373.” Resp’t Init. Br. at 5.

Respondent further reasons that the Speed Rule is not in line with the “substantive provisions” of the MMPA. Resp’t Init. Br. at 5. The focus of the MMPA is “controlling and punishing the take of marine mammals,” Respondent submits; therefore “the MMPA does not sanction proscribing activities that might incidentally result in take. The Speed Rule, by regulating activity far removed from actual take, exceeds this statutory scope.” Resp’t Init. Br. at 5. Respondent discusses *Colorado River Indian Tribes v. National Indian Gaming Commission*, 466 F.3d 134 (D.C. Cir. 2006), to support his argument that any regulation must fit within the framework enacted by Congress when it set up the statutory scheme. Resp’t Init. Br. at 6. Respondent suggests that since Congress “deliberately chose not to proscribe activity that could incidentally result in take,” then NOAA may not use the general rulemaking power in § 1382(a) to enact “prophylactic measures” like the Speed Rule that do not regulate take directly. Resp’t Init. Br. at 6.

Next, Respondent proposes that even “[i]f § 1382(a) did allow the Agency to regulate activity that *could* incidentally result in a take, there must be a demonstrable connection between the regulated activity and the possibility of a take.” Resp’t Init. Br. at 7. Respondent

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<sup>12</sup> The factors to be considered by the Secretary include:

(b) Factors considered in prescribing regulations

In prescribing such regulations, the Secretary shall give full consideration to all factors which may affect the extent to which such animals may be taken or imported, including but not limited to the effect of such regulations on—

- (1) existing and future levels of marine mammal species and population stocks;
- (2) existing international treaty and agreement obligations of the United States;
- (3) the marine ecosystem and related environmental considerations;
- (4) the conservation, development, and utilization of fishery resources; and
- (5) the economic and technological feasibility of implementation.

16 U.S.C. § 1373(b). The balance of this section concerns the types of allowable restrictions, such as restrictions on the age, size, or sex of animals that may be taken or imported; the procedure for prescribing the regulations to carry out this section; a directive that such regulations shall be periodically reviewed; and a directive for annual public reports. *See id.* § 1373(c) through (f).

cites *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), as support that “categorical rules are justified only when they reflect broad generalizations holding true in so many cases that inquiry into whether they apply to the case at hand would be needless and wasteful.” Resp’t Init. Br. at 7 (internal quotation marks omitted). Respondent contends that the activity prohibited by the Speed Rule “does not ‘usually present a pronounced risk of’ take, which occurs only in exceptional cases.” Resp’t Init. Br. at 8 (citing *Ragsdale*, 535 U.S. 81). Respondent surmises that “the probability of striking a right whale is less than one in a million nautical miles transited” based on the number of recorded whale injuries and mortalities and the total nautical miles traveled in SMAs by vessels subject to the Speed Rule from 2008 to 2019. Resp’t Init. Br. at 8 (citing JX 13<sup>13</sup>). Respondent also notes that “[f]rom 2018 to 2019, vessels subject to the Speed Rule transited 195,282 nautical miles in violation of the Speed Rule without any recorded strikes.” Resp’t Init. Br. at 8 (citing JX 13). Respondent represents that “[t]hese figures demonstrate the Speed Rule’s gross overreach in regulating behavior that poses virtually no risk to right whales.” Resp’t Init. Br. at 8. Respondent continues: “[T]he Speed Rule is unreasonable as it does not address a harm that occurs in the majority of cases it regulates. Accordingly, the Speed Rule’s categorical prohibition of such activity is ‘unreasonable’ and . . . arbitrary and capricious or otherwise not in accordance with law.” Resp’t Init. Br. at 8-9 (citing *Ragsdale*, 535 U.S. 81).

Along the same lines, Respondent argues that the ESA does not authorize the Speed Rule. Resp’t Init. Br. at 9. Respondent asserts that “[l]ike the MMPA, the ESA addresses the problem of endangered species by controlling and punishing a take or attempted take, along with import, sale, and possession.” Resp’t Init. Br. at 9. Respondent concludes that “the ESA’s definition of ‘take’ requires action against a particular animal, not the creation of a generalized risk of harm. The Speed Rule, which regulates vessel speed without direct connection to any specific take, falls outside this statutory framework.” Resp’t Init. Br. at 9. Respondent continues: “[E]ven if § 1540(f) permitted prophylactic regulations, for the reasons expressed above, the ESA does not authorize a regulation like the Speed Rule with so little nexus to the take of a protected species.” Resp’t Init. Br. at 9 (referencing *Colo. River Indian Tribes*, 466 F.3d 134).

In addition, Respondent represents that “[t]he Agency’s expansive interpretation of its authority under the MMPA and ESA triggers the major questions doctrine,” the doctrine that “requires Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.” Resp’t Init. Br. at 9 (citing *Ala. Ass’n of Realtors v. Dep’t of Health and Human Servs.*, 594 U.S. 758 (2021)). Referencing a proposed change to the Speed Rule to include smaller vessels,<sup>14</sup> Respondent expounds that:

Under the Agency’s reading of the statutes, it may regulate any size

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<sup>13</sup> JX 13 is the “North Atlantic Right Whale (*Eubalaena glacialis*) Vessel Speed Rule Assessment,” put forth by NOAA Fisheries’ Office of Protected Resources, dated June 2020.

<sup>14</sup> See Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule (Proposed Rule), 87 Fed. Reg. 46,921 (Aug. 1, 2022).

vessel in any geographic location with the presence of some protected animal and set a speed limit even lower than 10 knots. The potential economic impact of such expansive regulation is staggering, potentially disrupting critical ports, shipping, fishing, and international trade.

Resp't Init. Br. at 10. Respondent states that "Congress has not clearly delegated such far-reaching authority through the general rulemaking provisions of § 1382(a) and § 1540(f)." Resp't Init. Br. at 10.

Respondent concludes that "[b]ecause there is no statutory support for the Speed Rule, the Tribunal should dismiss the NOVA." Resp't Init. Br. at 10.

Next, Respondent argues that if the Tribunal finds statutory support for the Speed Rule, then the sweeping grant of regulatory authority implicated in the underlying statutes violates the nondelegation doctrine. Resp't Init. Br. at 10. Respondent asserts that "the statutes and accompanying regulations at issue here are quintessentially legislative" because "such regulatory action 'alters' what those on vessels sailing the eastern Atlantic seaboard can and cannot do." Resp't Init. Br. at 12 (quoting *Jarkesy v. Sec. and Exch. Comm'n*, 34 F.4th 446 (5th Cir. 2022)). Respondent also contends that the MMPA and ESA "fall far short of providing an intelligible principle." Resp't Init. Br. at 12. When describing the Agency's authority in issuing regulations under § 1382(a) and § 1540(f), Respondent explains that "[n]othing in the statutes cabins either decision in any meaningful way." Resp't Init. Br. at 12-13. Echoing its major questions argument, Respondent assesses that:

By their language, as general-purpose authorizations, the statutes appear to provide the Agency with unbounded discretion: the Agency could feasibly shut down all commerce in certain coastal zones or impose no restrictions whatsoever; it could set a speed limit of 30 knots, 3 knots, or no limit at all; it could restrict any activity within the coastal zone without clear parameters or constraints. This breadth of discretion raises serious constitutional concerns because it fails to establish any meaningful guidelines or standards to direct the Agency's regulatory decisions.

Resp't Init. Br. at 13.<sup>15</sup> Respondent therefore asks the Tribunal to dismiss the NOVA. Resp't

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<sup>15</sup> Respondent also indicates that the "lack of guidance [in § 1382(a) and § 1540(f)] is particularly stark when compared to other provisions within the same statutory framework." Resp't Init. Br. at 13. Respondent points out that "other relevant statutes carefully restrict the Agency's authority to issue other kinds of regulations related to the core prohibitions on taking wildlife provided the agency consider certain factors." Resp't Init. Br. at 13. Here, as examples of statutes that perhaps do not violate the nondelegation doctrine, Respondent cites § 1533 of the ESA, which describes the factors to be considered when listing a species as endangered or threatened, and § 1373 of the MMPA, which

Init. Br. at 15.

Entwined with Respondent's nondelegation argument (and perhaps, the foundation of it) is Respondent's allusions to any agency's attempts to promulgate criminal laws. Resp't Init. Br. at 11. As Respondent sees it, "[t]he grant of 'all legislative Powers' to Congress means that Congress may not transfer to others 'powers which are strictly and exclusively legislative'—such as the power to write criminal laws." Resp't Init. Br. at 11 (quoting *Wayman v. Southard*, 23 U.S. 1 (1825)). Therefore, asserts Respondent, agencies "may not exercise legislative power to declare 'what circumstances . . . should be forbidden' by criminal laws." Resp't Init. Br. at 11 (citing *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935)). Respondent suggests that the Agency has created "its own crimes" by promulgating the Speed Rule. Resp't Init. Br. at 12. With respect to the nondelegation doctrine, Respondent implies that "as part of this extensive legislative delegation, the Agency purportedly has the power to write regulations criminalizing behavior—a power that belongs to Congress and Congress alone. Certainly there are few greater threats to personal liberty than executive agencies creating the very crimes they are tasked with enforcing[.]" Resp't Init. Br. at 14-15 (internal citation, quotation marks, alteration omitted).

### **Agency's Reply**

In its Reply, the Agency maintains:

Respondent does not dispute the charged violations. Instead, Respondent's Initial Brief raises three discrete issues: (1) the Agency lacked statutory authority under the MMPA and the ESA to promulgate the Speed Rule; (2) if the Speed Rule was authorized under one or both statutes, the underlying statutory authority violates the nondelegation doctrine; and (3) the Agency's proposed civil penalty assessment violates the Eighth Amendment's Excessive Fines Clause. These arguments raise constitutional issues, and challenge the validity of the Speed Rule and the statutory authority upon which it was promulgated. Such questions may be adjudicated in an appropriate forum, but they fall outside the jurisdiction of this Tribunal.

NOAA Reply Br. at 1-2 (citing 15 C.F.R. § 904.200(b); another internal citation omitted). The Agency affirms that it "will address Respondent's statutory and constitutional arguments should this matter reach a forum with authority to rule on those issues . . . and expressly reserves all such arguments for the appropriate forum." NOAA Reply Br. at 3.

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describes the factors to be considered in issuing regulations on taking marine mammals. Resp't Init. Br. at 13.

Earlier, Respondent argued that "because the Speed Rule is a regulation on the taking of marine mammals, the Speed Rule must be justified under § 1373, not § 1382(a)." Resp't Init. Br. at 3-5 (emphasis added). How these two contentions interface is unspecified by Respondent at this juncture.

The Agency represents that “[t]he stipulated record is replete with evidence demonstrating Respondent’s liability for the three charged violations” and “Respondent admits the commission of these violations are not in dispute.” NOAA Reply Br. at 3. The Agency concludes that the Tribunal should find Respondent liable for violating the MMPA, ESA, and Speed Rule. NOAA Reply Br. at 3.

### **Respondent’s Reply**

In his Reply, Respondent acknowledges that the arguments made in his Initial Brief “are foreclosed by this Tribunal’s jurisdictional limitations under 15 C.F.R. § 904.200(b)” and “recognizes that they must be raised in a different forum with proper jurisdiction to consider constitutional and statutory validity arguments.” Resp’t Reply Br. at 1. Respondent states that he “therefore reserves these arguments for appeal where they may be properly considered[.]” Resp’t Reply Br. at 1.

## **V. DISCUSSION**

The Civil Procedures governing this matter provide:

The Judge is delegated authority to make the initial or final administrative decision of the Agency in proceedings subject to the provisions of this subpart, and to take actions to promote the efficient and fair conduct of hearings as set out in this subpart. 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.

15 C.F.R. § 904.200(b).

The parties are correct that the Tribunal may not consider challenges to the Speed Rule’s validity or the constitutionality of the statutes invoked as authorizing its promulgation. Therefore, all of Respondent’s arguments concerning the legitimacy of the Speed Rule under the MMPA and ESA, including arguments relying on the major questions doctrine and the nondelegation doctrine, are not presently addressed.

What is addressed is whether the Agency has shown by a preponderance of evidence that Respondent violated the Speed Rule, and the MMPA and ESA, as alleged in the NOVA. And, as discussed below, the stipulated facts and the joint exhibits establish that *M/V Michele My Belle* was a vessel subject to the Speed Rule, and was traveling at speeds greater than 10 knots over ground in active SMAs that were enacted to protect North Atlantic right whales.<sup>16</sup>

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<sup>16</sup> The North Atlantic right whale falls under the MMPA because it is a marine mammal. See 16 U.S.C. § 1362(6) (classifying cetaceans as marine mammals). Additionally, this species of whale is listed as



To be a covered vessel subject to the Speed Rule, *M/V Michele My Belle* must be a vessel greater than or equal to 65 feet in overall length and subject to the jurisdiction of the United States. 50 C.F.R. § 224.105(a). The *M/V Michele My Belle* satisfies all conditions. The parties have stipulated that *M/V Michele My Belle* is a “vessel.”<sup>17</sup> Jt. Stip. ¶ 8. According to the U.S. Coast Guard’s Certificate of Documentation, the recreational yacht *M/V Michele My Belle* is 73.6 feet in length. JX 2 at 4; Jt. Stip. ¶ 6. Furthermore, Respondent is a U.S. citizen and the vessel is subject to U.S. jurisdiction. Jt. Stip. ¶¶ 3, 5 (citing JX 2).

The AIS data,<sup>18</sup> comprised of *M/V Michele My Belle*’s latitude and longitude coordinates, show that the vessel was in SMAs. As part of the investigation, NOAA used the AIS data to plot *M/V Michele My Belle*’s location on navigational charts. See JX 1. According to these charts and the AIS data itself, *M/V Michele My Belle* was in the “Ports of New York/New Jersey” SMA (part of the Mid-Atlantic SMA) on November 19, 2022. See 50 C.F.R. § 224.105(a)(2)(ii)(A); JX 1 at 11; JX 3 at 2 (latitude and longitude coordinates in second and third columns from right); Jt. Stip. ¶ 12. The evidence demonstrates that *M/V Michele My Belle* was in the “Entrance to the Chesapeake Bay” and “Ports of Morehead City and Beaufort, NC” SMAs (both part of the Mid-Atlantic SMA) on November 20, 2022. See 50 C.F.R. § 224.105(a)(2)(ii)(C), (D); JX 1 at 12; JX 3 at 3-4; Jt. Stip. ¶ 13. And, on November 21, 2022, *M/V Michele My Belle* was in both the Mid-Atlantic and Southeast SMAs. See 50 C.F.R. § 224.105(a)(1), (a)(2)(i); JX 1 at 13; JX 3 at 5-7; Jt. Stip. ¶ 14.

A quick reading of the Speed Rule shows that the speed restriction was in effect when *M/V Michele My Belle* transited through the SMAs. The speed restriction is active in the Mid-Atlantic SMA from “November 1 to April 30 each year[.]” 50 C.F.R. § 224.105(a)(2). The speed restriction in the Southeast SMA is in effect from “November 15 to April 15 each year[.]” *Id.*

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endangered under the ESA. See, e.g., Endangered and Threatened Species; Endangered Status for North Pacific and North Atlantic Right Whales: Final Rule, 73 Fed. Reg. 12,024 (Mar. 6, 2008) (JX 25); Jt. Stip. ¶ 26.

For the sake of completeness, I note that, under the MMPA, the term “depleted” means “any case in which . . . a species or population stock is listed as an endangered species or a threatened species under the Endangered Species Act of 1973.” 16 U.S.C. § 1362(1)(C). Thus, the North Atlantic right whale is also “depleted” under the MMPA. Jt. Stip. ¶ 26.

<sup>17</sup> “Vessel means a vehicle used, or capable of being used, as a means of transportation on water which includes every description of watercraft, including nondisplacement craft and seaplanes.” 50 C.F.R. § 222.102.

<sup>18</sup> AIS stands for “Automatic Identification System.” Jt. Stip. ¶ 9. “AIS allows the automatic exchange of real-time vessel movement data, including static and voyage-related information, between ships or between ships and shore stations.” U.S. Dep’t of Transp., Marine Safety & Sec. Info. Sys., *AIS Overview*, at <https://mssis.volpe.dot.gov/Main/ais.php> (last accessed Feb. 25, 2025).

The parties have stipulated that “[t]he accuracy and reliability of this [AIS] data is not subject to reasonable dispute.” Jt. Stip. ¶ 10.

§ 224.105(a)(1). These violations are alleged to have occurred on November 19, 20, and 21. See JX 23. The speed restriction was therefore in effect in these SMAs, and covered vessels were not permitted to travel faster than 10 knots over ground through the SMAs. See Jt. Stip. ¶ 15; 50 C.F.R. § 224.105(b)(1).

The AIS data also reveal that *M/V Michele My Belle* was traveling in excess of 10 knots while in the SMAs. The raw AIS data provide the speed over ground. In all but a handful of instances on November 19, November 20, and November 21, 2022, the AIS data show *M/V Michele My Belle* was traveling in excess of 10 knots. See JX 3 at 2-7 (“sog” column). This is also demonstrated by the aforementioned charts prepared by NOAA, where the instantaneous speed of *M/V Michele My Belle* while in an SMA is represented by the color of the dot denoting the vessel’s location. For example, the color purple represents a speed equal to, or above, 18.001 knots over ground. The charts show that, while in the “Ports of New York/New Jersey” Mid-Atlantic SMA on November 19, 2022, *M/V Michele My Belle* was traveling at a speed greater than 18.0 knots, represented on the chart by a trail of purple dots within the boundaries of the SMA. JX 1 at 11. Similarly, *M/V Michele My Belle* was traveling faster than 10 knots while in the “Entrance to the Chesapeake Bay” and “Ports of Morehead City and Beaufort, NC” Mid-Atlantic SMA on November 20, 2022, denoted by yellow, orange, red, and purple dots on the navigational chart. JX 1 at 12. Finally, a trail of purple dots represents that *M/V Michele My Belle* was traveling faster than 18 knots while in other parts of the Mid-Atlantic SMA and Southeast SMA on November 21, 2022. JX 1 at 13. Therefore, on November 19, November 20, and November 21, 2022, while in active SMAs, *M/V Michele My Belle* was traveling faster than the speed limit of 10 knots over ground. See Jt. Stip. ¶¶ 12-14.

Vessels are allowed to travel above 10 knots in active SMAs when “necessary to maintain safe maneuvering speed.” 50 C.F.R. § 224.105(c). These circumstances could excuse a violation of the Speed Rule. But, there is no evidence, proffered by Respondent or otherwise, that “oceanographic, hydrographic and/or meteorological conditions severely restrict[ed] the maneuverability of the vessel[.]” *Id.*; see also Jt. Stip. ¶ 17 (suggesting that the Captain traveled at speeds above 10 knots “of his own volition”), Jt. Stip. ¶ 19. Even if there were, Respondent has not provided any justification for the speed traveled, or shown that the appropriate entry, signed and dated by the Captain, was made in the vessel’s logbook. 50 C.F.R. § 224.105(c); see also Jt. Stip. ¶ 20. Therefore, the excess speeds traveled by *M/V Michele My Belle* through SMAs were not excused.

Consequently, it has been established by a preponderance of the evidence that *M/V Michele My Belle* violated the Speed Rule. Moreover, Respondent does not deny that *M/V Michele My Belle* violated the Speed Rule. Indeed, these basic facts are stipulated to by the parties. See Jt. Stip. ¶ 12 (“On or about November 19, 2022, *M/V Michele My Belle* traveled at speeds in excess of 10 knots within a North Atlantic right whale Seasonal Management Area (SMA), as defined in 50 C.F.R. § 224.105(a). Specifically, this vessel transited 18.7 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 23.6 knots from approximately 15:57 to 16:45 UTC.”); Jt. Stip. ¶ 13 (“On or about November 20, 2022, *M/V Michele My Belle* traveled at speeds in excess of 10 knots within an SMA, as defined in 50 C.F.R.

§ 224.105(a). Specifically, this vessel transited 28.6 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 14.4 knots from approximately 00:54 to 3:02 UTC; and then traveled 10.2 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 16.5 knots from approximately 10:20 to 11:05 UTC; and, finally, traveled 28.8 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 23.9 knots from approximately 18:02 to 19:17 UTC.”); Jt. Stip. ¶ 14 (“On or about November 21, 2022, *M/V Michele My Belle* traveled at speeds in excess of 10 knots within an SMA, as defined in 50 C.F.R. § 224.105(a). Specifically, this vessel traveled 149.5 nautical miles through the Mid-Atlantic SMA at an average speed over ground of 23.4 knots from approximately 11:23 to 17:50 UTC; and then traveled 47.6 nautical miles through the Southeast SMA at an average speed over ground of 23.4 knots from approximately 20:31 to 22:32 UTC.”).

Even though Respondent was not on board the vessel at the time of the violations, Jt. Stip. ¶ 18, he is liable for *M/V Michele My Belle*’s violation of the Speed Rule. The Agency relies on the doctrine of respondeat superior to argue in support of Respondent’s liability. NOAA Init. Br. at 10-11. I agree that respondeat superior applies. “[I]t is a well-established principle that an employer may be vicariously liable for an employee’s acts when such acts are committed in the scope of employment and in furtherance of the employer’s business, pursuant to the theory of respondeat superior.” *Cho*, No. PI1500705, 2017 NOAA LEXIS 3, at \*66 (NOAA May 31, 2017). Here, “Respondent hired a captain to operate *M/V Michele My Belle* from New York to Florida on November 19, 2022, November 20, 2022, and November 21, 2022.” Jt. Stip. ¶ 11 (citing JX 1). And, “[a]t all relevant dates and times, the captain operated *M/V Michele My Belle* on behalf of Respondent and within the scope of the employment arrangement.” Jt. Stip. ¶ 16. The Captain and Respondent had an employer-employee relationship; the Captain was acting within the scope of the employment arrangement and carrying out the task he was hired to perform; and the task of transporting *M/V Michele My Belle* from New York to Florida was in furtherance of Respondent’s interests. Therefore, even though Respondent was not on the vessel during the violations of the Speed Rule, Respondent is liable for them. *See also* Resp’t Init. Br. at 3 (“Respondent’s violation of the Speed Rule is not in dispute.” (emphasis added)).

In sum, Respondent is liable for three counts (one for each day) of violating the Speed Rule, 50 C.F.R. § 224.105(b)(1).

A violation of the Speed Rule is a violation of the statutes that authorized it. The MMPA states “Any 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 . . .” 16 U.S.C. § 1375(a)(1). Under the MMPA, “[t]he term ‘person’ includes (A) any private person or entity[.]” *Id.* § 1362(10). As a private person, Respondent is a “person” under the statute. *See* Jt. Stip. ¶ 4. Thus, Respondent is liable under the MMPA for the violation of the Speed Rule—a “regulation issued thereunder,” and assessment of a civil penalty is proper.

Similarly, the ESA states that “with respect to any endangered species of fish or wildlife listed pursuant to [section 1533] of this Act it is unlawful for any person subject to the jurisdiction of the United States to . . . violate any regulation pertaining to such species or to

any threatened species of fish or wildlife listed pursuant to [section 1533] of this Act and promulgated by the Secretary pursuant to authority provided by this Act.” 16 U.S.C. § 1538(a)(1)(G). Pursuant to the ESA, “[t]he term ‘person’ means an individual, corporation, partnership, trust, association, or any other private entity[.]” *Id.* § 1532(13). Respondent, an individual, is a “person” under the ESA, and is subject to U.S. jurisdiction. See *Jt. Stip.* ¶ 4. As already noted, the North Atlantic right whale is an endangered species. *Jt. Stip.* ¶ 26; *JX* 25. Respondent has therefore violated the ESA, by violating a regulation related to an endangered species. The ESA also allows the Secretary to assess penalties against “[a]ny person” who violates—knowingly or not—a statutory provision or a provision of a regulation issued under the ESA. *Id.* § 1540(a)(1). As such, assessment of a civil penalty for violating the ESA is also proper.

## **VI. PARTIES’ ARGUMENTS ON PENALTY**

### **Agency’s Arguments**

The Agency avers that it “proposes a \$7,500 penalty assessment for each day Respondent caused *M/V Michele Belle* to exceed the 10-knot speed restriction while transiting an active SMA.” NOAA *Init. Br.* at 12. Since the violations occurred over three days in November 2022, the total proposed penalty assessed by the Agency is \$22,500. NOAA *Init. Br.* at 12. “[T]he Agency submits that a civil penalty assessment of at least \$22,500 is reasonable, and is necessary to properly adjudicate the gravity of these offenses and deter Respondent and other mariners from committing similar violations in the future.” NOAA *Init. Br.* at 13.

Specific to the ESA, which sets penalty tiers based on whether a violation was “knowingly” committed, the Agency argues that:

The route taken by the Captain and the excessive speeds at which he caused the vessel to travel were volitional acts committed in pursuit of Respondent’s affairs. The stipulated record contains no evidence that the Captain was compelled to operate the vessel through these waters in this manner. These facts are sufficient to conclude that the Captain “knowingly” caused the vessel to violate the Speed Rule.

NOAA *Init. Br.* at 14. NOAA continues: “Since the Captain operated *M/V Michele My Belle* on behalf of Respondent and within the scope of their employment arrangement, it would be fair and just for this Tribunal to conclude that Respondent ‘knowingly’ violated the Speed Rule under the principle of respondeat superior.” NOAA *Init. Br.* at 14.

In contrast, the Agency notes that the MMPA is a strict liability statute, with no need to demonstrate a violation was “knowingly” or “intentionally” committed. NOAA *Init. Br.* at 15 n.2 (citing *Kuhn*, No. 733-038, 1988 NOAA LEXIS 29 (NOAA Dec. 16, 1988)). The Agency proposes that “the Captain’s voluntary conduct described above independently supports a civil penalty

assessed against Respondent under the MMPA[.]” NOAA Init. Br. at 15 n.2.

NOAA explains that the “nature, circumstances, extent, and gravity of the three charged counts are serious.” NOAA Init. Br. at 15. The Agency maintains that the North Atlantic right whale is an endangered species, and has been for decades. NOAA Init. Br. at 15. NOAA declares that “the stock of these vanishing giants is substantially ‘depleted,’ with only about 360 remaining individuals, including fewer than 70 reproductively active females” and that “even one additional death a year increases the odds that the right whale will go extinct.” NOAA Init. Br. at 15 (citing *Dist. 4 Lodge of Int’l Ass’n of Machinists v. Raimondo*, 18 F.4th 38 (1st Cir. 2021); JX 14 (NOAA’s 2023 Stock Assessment Report for North Atlantic right whales); JX 4 (what seems to be a NOAA slide deck titled “North Atlantic Right Whales – Status and Threats to the Species: Focus on Vessel Strikes,” dated 2024)). The Agency argues that, since the whales may spend much time near the water’s surface, especially as calves, and because they are difficult to detect, “the threat posed by vessel strikes ranks among the greatest dangers threatening the species’ survival.” NOAA Init. Br. at 16 (citing JX 4, among others).

According to NOAA, the Speed Rule’s aim is to “lessen the risk of serious injury or death [to whales] by reducing vessel speed[.]” NOAA Init. Br. at 18 (quoting Jt. Stip. ¶ 49). The Agency affirms that it is “critical for vessels to maintain speeds of 10 knots or less to give both the whale and the vessel’s operator more time to take evasive action, and to reduce the force of a strike and its corresponding harm should a collision occur.” NOAA Init. Br. at 18. The Agency asserts that “[t]he Speed Rule is an effective mechanism for the conservation and survival of the right whale” and “Respondent’s violations directly undercut this conservation imperative.” NOAA Init. Br. at 19. The Agency proffers that “[a] collision would have resulted in significant blunt force trauma or lacerations from crashing into the vessel’s hull, propeller, rudder, or skeg” which could have caused “serious injury and mortality.” NOAA Init. Br. at 19 (citing Jt. Stip. ¶ 30). The Agency states that “*M/V Michele My Belle* maintained these lethal speeds for over 283 nautical miles through right whale habitat across the three days charged.” NOAA Init. Br. at 19 (citing Jt. Stip. ¶¶ 12-15). NOAA concludes that “the nature, circumstances, extent, and gravity of these violations warrants a commensurate civil monetary penalty, accounting for the critical condition of the North Atlantic right whale, the conservation and recovery impetus underlying the Speed Rule, and both the risk of harm and the grievous serious injury and mortality so risked.” NOAA Init. Br. at 20.

Next, the Agency discusses Respondent’s culpability, and proffers that Respondent acted without due care. NOAA Init. Br. at 20. The Agency argues that since the Speed Rule was published in the Federal Register, “Respondent and the Captain were on constructive notice of this requirement at the time *M/V Michele My Belle* traversed these waters at excessive speeds.” NOAA Init. Br. at 21. The Agency also notes its outreach with respect to the Speed Rule. NOAA Init. Br. at 21-23. The Agency argues that “a mariner’s failure to keep abreast of such material, particularly when cast across a wide array of media and boating fora, does not reflect responsible boating behavior and is evidence of negligence.” NOAA Init. Br. at 24 (citing *Neil*, 5 O.R.W. 200, 1988 NOAA LEXIS 34 (NOAA May 26, 1988)). NOAA highlights that its Office of Law Enforcement sent two compliance assistance letters concerning the Speed Rule to

Respondent months before the charged violations occurred, and that Respondent “does not disavow prior knowledge of the Speed Rule.” NOAA Init. Br. at 24. The Agency concludes that “[a]ny purported unawareness of regularly published navigational aids and of a speed restriction that has been in effect for well over a decade is inexcusable.” NOAA Init. Br. at 25.

The Agency argues that the penalty should not be mitigated even though Respondent has not been charged with prior violations of the Speed Rule. NOAA Init. Br. at 25. The Agency pronounces that “[c]lemency 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.” NOAA Init. Br. at 26 (citing *Fishing Co. of Alaska*, No. 316-024, 1996 NOAA LEXIS 10 (NOAA Apr. 17, 1996)). The Agency declares that “[i]f the North Atlantic right whale is to have any chance of recovery, a substantial deterrence message must be sent to Respondent and to any other mariner who would barrel through SMAs at speeds well in excess of the 10-knot restriction for hundreds of nautical miles.” NOAA Init. Br. at 26.

Finally, the Agency propounds that Respondent “has made no assertion that he is unable to pay the Agency’s proposed assessment.” NOAA Init. Br. at 27. The Agency states that “[a]ccordingly, the Agency submits that Respondent is able to pay a penalty assessment of at least \$22,500 as a remedy to this enforcement action.” NOAA Init. Br. at 27. Considering Respondent’s culpability, history of prior violations, and ability to pay the penalty, the Agency concludes:

Respondent must not be rewarded for his failure to exercise due care even in the face of the Agency’s substantial outreach efforts. Furthermore, the fact that Respondent is a first-time offender should carry little, if any, weight in light of the ESA’s and MMPA’s remedial purposes and the need to deter significant violations of the Speed Rule. For the foregoing reasons, and in the absence of any evidence of financial hardship, the Agency urges the Tribunal to conclude that the weight of these factors also supports an assessment of at least \$22,500.

NOAA Init. Br. at 27.

### **Respondent’s Arguments**

Respondent argues that because “Respondent did not pilot the ship at the time of the alleged violations, had no knowledge of such violations until he received the fine assessment, and is a first-time offender[,]” “imposing the assessed fine [of \$22,500] against Respondent would constitute an unconstitutionally excessive penalty in violation of the Eighth Amendment.” Resp’t Init. Br. at 15.

Respondent claims that “[a] civil sanction that is ‘at least partially punitive’ is subject to scrutiny under the Excessive Fines Clause.” Resp’t Init. Br. at 16 (citing *Timbs v. Indiana*, 586

U.S. 146 (2019)). Respondent asserts that “the speeding regulation penalty is punitive for several reasons.” Resp’t Init. Br. at 16. First, Respondent observes that “the penalty applies even in cases where no actual harm to whales occurred, indicating that its primary goal is punishment and deterrence rather than compensation for damages.” Resp’t Init. Br. at 16. Respondent also contends that “the substantial fine amount of \$22,500 in total (\$7,500 for each count) suggests a punitive rather than purely remedial purpose, and the fine can be increased as a further measure of deterrence[.]” Resp’t Init. Br. at 16 (citing 15 C.F.R. § 904.108(b)).

Respondent emphasizes that “[t]he central question in an Excessive Fines analysis is proportionality.” Resp’t Init. Br. at 16. Respondent highlights that “[a] fine violates the Excessive Fines Clause if it is ‘grossly disproportional to the gravity of a defendant’s offense.’” Resp’t Init. Br. at 16 (citing *United States v. Bajakajian*, 524 U.S. 321 (1998)). Respondent lists the nature and extent of violation, other potential penalties, and the harm caused as factors that should be considered in evaluating proportionality. Resp’t Init. Br. at 16 (citing *United States v. Chaplin’s, Inc.*, 646 F.3d 846 (11th Cir. 2011)). Respondent states that Respondent himself did not pilot the ship and “had no knowledge of the violations until receiving the fine assessment[.]” facts that “challenge[] the punitive aspect of the fine, as it’s not clear how punishing Respondent serves the interest of justice or deterrence.” Resp’t Init. Br. at 16-17. Respondent stresses that Respondent “is a first-time offender with no prior disciplinary history with the Agency[.]” and that “this case lacks the aggravating factors that might otherwise justify a substantial penalty.” Resp’t Init. Br. at 17. Respondent also contends “there is no allegation of actual harm to any protected whale” and that “[t]he absence of a verifiable event significantly reduces the gravity of the offense[.]” Resp’t Init. Br. at 17. Respondent also maintains that “the fine is based on the Agency’s speculative belief that slower speeds might protect whales in the aggregate.” Resp’t Init. Br. at 17. Respondent proclaims that “[t]his tenuous connection between the penalized conduct and the intended protection raises serious questions about the justification for the fine and its proportionality to the alleged offense.” Resp’t Init. Br. at 17. Respondent concludes that “the absence of actual harm and Respondent’s lack of direct involvement significantly diminish the offense’s severity.” Resp’t Init. Br. at 17.

Incorporating his arguments concerning the validity of the MMPA and ESA, Respondent argues:

While courts often defer to legislative judgments about appropriate penalties, and fines below statutory maximums are rarely found to violate the Excessive Fines Clause, this principle assumes the validity of the underlying statute. In this case, the core issue is not whether the penalty falls below a statutory cap, but whether NOAA possessed the authority to create the Speed Rule under the MMPA and ESA in the first place. If NOAA lacked this authority, the statutory maximum fines for MMPA and ESA violations become irrelevant. The penalty is not being assessed for

a direct violation of these acts, but for violating a rule that may itself be unlawful. Therefore, the Excessive Fines analysis here should not begin by comparing the fine to an inapplicable statutory maximum, but by examining whether the agency had any authority to impose a fine for this specific violation. In the absence of clear statutory authority for the Speed Rule, the court should consider the \$22,500 total fine on its own merits, without reference to the MMPA and ESA maximums.

Resp't Init. Br. at 18. Respondent goes on to suggest that "[t]he unique circumstances of this case, where the Agency's authority to create the rule is in question, require the court to conduct a more stringent Excessive Fines analysis." Resp't Init. Br. at 18. Respondent propounds that "[r]ather than simply deferring to statutory maximums that may not apply, the Tribunal should scrutinize the proportionality of this fine in relation to the specific offense and its circumstances." Resp't Init. Br. at 18. Respondent closes by affirming that "[h]ere, the assessed fine is unconstitutionally excessive and the NOVA should therefore be dismissed." Resp't Init. Br. at 18.

### **Agency's Reply**

The Agency argues that "Respondent's Excessive Fines Clause defense raises 'constitutional issues' outside the jurisdiction of the Tribunal to resolve." NOAA Reply Br. at 4 (citing 15 C.F.R. § 904.200(b)).

Pertaining to the reasonableness of the proposed penalty, the Agency starts with Respondent's contention that since Respondent did not pilot *M/V Michele My Belle*, "the assessment is not just and carries little deterrence value." NOAA Reply Br. at 4. The Agency explains that "[a]s the owner of *M/V Michele My Belle*, Respondent is responsible for the underlying violations." NOAA Reply Br. at 4. The Agency reiterates that "the actions of the captain are imputed to the vessel owner—even when the owner has not exercised detailed control over the operations of the vessel." NOAA Reply Br. at 4 (citing *Faithful Lady, Inc.*, No. SE950116ES, 1996 NOAA LEXIS 33 (NOAA Nov. 6, 1996)). The Agency disagrees that Respondent's lack of direct involvement should mitigate the penalty and maintains that "[r]espondeat superior prevents vessel owners from escaping or minimizing liability for the transgressions of the captains they hire[.]" NOAA Reply Br. at 4-5. NOAA reasons that "penalizing Respondent serves both principles of justice and deterrence because it levies consequences for negligent vessel management and encourages the vessel owner to responsibly supervise the persons they authorize to captain the vessel on their behalf." NOAA Reply Br. at 5.

The Agency then addresses Respondent's claim that until receipt of the NOVA, Respondent was unaware of the violations. NOAA Reply Br. at 5. The Agency states that Respondent "agrees" that, in January 2022, NOAA had sent Respondent compliance assistance letters "for the purpose of notifying Respondent that *M/V Michele My Belle* had previously



‘operated in excess of 10 knots inside an SMA[.]’” NOAA Reply Br. at 5 (citing Jt. Stip. ¶ 72). The Agency also argues that “Respondent’s citations to the stipulated record do not demonstrate that he was unaware of the Speed Rule, or even of these violations, prior to service of the [NOVA] in this matter.” NOAA Reply Br. at 5. The Agency notes that “Respondent does not dispute that NOAA has employed a number of outreach and education strategies to inform the public of the plight of the North Atlantic right whale and the application and purpose of the Speed Rule” and that “[t]he stipulated record contains no evidence that Respondent made any effort to avail himself of these resources[.]” NOAA Reply Br. at 5-6.

The Agency discusses Respondent’s status as a “first-time offender.” NOAA Reply Br. at 6. The Agency reiterates that NOAA Office of Law Enforcement “sent compliance assistance letters to Respondent at his address of record months before the instant offenses” because the Agency had information that the vessel had traveled at a speed greater than 10 knots in an SMA. NOAA Reply Br. at 6 (citing Jt. Stip. ¶ 72). The Agency highlights that:

[T]his Tribunal should not consider the absence of previously adjudicated offenses as the sole factor in assessing an appropriate penalty; rather, the Tribunal must “tak[e] into account all of the factors required by applicable law.” 15 C.F.R. § 904.204(m). As explained in the Agency’s Initial Brief, such factors necessarily include the critically endangered and substantially depleted status of the North Atlantic right whale population, the lethal speeds at which *M/V Michele My Belle* transited hundreds of nautical miles through important right whale habitat, the purpose of the Speed Rule, and the Agency’s widespread outreach and education efforts regarding this species and the Speed Rule. That this case marks Respondent’s first charged violations of the Speed Rule should be given little, if any, significance when weighed against this substantial and undisputed evidence.

NOAA Reply Br. at 6.

Finally, the Agency disputes Respondent’s assertion that there was “no actual harm” to a North Atlantic right whale. NOAA Reply Br. at 6-7. The Agency analogizes to motor vehicle speed limits, saying that “[t]he faster the vehicle is operated and the longer the distance travelled in violation of the speed limit, the greater the jeopardy risked to a larger population of motorists, pedestrians, and bystanders.” NOAA Reply Br. at 7. The Agency postulates that “[t]he critical purpose served by the Speed Rule and the substantial harm risked if its restrictions are violated must not be overlooked simply because *M/V Michele My Belle* likely had the good fortune not to strike a whale on these particular occasions.” NOAA Reply Br. at 7. Referencing “current research” and the stipulated record, NOAA concludes that “the Agency’s position that slower vessel speeds protect North Atlantic right whales from vessel strikes is supported by substantial scientific analysis as well as the stipulated facts in evidence.” NOAA Reply Br. at 7-9.

## Respondent's Reply

Respondent acknowledges that the argument concerning the constitutionality of the penalty under the Excessive Fines Clause is “foreclosed by this Tribunal’s jurisdictional limitations” and “reserves these arguments for appeal[.]” Resp’t Reply Br. at 1.

## VII. DISCUSSION

Respondent raises an Excessive Fines challenge to the proposed penalty, and questions whether the statutory maxima delimited in the MMPA and ESA apply if the Speed Rule exceeds NOAA’s statutory authority.<sup>19</sup> Resp’t Init. Br. at 15-18. The Agency responds that “Respondent’s Excessive Fines Clause defense raises ‘constitutional issues’ outside the jurisdiction of the Tribunal to resolve.” NOAA Reply Br. at 4 (citing 15 C.F.R. § 904.200(b)). In his Reply brief, Respondent likewise acknowledges that this Tribunal is constrained by 15 C.F.R. § 904.200(b). Resp’t Reply Br. at 1. So, whether the penalty imposed under the Speed Rule is a “fine,” whether the penalty is grossly disproportional to the gravity of the offense, and whether the statutory maxima are valid, are not for this Tribunal to decide.

Consequently, I now move on to the assessment of an appropriate penalty for the violations found. 16 U.S.C. § 1540(a)(1). The ESA authorizes three distinct monetary penalties: \$25,000; \$12,000; and \$500. As previously discussed, “for civil penalties in excess of \$500, the violation must be ‘knowingly’ committed.” *Ptak*, 1989 NOAA LEXIS 21, at \*9. The word “knowingly” has not been construed to require an understanding that the actions were unlawful; instead that term has been interpreted to mean actions which are “voluntary and intentional.” *Id.* at \*10 n.3. Because “the captain was in control of *M/V Michele My Belle’s* speed and location, and maintained vessel speeds in excess of 10 knots through waters within active SMAs of his own volition,” as the parties have stipulated, Jt. Stip. ¶ 17, I find that the violations here were “knowingly” committed.

Under the ESA, penalties of up to \$25,000 are allowed for violations of regulations issued pursuant to certain statutory subsections. See 16 U.S.C. § 1540(a)(1) (“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 subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d) (other than regulation relating to

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<sup>19</sup> As already mentioned, Respondent asserts “[i]n this case, the core issue is not whether the penalty falls below a statutory cap, but whether NOAA possessed the authority to create the Speed Rule under the MMPA and ESA in the first place. If NOAA lacked this authority, the statutory maximum fines for MMPA and ESA violations become irrelevant. . . . In the absence of clear statutory authority for the Speed Rule, the court should consider the \$22,500 total fine on its own merits, without reference to the MMPA and ESA maximums.” Resp’t Init. Br. at 18. It is unclear why, upon finding that the Speed Rule is not authorized by either the MMPA or ESA, as Respondent argues with respect to liability, any court would undertake a subsequent analysis of the proposed penalty.

recordkeeping or filing of reports), (f) or (g) of [section 1538] of this Act, may be assessed a civil penalty by the Secretary of not more than \$25,000 for each violation.”). The Speed Rule does not fall under any of the enumerated subsections that would authorize assessing penalties up to \$25,000 per violation. Instead, these violations of the Speed Rule have a statutory maximum of \$12,000. *Id.* (“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.”). Considering the inflation adjustment for penalties assessed in 2025, the maximum penalty for a violation of such a regulation is \$31,513. 15 C.F.R. § 6.3(f)(14)(ii) (effective Jan. 15, 2025).

The MMPA reads “Any 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 of not more than \$10,000 for each such violation.” 16 U.S.C. § 1375(a)(1). Taking into account the adjustment for inflation effective for penalties assessed in 2025, the maximum penalty for an MMPA violation is \$36,498. 15 C.F.R. § 6.3(f)(11) (effective Jan. 15, 2025). Therefore, the maximum penalty allowed for a violation of a regulation issued under the MMPA, such as the Speed Rule, is \$36,498.<sup>20</sup>

With respect to a penalty calculation, the Civil Procedures governing this matter state:

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 Judge has the authority and duty to “[a]ssess a civil penalty . . . taking into account all of the factors required by applicable law[.]” *Id.* § 904.204(m). In addition:

[T]here is no presumption in favor of the penalty proposed by the Agency, and as the Administrative Law Judge presiding in this matter, I am not required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document. Rather, I must independently determine an appropriate penalty taking into account all of the factors required by applicable law.

*Shell Island Boat Rentals, LLC*, No. SE1301095, 2014 NOAA LEXIS 5, at \*55-56 (NOAA July 8, 2014) (internal quotation marks and citations omitted). As neither the MMPA nor the ESA delineate statutory penalty factors, I am guided solely by the penalty factors enumerated in the

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<sup>20</sup> As previously noted, the MMPA is a strict liability statute. Therefore, there is no need for evaluating whether the violations of the Speed Rule were “knowingly” committed; the same statutory maximum applies for all violations.

Civil Procedures, and may impose a penalty up to the statutory maximum.<sup>21</sup>

I will start with the ability to pay the penalty. The Civil Procedures state that “[a] civil penalty may be decreased if the respondent establishes that he or she is unable to pay an otherwise appropriate civil penalty amount.” 15 C.F.R. § 904.108(b). The Civil Procedures also provide that “[i]f a respondent has requested a hearing on the violation alleged in the NOVA and wants the Initial Decision of the Judge to consider his or her inability to pay, verifiable, complete, and accurate financial information must be submitted to Agency counsel at least 30 days in advance of the hearing . . . . No information regarding the respondent’s ability to pay submitted by the respondent less than 30 days in advance of the hearing will be admitted at the hearing or considered in the Initial Decision of the Judge, unless the Judge rules otherwise.” *Id.* § 904.108(e). At no time has the Tribunal received any indication that Respondent was contesting his ability to pay the penalty, or that he had communicated to the Agency his intent to do so and provided his financial information. Accordingly, Respondent’s ability to pay will not be considered in the assessment of a penalty.

With respect to the history of prior violations, Respondent has argued that he is “a first-time offender with no prior disciplinary history.” Resp’t Init. Br. at 15, 17. Both parties agree that it is true that Respondent had not received a prior NOVA from the Agency. Resp’t Init. Br. at 17; NOAA Reply Br. at 6; Jt. Stip. ¶ 22. However, both parties also concur that “[o]n January 11, 2022 and January 27, 2022, [NOAA Office of Law Enforcement] sent compliance assistance letters and copies of the Compliance Guide to Respondent at his address of record. The purpose of these mailings was to inform Respondent that OLE had received information that *M/V Michele My Belle* operated in excess of 10 knots while inside an SMA and to remind Respondent of his obligations to comply with the Speed Rule.” Jt. Stip. ¶ 72. The parties also stipulate that “[t]he accuracy and reliability of [AIS] data is not subject to reasonable dispute.” Jt. Stip. ¶ 10. Whether *M/V Michele My Belle* violated the Speed Rule prior to January 11, 2022, is not being adjudicated here, and Respondent has not been given the opportunity to contest those allegations. Therefore, it would be unfair to Respondent to increase the penalty due to these whispers of prior violations. But, correspondingly, I find that the record as a whole does not compel a decrease in the penalty on the basis that Respondent has a lengthy and consistent documented history of compliance.

Further, the compliance assistance letters sent to Respondent should have apprised him

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<sup>21</sup> The Agency cited NOAA’s Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions (“Penalty Policy”), among other references, as a source it considered when calculating the proposed penalty. NOAA Init. Disc. at 6-7. No further mention of the Penalty Policy appears in the parties’ briefs. Even though I am allowed to take official notice of such materials, see 15 C.F.R. §§ 904.204(l), 904.251(g), I decline to do so here and do not intend to rely on the Penalty Policy in assessing a penalty. This is consistent with the text of the Penalty Policy itself, which states “The Policy is not binding on administrative law judges who hear NOAA enforcement cases.” Penalty Policy at 2.

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

of the existence of the Speed Rule months before the violations occurred, and this speaks directly to Respondent's culpability. I acknowledge that the parties stipulate that the letters were "sent"; there is no mention of whether they were received by Respondent. As the address on the January 11, 2022 letter matches Respondent's address of record, I am comfortable concluding that at least that letter was delivered to Respondent's residence. *Jt. Stip.* ¶ 3; *JX 15* at 1. If Respondent, as the owner of a seaworthy vessel, opted to dispose of a piece of government mail from an agency that, simply put, regulates the oceans, and therefore never saw the letter, then I can only conclude that Respondent manifested intentional ignorance. But if he did open the letter and read its contents, then it was incumbent upon Respondent to alert the Captain to the existence of a regulation of which he himself had been specifically informed by NOAA—a regulation which his vessel may have violated previously. Instead, assuming this series of events, it seems that Respondent did not ensure that his Captain was cognizant of the Speed Rule before the *M/V Michele My Belle's* departure in November 2022. *See JX 1* at 21 (Respondent writing, in an email, "According to the information I received, the operator of the vessel believes he was not in excess speed, even though *at the time he was unaware of the regulation.*" (emphasis added)). Either way, Respondent's actions show, at the least, a blatant disregard for NOAA's enforcement activities and its regulations.

Respondent also attempts to mitigate the penalty by arguing that he "did not pilot the ship at the time of the alleged violations [and] had no knowledge of such violations until he received the fine assessment[.]" *Resp't Init. Br.* at 15, 16. I am not swayed by Respondent's claims, and do not believe that this reduces his culpability. As with the determination on liability, Respondent may be held accountable for the actions of his Captain and assessed a penalty through the doctrine of respondeat superior; he need not have been on board the vessel and aware of the violations as they were happening. Respondeat superior, when encapsulated in statutory schemes like those of the MMPA and ESA, "remove[s] all possible incentive for owners to employ vessel operators inclined to law-breaking, only later to disclaim responsibility while retaining the fruits of the unlawful activity[.]" *Drinkwater*, No. NE1202710, 2015 NOAA LEXIS 20, at \*5 (NOAA App. Nov. 18, 2015) (citing *Boggess*, 4 O.R.W. 319, 1985 NOAA LEXIS 20 (NOAA Sept. 6, 1985)). The stipulated facts have shown that Respondent hired the Captain to operate the vessel from New York to Florida; and that the Captain did so on Respondent's behalf and within the scope of the employment arrangement. *Jt. Stip.* ¶¶ 11, 16. There has never been a suggestion that the Captain was acting for his own benefit or outside the employment agreement. Therefore, Respondent is responsible for whatever I deem an appropriate penalty for the violations found to have occurred; the penalty shall not be reduced because Respondent was not on board the vessel or aware of the violations. *See Kim*, Docket No. SW010208A, 2003 NOAA LEXIS 4, at \*26 (NOAA Jan. 7, 2003) (harassment case) ("More specifically, under the traditional doctrine of respondeat superior, federal courts have repeatedly held that employers are vicariously liable for the torts committed by their employees within the scope of their employment. 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. The employer . . . is not to be held liable for an employee's willful acts that are committed solely for the accomplishment of his own malicious or personal reasons and not done for the employer at all." (internal citations omitted)).

As to the nature, circumstances, extent, and gravity of the violation, I find that the speeds at which the vessel was traveling; the extent of travel through the SMAs; and the status of the North Atlantic right whale all warrant a severe penalty.

The maximum speed over ground allowed in an SMA for a vessel like *M/V Michele My Belle* is 10 knots. 50 C.F.R. § 224.105(a)(1), (2). On November 19, 2022, *M/V Michele My Belle* traveled at speeds ranging from 23.3 to 23.9 knots while in an SMA. JX 1 at 11; JX 3 at 2. On November 20, 2022, *M/V Michele My Belle* traveled at speeds ranging from 8.2 to 24.6 knots during one of its transits, then traveled at speeds ranging from 8.8 to 23.5 knots during a second SMA transit, and finally traveled at speeds ranging from 21.9 to 24.9 knots during its final SMA transit. JX 1 at 12; JX 3 at 3-4. On November 21, 2022, *M/V Michele My Belle* traveled at speeds ranging from 19.5 to 26.7 knots during one SMA transit, and then traveled at speeds ranging from 18.8 to 26.6 knots during a later SMA transit. JX 1 at 13; JX 3 at 5-7. A cursory perusal of the speed data transmitted by the *M/V Michele My Belle*'s AIS unit reveals that *most* of the recorded speeds are over 20 knots. JX 3. The data are clear that these are not minor speed exceedances: Frequently, *M/V Michele My Belle* was traveling at *more than twice* the lawful speed limit.

The distances traveled through the SMAs were also extensive. On November 19, 2022, *M/V Michele My Belle* traveled at an average speed over ground above 10 knots for 18.7 nautical miles while in an SMA; this transit lasted for 48 minutes. Jt. Stip. ¶ 12. On November 20, 2022, *M/V Michele My Belle* traveled at an average speed above 10 knots for 28.6 nautical miles, then traveled at an average speed above 10 knots for 10.2 nautical miles, and then traveled at an average speed above 10 knots for 28.8 nautical miles, all while in various portions of the Mid-Atlantic SMA. Jt. Stip. ¶ 13. These transits lasted 2 hours 8 minutes; 45 minutes; and 1 hour 15 minutes, respectively. Jt. Stip. ¶ 13. On November 21, 2022, *M/V Michele My Belle* traveled at an average speed above 10 knots for 149.5 nautical miles, and then traveled at an average speed above 10 knots for 47.6 nautical miles while in SMAs. Jt. Stip. ¶ 14. These transits lasted 6 hours 27 minutes and 2 hours 1 minute, respectively. Jt. Stip. ¶ 14. In total, the vessel traveled about 283 nautical miles in violation of the Speed Rule. Jt. Stip. ¶ 12-14.

As described previously, NOAA, as part of its investigation, created charts that plot *M/V Michele My Belle*'s location and speed. To reiterate, the speed is color coded; for example, a yellow dot connotes a speed between 10.001 and 12.0 knots; a purple dot represents a speed greater than 18.0001 knots. And, green dots represent speeds under 10 knots—in other words, a green dot means that the vessel was not traveling at a speed that would violate the Speed Rule. Examination of the charts demonstrates the gravity and extent of the violation with respect to the speeds traveled and the path of the vessel. As to speed, I detect only one instance of green dots—near “Cape Henry” lighthouse in Virginia; otherwise, *M/V Michele My Belle* was traveling faster than 10 knots at all other times while in an SMA. JX 1 at 11-13. As to the route of the vessel, the charts show that *M/V Michele My Belle* traveled long distances through SMAs. The vessel was not making minor incursions into SMAs, or skirting the

boundaries of the SMAs—indeed, the vessel traveled well into the hearts of the SMAs while moving at a violative speed. JX 1 at 11-13.

The SMAs were established to conserve the North Atlantic right whale. Specific facts about the current status of the North Atlantic right whale help to clarify the nature and circumstances of the violations.<sup>22</sup> The stipulated facts show that the North Atlantic right whale’s population numbers are very low: “Today, there are approximately 360 individual right whales left alive. There are fewer than 70 reproductively active females alive today.” Jt. Stip. ¶ 26. The stipulated facts indicate that North Atlantic right whales are not living long enough to die from natural causes: Vessel strikes and fishing gear are causing them to die prematurely, with vessel strikes being the predominant cause of “known human-related mortality events.” Jt. Stip. ¶¶ 27-29, 37. The parties also stipulate that “for the species to recover[,] the population cannot sustain, on average over the course of a year, the death or serious injury of a single individual due to human causes” and “[a]ny death or serious injury caused by anthropogenic sources increases the likelihood that the North Atlantic right whale will become extinct.” Jt. Stip. ¶¶ 38-39.

The stipulated facts reveal that “[v]essel speed is correlated with the severity of a vessel collision with a North Atlantic right whale. . . . [S]lower speeds reduce the force of impact, such that a vessel strike occurring at a reduced speed has a lower potential to seriously injure or kill a North Atlantic right whale.” Jt. Stip. ¶ 48. The parties stipulate that “[t]he speed limit applies to most vessels 65 feet and greater because the data available in 2008 indicated that such vessels were the most likely to cause a lethal injury in the event of a collision with a North Atlantic right whale” and that “[a] 10-knot speed limit was selected based on analyses of large whale vessel collisions [which] determined that when vessels reduced speed, particularly from 14 knots to 10 knots, the risk of a lethal strike declined substantially.” Jt. Stip. ¶ 55-56. The stipulations imply that “[r]educing vessel speed in Right Whale habitat remains the best mechanism to reduce mortality and serious injury resulting from vessel strikes.” Jt. Stip. ¶ 58.

It appears that the intent of the Speed Rule is to give the vulnerable North Atlantic right whale population a chance, if not its best chance, to avoid extinction. The fact that a single unnatural death from a vessel strike could jeopardize the North Atlantic right whale’s survival and precipitate the extinction of the species is bleak. Violations that threaten their continued existence need a penalty that ensures those violators will not repeat their infractions.

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<sup>22</sup> The parties have stipulated to facts that establish the whale’s current status. These stipulated facts cite JX 4, a NOAA slide deck titled “North Atlantic Right Whales – Status and Threats to the Species: Focus on Vessel Strikes,” dated 2024; JX 14, NOAA’s 2023 Stock Assessment Report for North Atlantic right whales; JX 24, Endangered and Threatened Species; Proposed Endangered Status for North Atlantic Right Whales (Proposed Rule), 71 Fed. Reg. 77,704 (Dec. 27, 2006); JX 25, Endangered and Threatened Species; Endangered Status for North Pacific and North Atlantic Right Whales (Final Rule), 73 Fed. Reg. 12,024 (Mar. 6, 2008); and JX 9, Endangered Fish and Wildlife; Final Rule To Implement Speed Restrictions to Reduce the Threat of Ship Collisions With North Atlantic Right Whales, 73 Fed. Reg. 60,173 (Oct. 10, 2008) (codified at 50 C.F.R. § 224.105).

I am not convinced that the penalty should be reduced because, as Respondent claims, the Agency's understanding of the relationship between vessel speed, and whale mortality, is "speculative." Resp't Init. Br. at 17. First, Respondent stipulated to facts that demonstrate the importance of the Speed Rule, and the scientific basis for it. See Jt. Stip. ¶¶ 23-59. So, a characterization of the relationship between vessel speed and whale mortality as "tenuous" seems disingenuous, at least for the duration of this proceeding. Resp't Init. Br. at 17. Next, the Agency cited studies that supported its action in its rulemaking publications. See JX 8 at 2, 5-6, 9; JX 9 at 1-6, 11-12. Hence, there was a basis for enacting the Speed Rule. And, any argument that the Speed Rule is arbitrary and capricious, or not tethered to the harms it attempts to prevent, is not an argument that this Tribunal can evaluate. See Not. of New or Add'l Claims or Def. (Aug. 12, 2024); Resp't Init. Br. at 8-9; 15 C.F.R. § 904.200(b).

I am also unconvinced that the penalty should be reduced because, according to Respondent, "there is no allegation of actual harm to any protected whale." Resp't Init. Br. at 17. The fact that no harm to a whale actually occurred was serendipity. Had there been evidence that Respondent's vessel actually struck a whale during its transits through SMAs, then the Agency could have alleged liability for *that* action under the appropriate statutory or regulatory authority and assessed a concomitantly increased penalty, rather than charging the Respondent here with a mere violation of a speed restriction. The harm under the present circumstances is the violation of the Speed Rule—a regulation promulgated by NOAA. Any violation of *any* regulation promulgated by the Agency is a harm in and of itself; there need not be a further harm to justify a penalty.

Pertaining to "other matters as justice may require," I do not find that there are other considerations to be weighed in calculating the proposed penalty.

These are serious violations, requiring serious penalties. Having found Respondent liable for three counts of violating the Speed Rule, and the MMPA and ESA, and based upon the stipulated record, I find that imposing a penalty in the amount of \$8,000 for Count I; \$8,000 for Count II; and \$8,000 for Count III is appropriate. It is the hope of this Tribunal that these steep penalties encourage Respondent to be more prudent with respect to the operation of his vessel, the *M/V Michele My Belle*, in the future.



**ORDER**

**IT IS HEREBY ORDERED,**

*That*, a civil penalty in the total amount of \$24,000, is **IMPOSED** upon Respondent Joseph Urbinati.

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.**



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

Dated: March 13, 2025  
Washington, D.C.