



**UNITED STATES DEPARTMENT OF COMMERCE**

**NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

In the Matter of:	)	DOCKET NUMBER:
Iakovos Iakovou,	)	<b>NE 1503255, F/V Knot Right</b>
Respondent.	)	

**INITIAL DECISION AND ORDER**

**Date:** July 24, 2019

**Before:** Christine Donelian Coughlin, Administrative Law Judge, U.S. EPA<sup>1</sup>

**Appearances:** For the Agency:

Katherine L. Pohl, Esq.  
U.S. Department of Commerce  
National Oceanic and Atmospheric Administration  
Office of General Counsel, Enforcement Section  
Northeast Regional Office  
Gloucester, MA

Charles Green, Esq.  
U.S. Department of Commerce  
National Oceanic and Atmospheric Administration  
Office of General Counsel, Enforcement Section

For Respondent:

Iakovos Iakovou, *pro se*  
Mashpee, MA

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

## I. PROCEDURAL BACKGROUND

The National Oceanic and Atmospheric Administration (“NOAA” or “Agency”) initiated this proceeding when it issued a Notice of Violation and Assessment of Administrative Penalty (“NOVA”), dated December 5, 2016, which charged Iakovos Iakovou (“Respondent”) with approaching and striking an endangered marine mammal with a vessel in violation of Section 9(a)(1)(B) of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B), or in the alternative, in violation of Section 102(a)(2)(A) of the Marine Mammal Protection Act, 16 U.S.C. § 1372(a)(2)(A). For the single-count of violation alleged in the NOVA, the Agency seeks a penalty of \$14,750. The NOVA was subsequently amended (“First Amended NOVA”) to include the addition of coordinates where the charged violation allegedly occurred and the addition of a regulatory provision promulgated under the Marine Mammal Protection Act that Respondent also allegedly violated.<sup>2</sup>

On July 17, 2017, Respondent requested a hearing on the alleged violation, and the matter was forwarded to this Tribunal. By Order dated December 13, 2017, I was designated to preside over the litigation of this matter. On December 18, 2017, I issued an Order to Submit Preliminary Positions on Issues and Procedures (“PPIP Scheduling Order”) to the parties, setting forth various prehearing filing deadlines and procedures, including filing deadlines for each party to submit its Preliminary Position on Issues and Procedures (“PPIP”). The Agency timely filed its PPIP. Respondent requested an extension of time within which to file his PPIP, which I granted. Nevertheless, Respondent did not timely file his PPIP by that extended deadline. Thereafter, I issued an order requiring Respondent to comply and established a new deadline for the submission of his PPIP,<sup>3</sup> a deadline that he met, in part, by submitting to this Tribunal a brief narrative of his position. However, Respondent did not comply with other requirements contained in the PPIP Scheduling Order in that he 1) failed to provide a summary of the expected testimony of his proposed witnesses and financial documentation to support an argument about an inability to pay a monetary penalty, and 2) continued to disregard service and filing requirements.<sup>4</sup> Consequently, I granted the Agency’s request for additional discovery (notably, depositions of Respondent and his proposed witnesses) in this case.<sup>5</sup>

On June 21, 2018, I issued the Notice of Hearing Order that established a hearing commencement date of September 5, 2018, to continue, as necessary, through September 6, 2018, as well as hearing time and location details. Prior to the hearing, the Agency filed two Motions in Limine, one in which it requested that I exclude any information introduced by Respondent as to his ability to pay an assessed penalty given that Respondent had failed to comply with this Tribunal’s orders on that issue and infer that Respondent has the ability to pay a penalty, and the other in which the Agency

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<sup>2</sup> See Order on the Agency’s Motion to Amend Notice of Violation and Assessment and Preliminary Position on Issues and Procedures and Motion to Take Official Notice, dated April 26, 2018, in which I granted the Agency’s request to amend the NOVA.

<sup>3</sup> See Order to Respondent to Comply, dated March 28, 2018.

<sup>4</sup> See Order on the Agency’s Motion for Additional Discovery, dated April 26, 2018.

<sup>5</sup> See Order on the Agency’s Motion for Additional Discovery, dated April 26, 2018.

sought to exclude one of Respondent's proposed witnesses, Chad McFall, on the basis that he was not qualified to offer lay or expert witness testimony at hearing. On August 29, 2018, I issued an Order on Agency's Motions in Limine, in which I granted the Agency's request to exclude ability to pay evidence and infer that Respondent has the ability to pay a proposed penalty, but denied the Agency's request to exclude the proposed witness testimony of Chad McFall.

Thereafter, I conducted the evidentiary hearing in this matter as scheduled on September 5, 2018, in Plymouth, Massachusetts.<sup>6</sup> At the hearing, the Agency presented Agency's Exhibits ("AX") 1 through 13, which were admitted into evidence. The Agency also presented the testimony of six witnesses: Todd Nickerson ("Special Agent Nickerson"), a Special Agent within NOAA's Office of Law Enforcement; Jeremy Belknap ("Mr. Belknap"), an intern with the Whale and Dolphin Conservation at the time of the alleged incident; Jonathan Brink ("Mr. Brink"), a senior Naturalist and second Captain for Hyannis Whale Watcher Cruises; Danielle Kurkjian ("Ms. Kurkjian"), an intern with the Whale and Dolphin Conservation at the time of the alleged incident; Regina Asmutis-Silvia ("Ms. Asmutis-Silvia"), a senior Biologist and Executive Director of the Whale and Dolphin Conservation North American Office, who was qualified as an expert in whale identification and conservation matters<sup>7</sup>; and Alexandra Hill ("Ms. Hill"), a marine researcher and Director of Education and Research at Dolphin Fleet Whale Watch, who was qualified as an expert in vessel collisions with humpback whales.<sup>8</sup> Respondent presented the telephonic testimony of Joseph Anzivino ("Mr. Anzivino"), an individual who was on Respondent's vessel at the time of the alleged incident, and Respondent's own testimony.<sup>9</sup>

Following service of the certified transcript of the hearing to the parties on September 19, 2018,<sup>10</sup> I issued an Order Scheduling Post-Hearing Submissions on September 21, 2018, establishing various post-hearing filing deadlines. No motions to conform the transcript to the actual testimony were filed. Consistent with its deadline, the Agency timely filed its Initial Post-Hearing Brief ("Ag. In. Br."). Respondent did not file an Initial Post-Hearing Brief; consequently, no reply briefs were filed.

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<sup>6</sup> Citations to the transcript of this evidentiary hearing are made in the following format: "Tr. [page]."

<sup>7</sup> See Tr. 143-47.

<sup>8</sup> See Tr. 199-200.

<sup>9</sup> Although Respondent was given the opportunity to present the telephonic testimony of Chad McFall, he was unable to secure his availability to testify and elected to conclude the hearing without his testimony. See Tr. 230, 251-53.

<sup>10</sup> At his request, Respondent was served a paper copy of the transcript to his Mashpee, Massachusetts, address, in addition to being sent a copy of the transcript by email. See Order Scheduling Post-Hearing Submissions, dated September 21, 2018.

## II. STATEMENT OF THE ISSUES

### a. Liability

In making a determination on liability, I must determine if Respondent, over the Stellwagen Bank in the Atlantic Ocean<sup>11</sup> and on or about September 17, 2015, did knowingly take an endangered species in violation of the Endangered Species Act at 16 U.S.C. § 1538(a)(1)(B), or alternatively, did take a marine mammal in violation of the Marine Mammal Protection Act at 16 U.S.C. § 1372(a)(2)(A) and regulations promulgated at 50 C.F.R. § 216.11 to implement that Act.

### b. Civil Penalty

If liability for a charged violation is established, then I must determine the amount of any appropriate civil penalty to be imposed for the violation. To this end, I must evaluate certain factors, including the nature, circumstances, extent, and gravity of the violation; Respondents' degree of culpability; any history of prior violations; Respondents' ability to pay; and such other matters as justice may require. See 15 C.F.R. § 904.108(a) (enumerating factors to be taken into account in assessing a penalty).

## III. FACTUAL SUMMARY

On September 17, 2015, a Hyannis Whale Watcher Cruise vessel ("Whale Watcher") was in the lower reaches of the Stellwagen Bank National Marine Sanctuary when it encountered an area of humpback whale activity. Tr. 98, 100, 107-08. On this date, these whales, namely the West Indies Humpback Whale stock population that travel in the Gulf of Maine, were listed on the Endangered Species List. Tr. 151, 182-83. There were "many" whales "actively feeding in a relatively contained area," estimated to be about 1.5 square miles around the Whale Watcher. Tr. 100. Mr. Brink, the Naturalist aboard the Whale Watcher, described the scene as a "very active feeding pattern," whereby the whales were "feeding and constantly shifting associations of whales," meaning that a whale observed in a group of three or four whales would leave that group and join another smaller group of whales in another area. Tr. 99-101. Mr. Brink estimated that there were 30 to 50 humpback whales in the area and off the bow of the Whale Watcher. Tr. 108. Interns of the Whale and Dolphin Conservation ("WDC") also aboard the Whale Watcher at the time similarly described the presence of 40 to 50 humpback whales in the area, with one of the interns, Mr. Belknap, characterizing the whale watching environment as a "busy day." Tr. 65, 123. Other vessels, including recreational vessels and fishing vessels, were also in the vicinity. Tr. 65, 117, 132.

As Mr. Brink was providing a narrative to the passengers aboard the Whale Watcher regarding the humpback whale activity and behaviors being observed, his attention was diverted by the actions of another vessel, named the F/V Knot Right ("Knot Right"), that is owned and was operated at the time by Respondent. Tr. 70, 72,

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<sup>11</sup> The Amended NOVA identifies the approximate coordinates to this geographical location as 42.2331°N, 70.1644°W. See Amended NOVA at 1.

101, 251; AX 1, pgs. 3, 5, 18; AX 3, pgs. 43-44, 50. As reflected in a recording taken at the time, Mr. Brink was so taken aback by the “high rate of speed” of the Knot Right as it transited through the area filled with humpback whales that he spontaneously stated over the microphone:

Out here at two o'clock, we have 40 whales out here and this guy comes bombing through here like he owns the place. I have a few choice adjectives that I can't use over the microphone for him. Where's the Coast Guard when you need them, they were around here before. What a menace to our whales. This is why about thirty percent of our known humpback whales have scars from propellers.

Tr. 99-101, 103; AX 12. Mr. Brink and Mr. Belknap estimated that the Knot Right was approximately one quarter of a mile away from the Whale Watcher, such that, according to Mr. Brink, they “were able to see the vessel transiting the area at a high rate of speed through feeding whales quite well.” Tr. 68, 103; AX 1, pg. 16. The Knot Right was well within the Stellwagen Bank National Marine Sanctuary at this time. AX 1 at pgs. 9-10, 12-13, 15-16. While other vessels were in the vicinity, unlike the Knot Right, they were either stationary or moving very slowly. Tr. 71, 123.

Mr. Brink, a boat captain with “fifteen years on the water, 100 days a year,” estimated the Knot Right's speed as it transited through the area to be “probably between 25 and 35 miles an hour. Probably faster, but no less than 25 knots.” Tr. 99, 103, 112. Mr. Belknap, based on his experience aboard the Whale Watcher for several months prior to this incident, likewise characterized the Knot Right as “a boat speeding along” that “went past us fairly quickly . . . traveling at a high rate of speed” that he estimated to be 25 to 30 knots. Tr. 65, 94-95; AX 1, pg. 16. Ms. Kurkjian, the other WDC intern aboard the Whale Watcher, characterized the speed of the Knot Right as “zooming past them” and “speeding across . . . with visible white wakes coming off the back of the boat,” such that even the passengers aboard the Whale Watcher and those on fishing boats in the vicinity became concerned and tried to get the attention of the Knot Right by waving their hands and shouting, in some instances over a microphone, to alert the Knot Right to slow down or stop. Tr. 123, 125; AX 1, pg. 10.

Both Mr. Brink and Mr. Belknap observed groups of whales on either side of the Knot Right as it transited through the area. Tr. 65-66, 107-08, 114. Ms. Kurkjian recalled seeing a whale begin to dive just as the Knot Right transected the whale's path. Tr. 124, 133. Mr. Belknap recounted that he “remember[s] seeing in slow motion that this boat [referring to the Knot Right] was going to intercept that path [of whales] and . . . [that he] hoped that the whales would be submerged at that point, would be under water and wouldn't get hit. But then, we heard an audible strike.” Tr. 68-69; *see also* Tr. 87-88. Mr. Brink recalled, “[W]e knew that a whale had been hit, and it still—it gives me goosebumps to this day when I think of that sound.” Tr. 104.

Each witness recounted that while observing the Knot Right transiting the area filled with many feeding humpback whales, they each heard a noise suggestive of an impact, like a “crack” or “clunk,” and immediately thereafter observed the Knot Right



stopped dead in the water, appearing to have sustained damage to one of its engines. Tr. 69, 83-84, 101, 103-05, 124; AX 1, pg. 2, 10, 16. Mr. Belknap recalled observing that the engine had been forced upward by something colliding with it and that a piece of trim on the port-side engine had broken. Tr. 69; *see also* AX 1, pg. 16. Respondent later confirmed that the Knot Right did, in fact, sustain damage in the form of a cracked cowling to one of the three outboard engines, repeated stalling of that engine immediately following the incident, and damage to the vessel's steering. Tr. 42-43, 241-42; AX 1, pgs. 4-5. The WDC and its interns regularly keep track of trash or debris observed floating on the water, typically consisting of plastic items, but according to Mr. Belknap, no significant debris or other large items were observed floating in the water at the time. Tr. 84.

Shortly after these events occurred, a whale known and identified as Epee<sup>12</sup> surfaced and had visibly fresh injuries, the markings of which were consistent with a vessel strike. Tr. 75-78, 105; AX 3, pgs. 26-35. These markings included fresh puncture marks on the whale's body that appeared to be created from a propeller, as well as fresh abrasions to its dorsal fin. AX 1, pgs. 9-10, 15-16. Mr. Belknap, as part of his duties as an intern at the WDC, took numerous photographs immediately following the incident, which were used not only to identify the injured whale as Epee, but also to confirm that Epee's injuries were recent and caused by a vessel strike. Tr. 69-70, 72, 165-68, 171-73, 200-02; AX 3, pgs. 34-36; AX 4; AX 5. After reviewing these photographs,<sup>13</sup> as well as earlier photographs of Epee within the WDC's catalog of whale identification,<sup>14</sup> Ms. Hill, an expert in vessel collisions with humpback whales, opined that Epee was indeed struck by a vessel on September 17, 2015. Tr. 200-02. Ms. Asmutis-Silvia, an expert in whale identification who confirmed Epee's identity, compared the photographs of Epee taken on September 17, 2015, with photographs taken two days earlier on September 15, 2015, and similarly opined that Epee was struck by a vessel. Tr. 168, 176.

Specifically, from the photographs taken of Epee on September 17, 2015, Ms. Hill noted fresh wounds on Epee's dorsal fin and peduncle (the area between the dorsal fin and fluke) that appeared "bright white," which revealed that healing had not yet started to occur. Tr. 203; AX 3, pg. 9. She also identified fresh blood on Epee's dorsal fin. Tr. 204; AX 3, pgs. 26-27. In addition, Ms. Hill noted fresh propeller mark incisions just behind Epee's dorsal fin from which blood was visibly leaking, and explained that the "parallel, evenly-spaced incision marks . . . fit the definition of a propeller wound . . . to a T." Tr. 205-12; AX 3, pgs. 28-33, 62, 64. Ms. Hill further explained that to create the "relatively parallel, evenly-spaced lines of a propeller wound," the "vessel would have to be in gear with the propeller spinning" and not stopped. Tr. 213-14, 218. Comparing this information to photographs of Epee that were taken two days earlier on September

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<sup>12</sup> Humpback whales are born with individually unique features – namely, the unique markings on the underside of the fluke, or tail, the unique edge patterns to the fluke, and the uniqueness of the dorsal fin – that are collectively used to identify each individual whale. Tr. 155. WDC maintains an online database and catalog of individual whales that have been identified and confirmed through photographs of the whale's unique features. Tr. 157-59. WDC's catalog of whale identification photographs was used to identify Epee as the individual whale believed to have sustained vessel collision injuries on September 17, 2015. Tr. 166-69.

<sup>13</sup> See AX 3.

<sup>14</sup> See AX 4 and AX 5.

15, 2015, Ms. Hill noted that she saw no evidence of any such vessel strike injuries or wounds. Tr. 212-13; AX 4; *see also* Tr. 90. Ms. Hill further opined that given the uniqueness of a humpback whale's long pectoral fins, it is able to maneuver in ways other whales cannot, making it feasible that such a whale could, for example, be struck by only one of three outboard engines, especially an outside engine. Tr. 214-15, 221.

Following the incident, Ms. Kurkjian and Mr. Belknap provided statements of their observations by each completing a Whale Harassment Report Form, dated September 17, 2015. AX 1, pgs. 9-10, 15-16. Also on that day, NOAA's Office of Law Enforcement (OLE) was notified of the incident. Tr. 26; AX 1, pg. 1. Ms. Kurkjian and Mr. Belknap's statements, along with the photographs that Mr. Belknap had taken of Epee and other information from the WDC, including videos taken during the incident, were transmitted to NOAA's OLE and utilized in NOAA's investigation of what had transpired. Tr. 24, 26-27; AX 1. A NOAA Special Agent, Todd Nickerson, was assigned to the investigation. Tr. 23. In the course of his investigation, Special Agent Nickerson interviewed Ms. Kurkjian, who provided information consistent with her written statement. AX 1, pgs. 1-3, 9-10.

Special Agent Nickerson also interviewed Respondent on September 24, 2015, one week after the incident. Tr. 38-41; AX 1, pgs. 4-5. In that interview, Respondent confirmed that he is the owner of the Knot Right and that he was operating the Knot Right when he struck a humpback whale.<sup>15</sup> AX 1, pg. 4. Respondent acknowledged that there were many whales in the area, describing it as a "thick day" in terms of the number of whales present. *Id.*; *see also* Tr. 236. He also described the area as "a 'minefield' of boats and whales as he tried to navigate." AX 1, pg. 4. He explained that upon colliding with the whale, the Knot Right's "far portside motor shot straight up and locked in an upward position," after which he saw a whale breach beside the vessel. *Id.*

Respondent also informed Special Agent Nickerson that he had been operating the Knot Right at a speed for the vessel to be "on plane,"<sup>16</sup> but was coming "off plane," thus reducing his speed, at the time of the whale strike. AX 1, pg. 4. Respondent maintained his position concerning the Knot Right being "off plane" at the time of the strike during his testimony at the evidentiary hearing. Tr. 232, 244-45, 247-50. However, Respondent also represented that his vessel attains a "plane" position at 12 knots, and he maintained both in his interview and at times during the evidentiary

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<sup>15</sup> While Respondent has maintained that no one directly saw his vessel, the Knot Right, come into physical contact with a humpback whale, he has not disputed that such contact occurred. More precisely, he argues that the strike was accidental, likening it to "being rear-ended when you're in a car," and that he was not targeting whales. Tr. 232-34, 240-42. He also speculates that the collision occurred when the whale moved its fluke underwater and thereby "tipped" the particular engine that sustained damage. Tr. 237.

<sup>16</sup> The term "on-plane" was described as a state in which a vessel is propelled with enough power from the vessel's engine(s) to generate a rate of speed such that the vessel is effectively moving "on top of the water" with minimal contact between the water and the vessel's bottom. Tr. 29, 31. Operating a vessel "on-plane" is considered more efficient than operating a vessel "off-plane" because the latter involves the vessel ploughing through the water at a slower speed, with the majority of the vessel in contact with the surface of the water, which creates more drag. Tr. 31. The speed at which a vessel reaches "on-plane" is dependent upon the particular vessel. Tr. 54.

hearing that he was travelling at 10 to 15 knots at the time of the whale strike. Tr. 235, 238-39; AX 1, pg. 4. At other points during his testimony, however, Respondent suggested he had come off-plane and was traveling at a trawling speed of approximately 5 or 6 knots when the whale strike occurred. Tr. 244-45, 248-50.

Respondent elaborated that traveling at 10 to 15 knots on the Knot Right provides sufficient speed to attain an “on plane” position, such that the bow of the vessel is level and a line of visibility is maintained, whereas traveling at slower speeds between six and 10 knots would cause the vessel’s bow to rise and thus impair visibility. Tr. 232, 235, 238, 240. Special Agent Nickerson, who received extensive boating training during his career and who possesses both employment-related and recreational experience as a boater, disagreed with this characterization. Tr. 30, 55. According to Special Agent Nickerson, “[i]f you’re traveling at a slow rate of speed, you can certainly look over the bow of the boat. If you’re traveling on plane, you can also look over the bow of the boat.” Tr. 56.

At the hearing, Mr. Belknap, Mr. Brink, and Ms. Kurkjian each characterized the speed of the Knot Right as greater than described by Respondent, and they testified, either directly or impliedly, that the vessel did not reduce its speed prior to the whale strike. Tr. 70, 103-04, 110-12, 123. Mr. Kurkjian’s written statement was consistent with her testimony on this point. AX 1, pg. 10. Conversely, Respondent’s witness, Mr. Anzivino, described the Knot Right’s speed as “just putting around . . . when the strike occurred.” Tr. 227. In response to questioning during which Respondent characterized the Knot Right’s speed as “idling” at the time of the strike, Mr. Anzivino reiterated his recollection that they were “just putting around.” Tr. 229.

In addition to the foregoing evidence concerning the speed at which the Knot Right was traveling as it transited the whale-filled area, a video of the scene provided by the WDC was also admitted into evidence. *See* AX 12. According to Respondent, the video initially shows the Knot Right traveling “on plane,” but then shows the vessel decreasing in speed and coming “off plane,” as evidenced by the rise in the vessel’s bow from the reduction in speed. Tr. 244. Special Agent Nickerson, on the other hand, characterized the Knot Right’s speed in the video as fast enough to remain “on plane” for the entire length of the video, adding that the video shows the Knot Right traveling at a sufficiently high and sustained rate of speed so as to generate a visibly long wake.<sup>17</sup> Tr. 28-32. Based on the video, he also challenged Respondent’s assertion of traveling at 10 to 15 knots, stating that “[w]e all saw a video of a vessel traveling clearly in excess of 15 knots. There is no question in anyone’s mind that the vessel is traveling at a high rate of speed, well in excess of 15 knots.” Tr. 256.

NOAA provides whale watching guidelines for the Greater Atlantic Region on its regional website. AX 10; Tr. 45, 176-77. These guidelines (“NOAA Guidelines”) were

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<sup>17</sup> Special Agent Nickerson explained that there is an “indirect correlation to the size and length of the wake with the speed” of a vessel. Tr. 32. He elaborated that a “visible wake” or “long wake” indicates a “high rate of speed.” *Id.* He then continued, “The slower a boat is traveling, the less wake there is, which is why, for example, in certain areas there are called no-wake zones” so as not to disrupt matters around that area. *Id.*



created from the collaboration of NOAA biologists, some of whom focus on the Stellwagen National Marine Sanctuary, as well as individuals from outside organizations, like the WDC. Tr. 47-48, 177. The NOAA Guidelines provide for, among other things, a decrease in vessel speed as the vessel approaches a whale like a humpback whale. See AX 10; Tr. 48. For example, the NOAA Guidelines advise that a vessel's speed within one mile of a whale should not exceed 10 knots, and when the vessel draws closer and is within one-half of a mile or less, the vessel's speed should be seven knots or less. See AX 10; Tr. 48.

Additionally, the WDC sponsors an educational program, titled "See A Spout, Watch Out," that was developed in consultation with NOAA experts and that provides information to recreational boaters about the ways in which boaters can safely and responsibly watch whales. Tr. 178-81; AX 9. The program seeks to condense the NOAA Guidelines into easy-to-remember catchphrases in an effort to encourage boaters to think about how to operate safely around whales. Tr. 178. Its title stems from data suggesting that if one whale is observed ("See A Spout"), then there is a high statistical likelihood that another whale will be present within two miles of the first sighting (hence, "Watch Out"). Tr. 179. The program is intended to "remind people that if they see a spout that they should post a lookout, slow down, be vigilant because there is very likely to be at least one other whale within two miles of that particular sighting." *Id.* To communicate this information to boaters, the WDC distributes brochures and erects signs at marinas and fuel docks from Maine through Rhode Island, as well as provides information through its online site. Tr. 183-84. The WDC also disseminates this information through its participation at a variety of boater education trainings. Tr. 183. The WDC has also presented at the Stellwagen Bank Advisory Council meetings to try to spread the information to the council's constituency and to the various stakeholder groups or industries that range from tuna fishing to recreational boating to commercial whale watching. *Id.*

Based on his investigation of Respondent's actions while operating the Knot Right on September 17, 2015, Special Agent Nickerson concluded that Respondent had failed to adhere to the NOAA Guidelines. Tr. 49. Thereafter, the matter was referred to NOAA's Office of General Counsel, and this civil enforcement proceeding ensued. AX 1.

#### **IV. LIABILITY**

##### **a. Principles of Law Relevant to Liability**

###### *i. Standard of Proof*

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. *Cuong Vo*, 2001 NOAA LEXIS 11, at \*16-17 (NOAA Aug. 17, 2001) (citing 5 U.S.C. § 556(d); *Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100-03 (1981)); 15 C.F.R. § 904.251(a)(2). This standard requires the Agency to demonstrate that the facts it

seeks to establish are more likely than not to be true. *Fernandez*, 1999 NOAA LEXIS 9, at \*8-9 (NOAA Aug. 23, 1999) (citing *Herman & MacClean v. Huddleston*, 459 U.S. 375, 390 (1983)). To satisfy this burden of proof, the Agency may rely upon either direct or circumstantial evidence. *Cuong Vo*, 2001 NOAA LEXIS 11, at \*17 (citing *Paris*, 4 O.R.W. 1058 (NOAA 1987)).

ii. *Endangered Species Act and Implementing Regulations*

In 1973, Congress enacted the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, as amended, “[t]o provide for the conservation of endangered and threatened species of fish, wildlife, and plants” that are “of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” Endangered Species Act of 1973, Pub. L. No. 93-205, pmb., § 2(a)(3), 87 Stat. 884, 884 (1973). The ESA directs the Secretary of Commerce, in coordination with the Secretary of the Interior, to identify any species that are endangered or threatened by using certain criteria and to list any such species in the Federal Register. 16 U.S.C. § 1533. At the time of the alleged violation in this case, all humpback whales were listed as endangered. *See* 50 C.F.R. § 224.101(h) (2015).

The ESA provides, in pertinent part, that “with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States.” 16 U.S.C. § 1538(a)(1)(B).

The term “person” is defined by the statute, in pertinent part, to mean “an individual.” 16 U.S.C. § 1532(13); *see also* 50 C.F.R. § 222.102. The term “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19); *see also* 50 C.F.R. § 222.102. In turn, the term “harm” as used in the definition of “take” means “an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102 (definition of “Harm”).

iii. *Marine Mammal Protection Act and Implementing Regulations*

Congress enacted the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. §§ 1361-1423h, as amended, based upon findings that “certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man’s activities” and that “they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management.” Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, § 2, 86 Stat. 1027, 1027 (codified at 16 U.S.C. § 1361(1), (6)). To accomplish this objective, Section 102 of the MMPA and the implementing regulations provide, in pertinent part, that it is unlawful for any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States. 16 U.S.C. § 1372(a)(2)(A); 50 C.F.R. § 216.11(b).

Definitions relevant to these provisions are as follows. The term “person” includes any private person or entity. 16 U.S.C. § 1362(10). “Marine mammal” encompasses any mammal, including Cetacea (whales, dolphins, and porpoises), that is morphologically adapted to the marine environment. 16 U.S.C. § 1362(6); 50 C.F.R. § 216.3. The MMPA defines “waters under the jurisdiction of the United States” to include:

(A) the territorial sea of the United States; [and]

(B) the waters included within a zone, contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State, and the other boundary is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured . . . .

16 U.S.C. § 1362(15).

Under the MMPA and its implementing regulations, the term “take” means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal. 16 U.S.C. § 1362(13); 50 C.F.R. § 216.3. The implementing regulations further define “take” to include “the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal.” 50 C.F.R. § 216.3.

Finally, the term “harassment” is defined for purposes of the MMPA as “any act of pursuit, torment, or annoyance” that (i) has the potential to injure a marine mammal or marine mammal stock in the wild (“Level A harassment”); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns such as migration, breathing, nursing, breeding, feeding, or sheltering (“Level B harassment”). 16 U.S.C. § 1362(18); 50 C.F.R. § 216.3.

The unlawful taking of a marine mammal in violation of the MMPA is a strict liability offense and, therefore, requires no specific intent. *See, e.g., Pac. Ranger, LLC, v. Pritzker*, 211 F.Supp.3d 196, 214 (D.D.C. Sept. 30, 2016) (“[A]s the text of the MMPA and its implementing regulations make clear, the prohibited act of taking a marine mammal is a strict-liability offense that is broadly defined.”); *Cordel*, 1994 WL 1246349, at \*2 (NOAA Apr. 11, 1994) (finding that no specific intent is required for an unlawful taking of a marine mammal in violation of the MMPA); *see also* 16 U.S.C. § 1375(a)(1). The MMPA provides that any person who violates any of its provisions or implementing regulations may be assessed a civil penalty. 16 U.S.C. § 1375(a)(1).

## **b. Arguments Regarding Liability**

In its Initial Post-Hearing Brief, the Agency argues that it has established through testimonial and documentary evidence, segments of which are highlighted throughout the brief, that Respondent violated the ESA on September 17, 2015, when he committed

a “take” on an endangered species, namely a humpback whale identified as “Epee.” Ag. In. Br. at 8-12. Specifically, the Agency contends, Respondent struck Epee with his vessel, “lacerating the whale’s lower right tail stock and causing sharp trauma wounds to its dorsal fin,” thereby “harming” or “wounding” the whale within the meaning of the ESA. *Id.* at 8-9. In support, the Agency relies largely upon the eyewitness accounts of what transpired during the incident, presented by the testimony of Mr. Brink, Mr. Belknap, and Ms. Kurkjian; photographs of Epee, before and on the same day of the incident, the latter of which depicted fresh wounds; the expert testimony of Ms. Asmutis-Silvia identifying Epee as the photographed whale; and the expert testimony of Ms. Hill, who opined from Epee’s wounds that the whale had indeed been struck by a vessel, notably a propeller. *Id.* at 6-8, 10-11.

Apart from the foregoing evidence, the Agency notes that Respondent conceded during both the evidentiary hearing and his interview with Special Agent Nickerson that he struck a whale. *Id.* at 9 (citing Tr. 39, 231, 234, 246; AX 1, pg. 4). Furthermore, the Agency points out, Respondent has offered no other plausible explanation for the incident. *Id.* at 9. The Agency maintains that other vessels in the area could not have caused the strike, as “[u]nlike Respondent, the other vessels were generally ‘following safe guidelines’ [by] not moving, or moving very slowly.” *Id.* at 9-10 (citing Tr. 71, 107). Additionally, the Agency notes, “[t]here was no notable debris in the area.” *Id.* at 9 (citing Tr. 84). Finally, in response to challenges to the Agency’s evidence that Respondent made during the evidentiary hearing, including the speed at which his vessel was traveling at the time of the incident and the fact that West Indies Humpback Whales found in the Gulf of Maine have since been removed from the endangered species list, the Agency counters that Respondent’s actual speed is not relevant to liability and that at the time of this incident, all humpback whales were endangered and the law in effect at the time of the violation is what governs. *Id.* at 10, 12.

With regard to its alternative theory of liability, namely under the MMPA, the Agency asserts that it has established that Respondent violated the MMPA by “taking” a marine mammal, as that term is defined by the statute, when he operated his “vessel at high speeds through an area dense with whales and striking and wounding a whale.” *Id.* at 12-13. The Agency contends that Respondent has not rebutted its evidence establishing a violation under the MMPA and urges that I find liability for the proven violation. *Id.* at 13.

### **c. Analysis of Liability**

At the outset, I note that the uncontroverted evidence establishes that Respondent is a “person” as defined in the ESA and MMPA; that the alleged violation occurred within federal jurisdictional waters as defined in each statute; and that humpback whales, including the West Indies Humpback Whale, were listed as endangered under the ESA at the time of the alleged violation. The remaining element to the charged violation is whether Respondent engaged in a “take” of an endangered species under the ESA or, alternatively, whether Respondent engaged in a “take” of a marine mammal under the MMPA. The credible evidence presented supports a determination of liability under either theory.

To briefly summarize that which is more fully stated and cited above, the ESA prohibits the “take” of an endangered species, meaning that a person is prohibited from harming or wounding such species. Here, the term “harm” is further defined to include an act that injures fish or wildlife. The MMPA, in turn, prohibits the “take” of a marine mammal such as a whale, meaning that a person is prohibited from harassing a marine mammal or from engaging in the negligent or intentional operation of a vessel, or any other negligent or intentional act, such that it disturbs a marine mammal. For purposes of the MMPA, the term “harassment” means an act of pursuit, torment, or annoyance that has the potential to injure a marine mammal.

As pointed out by the Agency, Respondent has repeatedly acknowledged that on September 17, 2015, he struck a humpback whale with his vessel, the Knot Right. Respondent first conceded this point during his interview with Special Agent Nickerson a week after the incident, and he acknowledged his actions again during his sworn testimony at the evidentiary hearing. While at times during the hearing Respondent noted that no one directly saw his vessel come into physical contact with a humpback whale, he did not dispute that such contact occurred, at least to some degree.

In addition to Respondent’s concession, the evidence presented by the Agency is sufficiently substantial and compelling to establish that Respondent engaged in conduct constituting an unlawful “take” of an endangered species in violation of the ESA or, alternatively, the unlawful “take” of a marine mammal in violation of the MMPA. Consistent and convincing eyewitness testimony from three individuals aboard the Whale Watcher at the time of the incident, namely Mr. Belknap, Mr. Brink, and Ms. Kurkjian, established that Respondent, while operating the Knot Right, transited through the Stellwagen Bank National Marine Sanctuary at a high rate of speed, where a great many whales were present and feeding, and that he ultimately struck a humpback whale. These witnesses, one of whom is an experienced boat captain, characterized Respondent’s speed as excessive. In particular, Mr. Belknap and Mr. Brink estimated the Knot Right’s speed to be 25 to 30 knots, with Mr. Brink expressing certainty that the vessel was traveling at no less than 25 knots, notably exceeding the NOAA Guidelines and otherwise operating at an excessive speed given the whale activity in the area in which the Knot Right was transiting.

Special Agent Nickerson, while not present at the time of the incident, reviewed a video of Respondent’s activities and, relying on his extensive boating experience and training, concurred in the other witnesses’ characterization of Respondent’s vessel speed during the incident. Ms. Kurkjian noted her observation of a visible white wake of water generated by the Knot Right as it transited the area, Tr. 123, and Special Agent Nickerson credibly testified that such a wake is indicative of a vessel traveling at a high rate of speed, Tr. 32.

As compelling, and perhaps even more telling, were the accounts of spontaneous statements made and behaviors exhibited during the incident, which lend credence to the witnesses’ characterization of Respondent’s speed while operating the Knot Right. In particular, I note the spontaneous statements of Mr. Brink during his narrative



aboard the Whale Watcher, in which he commented upon Respondent's speed as someone "bombing through" the area "like he owns the place," and questioned why the Coast Guard was not present, presumably to address the excessive speed. AX 12. Further, he explained to the Whale Watcher passengers that this type of excessive speed accounted for why 30 percent of the known humpback whale population in the area sustained scars from vessel propellers, and was a "menace to our whales." *Id.* Indeed, Mr. Brink's remarks were a foreshadowing of the strike that followed.

Equally notable was Ms. Kurkjian's account of the behavior exhibited by the passengers aboard the Whale Watcher and other vessels in the immediate vicinity in response to the Knot Right's speed. Specifically, Ms. Kurkjian explained that these individuals became concerned over the Knot Right's apparent high rate of speed and tried to get the attention of the Knot Right by waving their hands and shouting, in some instances over a microphone, to alert the Knot Right to slow down or stop. Such efforts were to no avail. All of the Agency's witnesses who observed the incident were in agreement that the Knot Right did not decrease its speed prior to striking a whale, the impacts of which caused the vessel to stop dead in the water.

Respondent and his witness, Mr. Anzivino, had a different characterization of the Knot Right's speed. Aside from their characterization being at odds with the Agency witnesses, they also, at times, appeared to be inconsistent with one another based on Respondent's changing representations of the Knot Right's speed. For example, Mr. Anzivino, who testified before Respondent, described the Knot Right's speed at the time of the whale strike as merely "putting around," a characterization to which Respondent apparently agreed when he later asked Mr. Anzivino to confirm that the Knot Right was "idling" when the strike occurred, to which Mr. Anzivino responded that the vessel was "just putting around." However, during portions of Respondent's own testimony, and consistent with his representations during his earlier interview with Special Agent Nickerson, he represented that he was traveling 10 to 15 knots at the time of the whale strike, noting that the Knot Right attains a planing position at 12 knots. This rate of speed, at or near planing position, appears to be inconsistent with Mr. Anzivino's account that the Knot Right was merely "putting around" or "idling" at the time of the strike. Later in Respondent's testimony, however, he suggested that he was not traveling at 10-15 knots at the time of the whale strike, but that he had come off-plane and reduced his speed to 5 to 6 knots and was "putting" or trawling when the strike occurred. Tr. 244-45.

Other evidence in the record further supports a finding that the Knot Right was traveling at a speed greater than mere "idling" at the time of the strike. For example, Mr. Brink's observations of the Knot Right immediately after the whale strike reveal that the Knot Right was stopped and "floundering in its own wake . . . bobbing up and down." Tr. 104. I may reasonably conclude that a wake had to be generated for the vessel to be floundering within it, and it is a stretch of the imagination to suggest that a vessel "putting along" at an "idling" speed could generate a wake sufficient enough to create such a situation. In addition, the Knot Right sustained significant damage from the

whale strike in the form of a cracked cowling to one of the three outboard engines,<sup>18</sup> repeated stalling of that engine immediately following the incident, and damage to the vessel's steering. It appears more likely, therefore, that the Knot Right was traveling at a speed greater than mere "idling" to sustain such extensive damage from the impacts of a whale strike. Moreover, video evidence of the Knot Right transiting the area just prior to the whale strike reveals that, contrary to Respondent's claims, the Knot Right did not reduce speed prior to exiting the frame of the video but, rather, maintained a consistent planing speed throughout the video, generating a visible wake, even to the untrained eye. According to the credible testimony of Special Agent Nickerson, such a wake is indicative of a high rate of speed, undoubtedly faster than mere "idling."

Following the strike, experts in whale identification and vessel collisions confirmed that the humpback whale struck by the Knot Right on September 17, 2015, was a whale known as Epee and that Epee sustained injuries as a result of that incident. Instrumental in reaching these conclusions was photographic evidence of Epee that was already contained in the WDC database prior to the incident, as well as photographic evidence taken by Mr. Belknap shortly after he observed the Knot Right abruptly stop in the water and a whale surface nearby, which depict a whale with visibly fresh wounds. In particular, Ms. Asmutis-Silvia, who was qualified as an expert in whale identification, credibly and convincingly testified that the whale in question was Epee based on a comparison of the two sets of photographs. Ms. Hill, whose expertise is in vessel collisions with humpback whales, then credibly and convincingly opined that Epee was indeed struck by a vessel on September 17, 2015. She explained in detail the rationale for her opinion, highlighting that the bright white appearance of some of Epee's injuries signified fresh wounds for which healing had yet to take place. She identified the presence of fresh blood that was visible on Epee's dorsal fin, noting parts of the skin that were "ripped up" showing that the injury was "extremely fresh because the skin [was] not [yet] even sloughed off" the area. Tr. 211-12; AX 3, pg. 62. Ms. Hill also discussed at length the visibly very fresh (that is, still bleeding), evenly-spaced, and parallel incision marks found on Epee that "fit the definition of a propeller wound . . . to a T." Tr. 205-12; AX 3, pgs. 28-33, 62, 64. Additionally, Ms. Hill explained that such a propeller wound as was found on Epee had to have been inflicted by a vessel's propeller that was in gear and rotating, not from a vessel that was not in gear or stopped in the water. Tr. 213, 218-19. While other vessels were in the vicinity at the time of this incident, they were either stopped or moving very slowly and, thus, could not reasonably be deemed to have caused Epee's injuries. Notably, Epee did not possess such injuries two days earlier.

At the hearing, Respondent did not offer any evidence to rebut the compelling evidence presented by the Agency, including the expert opinions provided by Ms. Asmutis-Silvia and Ms. Hill, that collectively established the identity of Epee and the injuries sustained to him on September 17, 2015. Further, as asserted by the Agency, the record does not otherwise support any explanation for those injuries other than Epee being struck by the Knot Right as Respondent operated the vessel in the area where

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<sup>18</sup> Respondent testified that the impact of the whale strike caused the port outboard motor to "kick[] up," which, in turn, caused the cowl to hit the back of the transom and break. Tr. 242. Special Agent Nickerson testified that a significant amount of force would be required to dislodge the motor as described because each of the Knot Right's motors weighs approximately 600 pounds. Tr. 40.

Epee and other humpback whales were feeding. Thus, the totality of the credible evidence presented at the hearing convincingly establishes that Respondent struck and injured a humpback whale known as Epee with his vessel, the Knot Right, on September 17, 2015. Such an infliction of injuries squarely falls within the meaning of the term “take,” which the ESA defines as an act that harms or wounds an endangered species. Accordingly, I conclude that Respondent engaged in the “take” of an endangered species on September 17, 2015, in violation of the Endangered Species Act at 16 U.S.C. § 1538(a)(1)(B).

As to the Agency’s alternate theory of liability under the MMPA, while I need not consider it given my conclusions above, it is worth discussing, albeit briefly, that the evidence also supports a determination that Respondent engaged in the unlawful “take” of a marine mammal when, by and through his actions while operating the Knot Right, he caused injury to a marine mammal. While the relevant sections of the MMPA and implementing regulations contemplate acts that pose the “potential to injure” a marine mammal, *see* 16 U.S.C. § 1362(18); 50 C.F.R. § 216.3, in the instant case the evidence is clear that Respondent’s actions went further than mere “potential.” His actions did, in fact, cause actual injury to a marine mammal.

Having determined that Respondent is liable for the charged violation, I next turn to the issue of civil penalty. Here, I must determine what amount, if any, is appropriate to assess as a monetary penalty for Respondent’s violation of federal law.

## **V. CIVIL PENALTY**

### **a. Principles of Law and Policy Relevant to Civil Penalty**

The ESA provides that any person who knowingly violates any provision of the Act may be assessed a civil penalty not to exceed \$25,000 for each such violation. *See* 16 U.S.C. § 1540(a)(1). The MMPA provides that any person who violates any provision of the Act or implementing regulation may be assessed a civil penalty not to exceed \$10,000 for each such violation. *See* 16 U.S.C. § 1375(a)(1). However, consistent with the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990), as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996), the maximum civil penalty available under the ESA has been increased to \$52,596 per knowing violation to adjust for inflation, and the maximum civil penalty available under the MMPA has been increased to \$29,239 per violation to adjust for inflation. 15 C.F.R. § 6.3 (March 1, 2019).

While neither the ESA nor the MMPA set out specific factors to be considered in assessing a civil monetary penalty, the procedural regulations that apply in this case provide as follows:

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). With regard to considering a respondent's ability to pay, the procedural regulations provide that "if a respondent asserts that a civil penalty should be reduced because of an inability to pay, the respondent has the burden of proving such inability by providing verifiable, complete, and accurate financial information to NOAA." 15 C.F.R. § 904.108(c). If such a claim is made after a request for hearing, the procedural regulations require that such "verifiable, complete, and accurate financial information must be submitted to Agency counsel at least 30 days in advance of the hearing." 15 C.F.R. § 904.108(e).

Additionally, I took official notice<sup>19</sup> of the Agency's guidance document titled "Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions," effective July 1, 2014 ("Penalty Policy"), which is publicly available on the Internet.<sup>20</sup> Under the Penalty Policy, penalties are based on:

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

Penalty Policy at 4. As mentioned above, the "initial base penalty" amount consists of two factors, collectively constituting the seriousness of the violation: "(1) the gravity of the prohibited act that was committed; and (2) the alleged violator's degree of culpability," which assesses the mental culpability in committing the violation. *Id.* The "gravity" factor (also referred to as "gravity of the violation" or "gravity-of-offense level") is comprised of four or six (depending upon the particular statute at issue) different offense levels, reflective of a continuum of increasing gravity, taking into consideration the nature, circumstances, and extent of a violation.<sup>21</sup> *Id.* at 6-8. Thus, offense level I represents the least significant offense level, while offense level VI represents the most significant offense level. *Id.* at 8.

The "culpability" factor (also referred to as "degree of culpability") is comprised of four levels of increasing mental culpability: unintentional activity (such as an act that is inadvertent, unplanned, and the result of accident or mistake); negligence (such as carelessness or a lack of diligence); recklessness (such as a conscious disregard of

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<sup>19</sup> See Order on the Agency's Motion to Amend Notice of Violation and Assessment and Preliminary Position on Issues and Procedures and Motion to Take Official Notice, dated April 26, 2018.

<sup>20</sup> The Penalty Policy can be found at the following address:

[https://www.gc.noaa.gov/documents/Penalty%20Policy\\_FINAL\\_07012014\\_combo.pdf](https://www.gc.noaa.gov/documents/Penalty%20Policy_FINAL_07012014_combo.pdf).

<sup>21</sup> Where a violation and corresponding offense level are not listed in the Penalty Policy, the offense level is determined by using the offense level of an analogous violation or by independently determining the offense level after consideration of the factors outlined in the Penalty Policy. Penalty Policy at 7-8.

substantial risk of violating conservation measures); or an intentional act (such as a violation that is committed deliberately, voluntarily, or willfully). Penalty Policy at 8-9.

These factors are depicted in a penalty matrix, with the “gravity” factor represented by the vertical axis of the matrix and the “culpability” factor represented by the horizontal axis of the matrix. Penalty Policy at 6. The intersection of the levels used in each factor then identifies a penalty range on the matrix. *Id.* at 7. The midpoint of this penalty range determines the “initial base penalty” amount. *Id.* Once an “initial base penalty” amount is determined, “adjustment factors” are considered in order to increase or decrease the initial base penalty amount from the midpoint of the penalty range, or to move to an altogether different penalty range, where appropriate. *Id.* at 9-10. The “adjustment factors” consist of an alleged violator’s history of prior offenses and “other matters as justice may require,” which include consideration of the good or bad faith activities of the alleged violator after a violation occurs, as well as “other considerations.” *Id.* at 9, 12. After the application of any adjustment factors, the resulting figure constitutes the “base penalty.” *Id.* at 9. Next, the proceeds gained from the unlawful activity and any additional economic benefit of noncompliance to an alleged violator are considered and factored into the penalty calculation (such as the gross value of fish, fish product, or other product illegally caught, or revenues received; delayed costs; and avoided costs). *Id.* at 13-14. Finally, the Agency “will consider at the appropriate stage the ability of the alleged violator to pay a penalty” when requested information that is “verifiable, accurate, and complete” has been provided. *Id.* at 14-15.

## **b. Arguments Regarding Penalty**

In its Initial Post-Hearing Brief, the Agency urges that I assess a penalty for Respondent’s violative conduct consistent with its proposed assessment of \$14,750. Ag. In. Br. at 13. Noting that the ESA requires a violation to be committed “knowingly” in order for a penalty exceeding \$500 to be assessed, *id.* at 14 (citing 16 U.S.C. § 1540(a)(1)), the Agency contends that Respondent “knowingly” violated the ESA because he “knowingly engaged in the actions which resulted in the law being broken,” *id.* at 14 (quoting Wilson, 2013 WL 8340703, at \*6 (NOAA June 13, 2013)). The Agency argues that Respondent “intentionally operated his vessel at high speeds in an area where there were 40 to 50 whales present,” which triggers higher penalties under the ESA. *Id.* at 15 (citing AX 1, pg. 16; AX 12). Recognizing that Respondent disputes the speed at which he was operating the Knot Right at the time of the strike, the Agency contends that Respondent’s representations on this point have been “nothing but inconsistent.” *Id.* (citing Tr. 19, 41, 237, 245, 263; AX 1, pg. 4). According to the Agency, Respondent’s representations are also at odds with the testimony of three eyewitnesses to the incident, who have consistently described Respondent as traveling between 25 and 35 knots at the time of the strike and “who have no incentive to misreport Respondent’s speed,” and video evidence showing the Knot Right traveling at high speeds in an area where numerous whales were present. *Id.* (citing Tr. 70, 103, 256; AX 1, pg. 16; AX 12). The Agency further argues that Respondent acknowledges that he “broke” the NOAA Guidelines when transiting the area. *Id.* Consequently, the Agency asserts, Respondent “knew or should have known there was a foreseeable



danger that he could strike a whale when traveling at high speeds through a densely populated area,” which justifies a significant penalty. *Id.*

Additionally, the Agency maintains that Respondent’s violative conduct was serious based on a number of considerations, including the significant ecological role of humpback whales and the significant impact that harm to one whale can have on the ecology of an area, as described by Ms. Asmutis-Silvia. Ag. In. Br. at 16 (citing Tr. 148-50). Further, the Agency argues, the effects of the violation are unknown because, as explained by Ms. Hill, “small lacerations may become infected and turn fatal,” meaning that the gravity of harm in this matter is uncertain. *Id.* at 16-17 (citing Tr. 215). The Agency also notes that, among other information disseminated to boaters, the NOAA Guidelines – namely, those that Respondent failed to follow – were established to reduce the threat of collisions between whales and vessels and to “preserve our national marine resources.” *Id.* at 17 (quoting Tr. 47-48). The Agency urges, “Respondent’s conduct is precisely what these programs seek to prevent. Therefore, the civil penalty assessed should be adequate to deter Respondent, specifically, and other recreational tuna fishers and boaters generally from not adhering to the operating guidelines.” *Id.* at 17. Finally, the Agency argues that Respondent’s actions — “[speeding] through an area with an abundance of whales and with people shouting for him to slow down” — were reckless and “evinced a conscious disregard of the risk that his vessel would strike and harm a whale that was protected by law.” *Id.* Accordingly, the Agency urges that I assess a civil penalty of \$14,750 under the ESA. *Id.* at 18.

### **c. Analysis and Discussion of Civil Penalty and Assessment**

There is no presumption in favor of the penalty proposed by the Agency; thus, as the Administrative Law Judge presiding in this matter, I am not bound by it and need not “state good reasons” for departing from it. *Nguyen*, 2012 WL 1497024, at \*8 (NOAA Jan. 18, 2002); see 15 C.F.R. § 904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631 (June 23, 2010). Rather, I must independently determine an appropriate penalty, “taking into account all of the factors required by applicable law.” 15 C.F.R. § 904.204(m); see 15 C.F.R. § 904.108 (enumerating factors that may be considered in assessing a penalty). To that end, I have based my analysis regarding penalty on the regulatory factors I must consider, while also giving some consideration to the Agency’s Penalty Policy.

At the outset, I note that as to the factor concerning Respondent’s ability to pay any assessed penalty, my Order on Agency’s Motions in Limine, dated August 29, 2018, provided a very detailed account for my ruling, in which I granted the Agency’s motion and ordered that any information regarding Respondent’s ability to pay a penalty would be excluded from consideration. The Order further concluded that Respondent is presumed to have the ability to pay any assessed penalty. Nevertheless, Respondent renewed the issue at hearing. Declining to revisit the issue, I referred Respondent to the very detailed Order that I had issued approximately one week earlier and explained that I would not depart from my earlier ruling. Tr. 260-61.

As another preliminary matter, I also note that the term “knowingly,” as used in the ESA regarding the imposition of a civil penalty, is not defined within the statute. See 16 U.S.C. § 1532. However, various tribunals have construed it as requiring only the commission of voluntary acts that cause or result in the violation. See, e.g., *Huber*, 1994 WL 1246350, at \*3 (NOAA Apr. 12, 1994) (citing *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 588 (1971) (holding that “knowingly” relates to knowledge of the facts rather than the law); *United States v. Jonas Bros. of Seattle, Inc.*, 368 F. Supp. 783 (D. Alaska 1974) (holding that only a showing that the acts involved were voluntary and intentional need be made); *Newell*, 2 O.R.W. 111 (NOAA 1979), *aff’d*, 2 O.R.W. 368 (NOAA App. 1981)). In this case, the evidence reflects that Respondent voluntarily and intentionally operated the Knot Right in an area where he knew whales were present and then struck a whale. The commission of that act resulted in the charged violation. Thus, Respondent can be found to have “knowingly” violated the ESA, and a civil penalty may be assessed pursuant to 16 U.S.C. § 1540(a)(1).

*i. Nature, Circumstances, Extent, and Gravity of the Alleged Violation*

Urging that the nature, extent, and gravity of Respondent’s violation was serious and that a civil penalty commensurate with the seriousness of the violation be imposed, the Agency points to certain testimony in the record as establishing the importance of humpback whales and the risks posed to that resource by vessels traveling at high rates of speed in areas where whales are present. Ag. In. Br. at 16-17. In particular, the Agency refers to the testimony of Ms. Asmutis-Silvia, who “explained the significant ecological role that humpback whales play in ‘provid[ing] nutrients to a surface layer of phytoplankton,’ which ‘serve as the base of the food chain.’” *Id.* at 16 (citing Tr. 148). Indeed, Ms. Asmutis-Silvia related that harm to whale populations can significantly impact the ecology of the area. Tr. 149. She also spoke of the unique characteristics of the humpback whale population at issue in this case (i.e., the West Indies breeding stock of humpback whales that travel in the Gulf of Maine, of which fewer than 1,000 are consistently present) and their significance to the general humpback whale population. Tr. 149-51, 152-55. Specifically, she explained:

[T]heir feeding techniques are culturally transmitted, which means that individual whales learn from each other. So, because of prey changes that are happening, and particularly weather changing climate now . . . an individual whale will figure out a new way to exploit a prey resource. Other whales will learn from that. And so one of the things that we’re looking at now are who are those innovators in the population who are developing these new techniques and passing them on? Because they’re learning feeding techniques not from their mothers, but from each other. And so, as new prey are coming into the area, they’re actually learning to exploit new prey in more efficient ways. And so, the individuals who are figuring that out, we’re referring to them as the innovators within the population . . . [W]e’re looking at . . . the trendsetters . . . [who] pass that along. So, kick feeding, for instance, is an example of that, which was discovered, and the only population in the world that does it, are these humpbacks here off our coast. In 1980, no whales kick fed, and by 1990 half of them are. And it’s

not something they learned from their mothers. It's something that [an individual] figured out. So, the significance of individuals in the population is tremendous when you're looking at these humpbacks because [an individual] has to figure out how to do something in a better way, which enables the population to thrive.

Tr. 149-51.

The Agency, relying on the testimony offered by Ms. Hill, further argues that the gravity of the harm in this case, like that of other vessel collisions, is unknown or difficult to predict. *See* Ag. In. Br. at 16-17 (citing Tr. 215). As Ms. Hill explained, "there are instances in the past where we have had propeller-site injuries that we thought were healed, that later killed the animal" due to an infection or other related cause. Tr. 216-17.

The Agency maintains that because of the significant threat to humpback whales posed by vessel collisions, it worked together with other organizations such as the WDC to establish the NOAA Guidelines as a way of educating boaters on the parameters in which it is safe to approach and observe whales. Ag. In. Br. at 17 (citing Tr. 47-48). These guidelines aim to "reduce vessel strikes and mortalities of humpback whales" by advising boaters to "reduc[e] speed, post[] a lookout, and avoid[] head-on approaches." *Id.* at 17 (citing Tr. 48). As noted by the Agency, the WDC also "developed a program, entitled See a Spout, Watch Out, which provides safe boating guidelines through 'easy-to-remember catch phrases' to 'encourage people' to 'operate safely.'" *Id.* (citing Tr. 178-180; AX 9).

Respondent did not offer anything at the hearing to refute the foregoing evidence or avail himself of the opportunity to file a post-hearing brief in this matter. He asserted only that he was unaware of the NOAA Guidelines or the WDC's educational efforts that it has memorialized on placards and other materials and made available at various marinas and fuel docks from Maine through Rhode Island. *See* Tr. 183-85, 243. As discussed above, the NOAA Guidelines advise vessel operators to reduce their speed in the presence of a whale. Specifically, if a vessel is one-half mile or less from a whale, the vessel's speed should not exceed seven knots. In spite of Respondent's assertions in this matter, he nevertheless agreed, in response to questioning by Agency counsel at the hearing, that it would be appropriate for a vessel's speed not to exceed five or six knots, or otherwise be traveling slowly, if the vessel was, for example, in an area where people were swimming. Tr. 250-51. While the subject of the activity – human beings versus humpback whales – is clearly different, the underlying point is the same, namely that a vessel should be traveling slowly in order to safely operate around and avoid a collision with obstructions in the water, whether the obstruction is an endangered species or a human being. By his own admission, Respondent did not do so. He acknowledged that many whales were present, describing the scene as a "thick" day in the context of the numerous whales that were present, yet he operated his vessel, the Knot Right, well in excess of a safe and appropriate speed in the vicinity of the whales. The high speed at which he was operating the Knot Right is evident from the video taken from the Whale Watcher, which, according to Mr. Brink and Mr. Belknap, was one quarter mile from the

Knot Right at the time. Multiple whales are visible in between the Knot Right and the Whale Watcher in the video. Thus, Respondent was operating the Knot Right at a high speed less than one quarter mile from those animals. Not surprisingly, and as a direct result of Respondent's actions, an endangered humpback whale, Epee, was struck by the Knot Right and sustained visible and significant injuries, the outcome of which remains unknown.

The evidence presented leads me to agree with the Agency regarding the seriousness of Respondent's violation and its potential impacts to the subject humpback whale population. Additionally, I note that Respondent appeared to have little or no regard for the seriousness of his actions. Specifically, Respondent repeatedly testified that he believed he had done nothing wrong and argued that the NOAA Guidelines are not law, presumably to suggest that one need not abide by them. *See* Tr. 46, 233-36, 240-41. While I recognize and agree that such guidelines do not carry the weight of law, I disagree with Respondent's implication that no heed need be given to guidelines generally or the NOAA Guidelines specifically. As the evidence has illustrated, the NOAA Guidelines were developed to aid in the prevention of the very type of behavior that Respondent displayed and to equip recreational and fishing vessels with the tools necessary to operate safely around whales in an effort to avoid any potential violations of law. In short, these guidelines, as the title suggests, provide instruction as to how recreational and fishing vessels should operate around whales. A prudent vessel operator would be wise to abide by such instruction.

Also notable was Respondent's characterization of a vessel and whale encountering each other as a "challenge" that the vessel would not "win." *See* Tr. 234. Likening such an encounter to a losing battle for the vessel is telling and suggests that Respondent's focus rests with maintaining the integrity of his vessel, without regard for other forms of damage, like here, where an endangered species was struck and injured, impacting the welfare of the individual animal and potentially impacting the species.

Finally, as an Administrative Law Judge, I am responsible for observing the candor (or lack thereof) and demeanor of witnesses, including parties. While not instrumental in this decision, I would be remiss in failing to note Respondent's apparent disinterest in the testimony of Ms. Asmutis-Silvia as that testimony related to the significant ecological role of humpback whales generally, the unique characteristics of the West Indies Humpback Whale population that travels in the Gulf of Maine specifically, and the impact that the "innovators" of that species has on the overall whale population, including the ability to adapt to ecological changes and survive. During this testimony, which was not only relevant with regard to penalty considerations but also educational, Respondent's body language conveyed indifference, or perhaps boredom, when I observed him gazing into the distance with his head resting on his hand.

In my penalty assessment, I have considered the credible and substantial evidence presented concerning the nature, circumstances, extent, and gravity of Respondent's violative conduct and the Agency's arguments that the civil penalty imposed must reflect the seriousness of Respondent's actions. My review of the evidence presented reveals that Respondent has shown little to no regard for the

seriousness of his conduct and, in fact, has taken the position that he committed no wrongdoing by his actions. Accordingly, my assessment of a penalty has been adjusted to appropriately account for the seriousness of the committed violation and Respondent's lack of acknowledgment of the seriousness of his violative conduct.

*ii. Respondents' culpability and history of violations*

As to Respondent's level of culpability, the Agency argues that Respondent "was reckless when he operated his vessel in a manner that had no regard for the animals in his path." Ag. In. Br. at 17. Specifically, the Agency contends that Respondent "sped through an area with an abundance of whales and with people shouting for him to slow down," thus "evin[ing] a conscious disregard of the risk that his vessel would strike and harm a whale that was protected by law." *Id.* at 17-18 (citing *Ptak*, 1989 WL 265319, at \*534 (NOAA July 28, 1989)). In support, the Agency highlights that Respondent routinely fished in areas where whales were present and acknowledged the abundance of whales present on the day of violation, describing the environment to Special Agent Nickerson as a "minefield" of boats and whales through which to navigate,<sup>22</sup> but that he failed to "familiarize himself or adhere to the speed guidelines when whales are present." *Id.* at 18.

The Agency's arguments are persuasive, as is the evidence presented at hearing upon which those arguments are based, to establish the extent of Respondent's culpability in his vessel striking a humpback whale. The Agency argues that Respondent's conduct was "reckless." The Penalty Policy defines "recklessness" as follows:

a conscious disregard of a substantial risk of violating conservation measures that involves a gross deviation from the standard of conduct a law-abiding person would observe in a similar situation. Recklessness occurs where someone does not intend a certain result, but nonetheless foresees the possibility that his or her actions will have that result and consciously takes that risk. Recklessness may also occur where someone does not care about the consequences of his or her actions. Recklessness involves a lesser degree of fault than intentional wrongdoing but a greater degree of fault than negligence.

Penalty Policy at pg. 9.

Worthy of further discussion relative to this factor is the speed at which Respondent operated the Knot Right when he transited an area filled with 30 to 50 humpback whales. As the Agency has noted, Respondent has offered internally inconsistent testimony regarding the speed at which he was traveling at the time of the whale strike. For example, Respondent testified that he was traveling at 10 to 15 knots in the Knot Right, at which speed the vessel would be traveling on plane, at the time of the whale strike, which was consistent with his statement to Special Agent Nickerson

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<sup>22</sup> See AX 1, pg. 4.



one week after the incident. Tr. 232, 235, 247; AX 1, pg. 4. However, at other points in the hearing, Respondent also testified that he had reduced the Knot Right's speed to come off plane, and was traveling, or "trawling," at only five to six knots when the whale, Epee, rear-ended his vessel. Tr. 232-33, 245. Respondent's witness, Mr. Anzivino, testified that the Knot Right was "putting along" when he heard the one of the three engines "fly[] up," "smash[]" the engine cover, and "slam[]" back down, at the time of the strike. Tr. 227-29. While the repeated characterization of "putting along" might be consistent with "trawling," it is not consistent with Respondent's earlier testimony and statement that he was traveling at 10-15 knots, and on-plane, at the time of the strike. Given such inconsistency, particularly when the inconsistencies arise for the first time at an evidentiary hearing years after the incident, I find Respondent's representations of merely trawling at five to six knots when the whale allegedly rear-ended his vessel to be simply unworthy of belief and clearly self-serving.

In contrast, the Agency's witnesses, many of whom were disinterested witnesses to this particular enforcement action, provided consistent testimony that I found to be credible and to which I assigned great weight in my evaluation of this case. These witnesses, whose testimony was supported by other evidence in the case, described a very different picture with regard to the Knot Right's speed at the time of the incident. They agreed that the Knot Right transited an area filled with 30 to 50 humpback whales, visibly feeding and breaching the surface of the water, at a high rate of speed. Mr. Brink, a veteran boat captain, estimated the Knot Right's speed at the time of the incident to be 25 to 30 miles per hour, but at the very least no less than 25 knots. His spontaneous description of the Knot Right's speed ("bombing through here like he owns the place") during his narrative aboard the Whale Watcher, well before an enforcement action was initiated in this case, was very compelling and credible. Mr. Belknap, an intern with the WDC, similarly estimated the Knot Right's speed to be 25 to 35 knots and characterized the Knot Right as traveling at a high rate of speed through the area. He recounted, in what was apparent dread at the time, seeing that the Knot Right was going to intercept a path of whales and hoping that the whales would be submerged and out of range of a potential strike. His written statement prepared shortly after the incident was consistent with his testimony. Ms. Kurkjian, another intern at the WDC, offered testimony consistent with the other witnesses and recounted that the Knot Right was "zooming" past the Whale Watcher at such a high rate of speed that it created a trail of visible white wakes. Her written statement prepared shortly after the incident was consistent with her testimony. In that written statement, she described "gasping at the numerous close-calls" as the Knot Right sped through the whale-filled area. AX 1, pg. 10.

Contrary to Respondent's assertion that the Knot Right was off plane and trawling at the time of the strike, the above witnesses, each of whom personally observed the incident, consistently recounted that the Knot Right was traveling at a high rate of speed when the strike occurred and that the Knot Right suddenly stopped dead in the water following the audible sound caused by the strike. These witnesses also agreed that the Knot Right did not decrease its speed prior to the strike.

While other vessels were in the area at the time of the incident, these vessels were either stationary or moving slowly, consistent with the NOAA Guidelines. The high rate of speed at which the Knot Right was traveling through the whale-filled area was apparently so egregious that it captured the attention of passengers aboard the other nearby vessels, such that passengers aboard those vessels, along with passengers aboard the Whale Watcher, shouted, in some instances with microphones, toward the Knot Right and waved their hands in an unsuccessful attempt to alert Respondent to slow down. Even though the Knot Right was only about one quarter of a mile away from the Whale Watcher and presumably in close proximity to the other vessels in the immediate area, according to Respondent, he heard none of this activity, which would seem to reinforce that the Knot Right was not “trawling” as claimed by Respondent because such a slow speed would likely generate far less noise from the Knot Right’s three outboard engines than when it is underway and traveling at or near on plane speed.

In addition, video evidence of a vessel, later determined to be the Knot Right, shows it transiting an area with multiple whales present at a sustained speed and one that was sufficient enough to generate a visibly long white wake. AX 12. This video evidence captures Mr. Brink’s spontaneous narrative regarding his observations of the Knot Right’s speed as it transited the area, Tr. 99-101, and it was utilized by both parties and many witnesses throughout the hearing. Contrary to Respondent’s assertion at hearing that the video depicts a vessel decreasing its speed, evidenced by the bow of the vessel rising up, even an untrained eye can see that neither the vessel’s speed nor the position of the vessel’s bow appeared to change throughout the length of the video. Mr. Brink, who reviewed the video during his testimony, also disagreed with Respondent, characterizing the vessel’s speed throughout the video as traveling at 25 to 35 miles per hour, but no less than 25 knots. Moreover, Special Agent Nickerson, a trained and experienced boater in both a recreational and enforcement capacity, described the video footage as depicting a vessel traveling clearly in excess of 15 knots, leaving no doubt in anyone’s mind that the vessel was traveling at a high rate of speed.

The collective credible evidence demonstrates that Respondent operated the Knot Right at an excessive speed when he transited an area filled with 30 to 50 humpback whales, many of which were visibly feeding and breathing at the water’s surface. Respondent should have known or foreseen, particularly as the experienced boater he professes to be, Tr. 234, that, irrespective of the NOAA Guidelines, his operation of the Knot Right at high speed amidst such dense whale activity would put him at risk of a whale strike. Notably, unlike the Knot Right, the other vessels in the area were either stopped or moving very slowly. Nevertheless, Respondent chose to “bomb through” the area, thus demonstrating reckless behavior that made the risks associated with that behavior a reality when he struck and injured an endangered humpback whale, Epee.

Respondent’s argument at hearing — that the whale strike was simply an accident — is unconvincing. Respondent argued that he wasn’t doing anything “wrong” or “bad” but that “sometimes things happen” when you are in the ocean with fish and mammals. Tr. 240-42. On the contrary, Respondent’s reckless operation of the Knot Right led to an inevitable result, namely a vessel strike of an endangered humpback whale. The product of such conduct cannot reasonably be characterized as accidental, but more

appropriately could be described by the idiomatic expression as “an accident waiting to happen.” Thus, I have considered Respondent’s reckless level of culpability in my assessment of an appropriate monetary penalty to be imposed for his violative conduct.

The Agency represents that it is unaware of any prior violations assessed against Respondent. Ag. In. Br. at 18. Accordingly, this factor was not weighed in my assessment of a penalty in this case.

*iii. Other matters as justice may require*

The fact that Respondent has repeatedly expressed his belief that he did nothing wrong, compounded by an apparent unwillingness to accept the NOAA Guidelines as instructive because they are not “the law,” does not support his position or the mitigation of a monetary penalty. Respondent’s lack of recognition for the seriousness of his actions, and the potentially grave impacts from his actions to the already limited West Indies breeding stock of humpback whales, is concerning. Respondent’s dismissal of the consequences of his reckless operation of the Knot Right, consequences that included striking and injuring an endangered humpback whale, as nothing more than an accident that sometimes happens when you are in the ocean with mammals, is also concerning. Although Respondent testified that he has been a boater “for a long, long time,” that he is “cautious,” and that he takes “all the extra precautions with everything,” Tr. 234, his reckless conduct in this matter shows otherwise. For these reasons, I am inclined not to agree with the Agency’s proposed penalty for Respondent’s violation of the ESA. Rather, I conclude that the particular facts and circumstances of this case justify, if not demand, an upward departure to \$17,000 for Respondent’s violative conduct.<sup>23</sup>

## **VI. DECISION AND ORDER**

Respondent is liable for the charged violation in this case. A civil monetary penalty of \$17,000 is imposed for the charged violation. Once this Initial Decision becomes final under the provisions of 15 CFR § 904.271(d), Respondent 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. 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

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<sup>23</sup> See the Penalty Policy at page 26 for the Penalty Matrix for the ESA, which reflects \$17,000 as the matrix maximum for a violation consisting of a gravity offense level III (endangered species) and a reckless level of culpability.

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

Dated: July 24, 2019  
Washington, D.C.

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

*15 CFR 904.271-273*

§ 904.271 Initial decision.

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

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

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

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

(4) A statement of further right to appeal.

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

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



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

(1) Otherwise provided by statute or regulations;

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

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

#### § 904.272 Petition for reconsideration.

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

#### § 904.273 Administrative review of decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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