



**UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

IN THE MATTER OF:)
)
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Patrick Roy Harper,)
)
)
Respondent.)
)

Docket Number: NW1902615,
F/V Marian

INITIAL DECISION AND ORDER

Date: November 30, 2021

Before: Christine Donelian Coughlin, Administrative Law Judge,
U.S. Environmental Protection Agency¹

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

I. PROCEDURAL 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 October 16, 2020, to Patrick Roy Harper (“Respondent”). The NOVA charges Respondent, as owner and operator of the F/V Marian, with violating the National Marine Sanctuaries Act (“NMSA” or “Act”), specifically, 16 U.S.C. § 1436(1). In the NOVA’s single count, for which the Agency seeks a proposed penalty of \$5,000, Respondent is accused of the following:

On or about May 16, 2019, at the approximate coordinates in the Tomales Bay, California, of 38° 12.2929N 122° 55.6749W, and within the boundaries of the Greater Farallones National Marine Sanctuary (GFNMS), Patrick Roy Harper, owner and operator of the F/V Marian (Off. No. 250759) did violate the National Marine Sanctuaries Act; to wit, Respondent did destroy, cause the loss of, or injury[sic] a sanctuary resource within the GFNMS. Specifically, Respondent’s fishing vessel ran aground in a protected seagrass zone of the GFNMS, causing damage to approximately 82.66 m² of seagrass and seagrass habitat.

NOVA at 1.

In response to the NOVA, Respondent requested a hearing on the alleged violations, and the matter was forwarded to this Tribunal. It should be noted that on the NOVA and the transmittal memorandum from NOAA to this Tribunal, Respondent’s mailing address was incorrectly identified as 6696 Bloomfield Rd., Petaluma CA 94952. Nevertheless, the NOVA was served at Respondent’s correct address of 6690 Bloomfield Rd., Petaluma CA 94952, and the return address identified on Respondent’s hearing request was also 6690 Bloomfield Rd., Petaluma CA 94952 (emphasis added).

By order dated December 1, 2020, I was designated to preside over the litigation of this matter. On that same date, I issued an Order to Submit Preliminary Positions on Issues and Procedures (“PPIP”) to the parties, setting forth various prehearing filing deadlines and procedures, including filing deadlines for each party to submit its PPIP. Thereafter, the Agency timely filed its PPIP, which it later supplemented. Respondent did not submit a PPIP. On February 23, 2021, I issued an Order to Respondent to Show Cause for his failure to file a PPIP and why an order adverse to his interests should not be issued and provided a deadline by which Respondent was directed to respond. Respondent did not respond. On March 26, 2021, I issued an Order Barring Respondent from Submitting Certain Evidence at Hearing and I also issued a Hearing Order scheduling a hearing in this matter to commence by videoconference on June 23, 2021. On April 29, 2021, the Tribunal noted the address discrepancy for Respondent and noted that by this time some of NOAA’s filings and some of the Tribunal’s orders were sent to Respondent’s incorrect mailing address. To remedy this error, on April 29, 2021, an OALJ staff attorney sent, by certified mail, a letter to Respondent at his correct

address explaining the address discrepancy and enclosing copies of the Order Barring Respondent from Submitting Certain Evidence at Hearing and the Hearing Order. Although U.S. Postal Service tracking information revealed that this mailing was delivered to an individual at Respondent's correct mailing address, the Tribunal received no communication from Respondent.

At the Agency's request, the hearing was rescheduled. On May 12, 2021, an Order Rescheduling Hearing was issued that established a new videoconference hearing date of August 9, 2021. This Order Rescheduling Hearing was sent by certified mail to Respondent's correct mailing address and U.S. Postal Service tracking information revealed that this mailing was delivered to an individual at Respondent's correct mailing address. On June 30, 2021, I issued a Notice of Virtual Hearing Access containing links, phone numbers, and instructions for accessing the virtual hearing, as well as a Letter to Respondent informing him of the date, time, and phone number for a July 12, 2021 prehearing teleconference, and sent the Notice and Letter to Respondent to his correct mailing address by certified mail. According to U.S. Postal Service tracking information, notice of delivery was left at Respondent's address on July 3, 2021 when no authorized recipient was available to receive the mailings and by July 26, 2021 the mailings were deemed unclaimed by the U.S. Postal Service and returned to the sender. On July 9, 2021, I reissued the Notice of Virtual Hearing Access and Letter to Respondent to his correct mailing address by regular first-class mail. On July 15, 2021, a letter was sent to Respondent by certified mail and regular first-class mail inviting him to participate in a test session of the virtual hearing platform on August 2, 2021. According to U.S. Postal Service tracking information, notice of delivery was left at Respondent's address on July 19, 2021 when no authorized recipient was available to receive the mailing, and by July 26, 2021 the mailing was deemed unclaimed by the U.S. Postal Service and returned to the sender. Throughout this proceeding, this Tribunal has not received any filings or communications from Respondent.

On August 9, 2021, I conducted the evidentiary hearing in this matter by videoconference. At the hearing, the Agency presented Agency Exhibits ("AX") 1 through 8, which were admitted into evidence. The Agency also presented the testimony of four witnesses: Donald Tanner ("Agent Tanner"), a (now retired) Special Agent in the Office of Law Enforcement with the National Marine Fisheries Services ("NMFS") component of NOAA; Richard James ("Mr. James"), a private citizen and resident of Tomales Bay, CA; Sage Tezak, a Geographical Information System ("GIS") Analyst for the GFNMS; and Karen Reyna, the Resource Protection Coordinator for the GFNMS. Respondent did not appear for the hearing. Consequently, a default judgment was entered against Respondent in accordance with 15 C.F.R. § 904.211(a)(2). Nevertheless, testimony was taken from the available Agency witnesses for full development of the record, particularly with regard to penalty.

On September 3, 2021, the parties were provided with the official transcript of the evidentiary hearing² along with an Order Scheduling Post-Hearing Submissions that established various post-hearing filing deadlines. In accordance with these deadlines,

² Citations to the transcript of this evidentiary hearing are made in the following format: "Tr. [page]."

the Agency filed a Motion to Conform Hearing Transcript to Testimony, which I granted by Order dated October 4, 2021. The Agency timely filed its Post-Hearing Brief. Respondent did not file any submissions or otherwise communicate with this Tribunal.

II. STATEMENT OF THE ISSUES

With regard to liability, the NOVA charges Respondent with violating the NMSA, specifically, 16 U.S.C. § 1436(1), by destroying, causing the loss of, or injuring a sanctuary resource within the GFNMS. More particularly, Respondent is charged with allowing his fishing vessel to run aground in a protected seagrass zone of the GFNMS, causing damage to approximately 82.66 m² of seagrass and seagrass habitat.

With regard to civil penalty, the Agency seeks a penalty of \$5,000 for the single violation charged in the NOVA. In assessing a penalty, I may consider the nature, circumstances, extent, and gravity of the violation; Respondent's degree of culpability; any history of prior violations; Respondent's 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

Respondent is the owner and operator of the U.S. Coast Guard documented vessel, the F/V Marian. AX 1 at 2-3; AX 5. At the time of this incident, on or about May 16, 2019, Respondent was keeping the F/V Marian anchored in Tomales Bay, within the GFNMS and eelgrass habitat. Tr. 58; AX 1 at 1, 3; AX 2 at 1-2. He was aware of the presence of eelgrass habitat in Tomales Bay. Tr. 39-40; AX 1 at 3. Respondent utilized a dinghy when he needed to travel from the anchored vessel to land. AX 1 at 3.

A weather event that impacted the Tomales Bay region caused the F/V Marian to break anchor from its location and run aground in the shallows of Tomales Bay within the GFNMS on May 16, 2019. Tr. 117-19; AX 1 at 3; AX 2 at 1-2; AX 6. Respondent was not on the vessel at this time. Tr. 41; AX 1 at 3. Mr. James, a Tomales Bay resident, was in the vicinity and observed the F/V Marian aground in the bay, which he documented with photography. Tr. 52-53, 56-57, 60-61, 63; AX 3 at 1. Mr. James also observed two people in a dinghy to the side of the grounded F/V Marian who were making their way to shore. Tr. 62; AX 3 at 2. Mr. James subsequently encountered them once they reached the shore and learned that one of the two men was Respondent and the owner of the F/V Marian. Tr. 63-64; AX 3 at 2. Mr. James learned from his conversation with them that they were charging the vessel battery so they could move the boat from its grounded position. Tr. 65; AX 3 at 2. Mr. James agreed to give Respondent and the other man a ride to their nearby home, and during the drive Respondent remarked that the F/V Marian was listing so far that the oil sump was dry and that he planned to return later that evening with motor oil so that he could start the engine and move the vessel from the mud. Tr. 65-66; AX 3 at 2-3.

The next day, May 17, 2019, Mr. James returned to the area where the F/V Marian ran aground and he observed that the vessel had been moved to a location

across the bay to an area known as White Gulch Cove. Tr. 67, 69; AX 3 at 3-4. Mr. James, an avid photographer, documented his observations with his “flying camera,” commonly referred to as a “drone,” which has GPS functionality. Tr. 67-68, 70; AX 3 at 3-4. With his drone, he also documented “some images of the scars on the bay floor made by the [F/V Marian].” Tr. 70; AX 3 at 3-9. Mr. James positioned his drone camera to capture images from above and “looking straight down on the area where the Marian lay grounded.” Tr. 71. Mr. James retrieved the latitude and longitude coordinates from the drone’s GPS data, in addition to elevation information, and he entered those coordinates into Google Earth to create a waypoint for the location in which the F/V Marian grounded. Tr. 90-92. Mr. James compared this drone data with data he retrieved from a secondary piece of equipment, a hand-held GPS device, and found that the data mapping was “almost identical,” with a difference, at most, of roughly six feet between the two GPS readings. Tr. 76, 93. Mr. James returned to the area about three weeks later, on June 7, 2019, and took additional photographs of the F/V Marian grounding location to document that the scarring from the vessel was still visible. Tr. 94, AX 3 at 9-11. Thereafter, Mr. James shared his documented observations of the incident, including his photographic evidence, with state and local authorities as well as with NOAA. AX 3 at 3.

Utilizing Mr. James’s information, NOAA evaluated the incident and assessed the damage done to the GFNMS, namely to the sensitive eelgrass bed that was impacted by the grounding of the F/V Marian. AX 1 at 4; AX 2 at 1. NOAA staff, including GFNMS and GIS specialists, performed GIS-based analysis using sophisticated software, namely GIS Pro ESRI and Drone2Map, to create “an orthomosaic from the drone imagery captured by [Mr.] James” and to assess and measure the extent of habitat damage to the GFNMS from the F/V Marian grounding. Tr. 120-23, AX 1 at 4; AX 4 at 1, 4. GIS technology is utilized to “create, manage, store, [and] analyze spatial data and map spatial data.” Tr. 107. GIS Pro ESRI is a desktop software tool that allows the user to plot exact locations on a map and to overlay layers of data for purposes of analysis and measurement. Tr. 110, 111. Drone2Map is a compatible software that removes from photographs “any distortions that may have been from the camera tilt, the lens distortion, or the topographic relief for the lay of the land” and then creates a larger image from which measurements can be taken and quantitative analyses performed. Tr. 121-22. Based on NOAA’s analysis of the impacted area, it conservatively estimated that “over 976 square meters of habitat” and “an estimated 82 square meters of eelgrass” were damaged by the grounding of the F/V Marian. Tr. 124; AX 4 at 1-5.

The GFNMS is considered a “biological hot spot” due to its diversity of habitats and other unique characteristics. Tr. 135-37. It is one of the few sites on the West coast that is a UNESCO-designated wetland of international importance. Tr. 138-39; AX 4 at 6. Tomales Bay, and its eelgrass beds in particular, is ecologically significant because it serves as the “nursery ground of many important commercially-important species, as well as species that contribute to the bio-diversity of the entire ecosystem that’s offshore of the bay.” Tr. 139. NOAA considers eelgrass to be a “keystone species” that is of special interest in understanding, tracking, and protecting because it serves as “the basis of providing food, shelter, or some other ecosystem service, to all other species in the food chain.” Tr. 140-41; AX 4 at 7-8. It is “the basis of the food chain for a lot of

ecologically important species” and contributes to cleaner waters, thus contributing to the ecological and conservation value of the GFNMS. Tr. 142-43. Eelgrass is highly studied with regard to its scientific value in, for example, “potentially lessen[ing] the impacts of ocean acidification.” Tr. 144. Consequently, any removal or damage to eelgrass beds poses an adverse impact on the species in that area that relied upon those beds as well as an adverse impact through the entire food chain. Tr. 153. Damage to seagrasses can occur when, for example, a vessel is “swinging on anchor,” dragging an anchor during strong winds, or pulling up an anchor that was dropped in eelgrass, which “can ‘plow’ up seagrass beds, dislodg[e] their roots” and kill them. AX 4 at 8. Damage can also occur from a vessel’s hull or keel resting on an eelgrass bed, thus crushing and burrowing into the “rhizomes” and killing the plant. Tr. 151; AX 4 at 8

IV. LIABILITY

a. Principles of Law Regarding Liability

To prevail on its claim that Respondent violated the Act and implementing regulations, the Agency must prove facts constituting the violation by a preponderance of reliable, probative, substantial, and credible evidence. 5 U.S.C. § 556(d); *Vo*, Docket No. SE010091FM, 2001 WL 1085351, at *6 (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)). This standard requires the Agency to demonstrate that the facts it seeks to establish are more likely than not to be true. *Fernandez*, Docket No. NE970052FM/V, 1999 WL 1417462, at *3 (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. *Vo*, 2001 WL 1085351, at *6 (citing *Paris*, 4 O.R.W. 1058 (NOAA 1987)).

Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, codified as amended at 16 U.S.C. §§ 1431-1445c and commonly known as the National Marine Sanctuaries Act or “NMSA,” established the National Marine Sanctuary System for the designation and management of areas of the marine environment that “have special conservation, recreational, ecological, historical, cultural, archeological, scientific, educational, or esthetic qualities as national marine sanctuaries.” 16 U.S.C. § 1431. Under the NMSA, NOAA has been delegated authority to “designate any discrete area of the marine environment as a national marine sanctuary and promulgate regulations implementing the designation” 16 U.S.C. § 1433(a). More generally, NOAA “may issue such regulations as may be necessary to carry out [the NMSA].” 16 U.S.C. § 1439. NOAA has issued such regulations at 15 C.F.R. pt. 922.

Among other prohibitions, the NMSA makes it “unlawful for any person to—destroy, cause the loss of, or injure any sanctuary resources managed under law or regulations for that sanctuary.” 16 U.S.C. § 1436(1). “Sanctuary resource” is defined in the NMSA as “any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, educational, cultural, archeological, scientific, or aesthetic value of the sanctuary.” 16 U.S.C. 1432(8).

Similarly, regulations define “sanctuary resources” to mean “any living or non-living resource of a National Marine Sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the Sanctuary, including, but not limited to, the substratum of the area of the Sanctuary, other *submerged features and the surrounding seabed*, carbonate rock, corals and other bottom formations, coralline algae and other *marine plants* and algae, marine invertebrates, brine-seep biota, phytoplankton, zooplankton, fish, seabirds, sea turtles and other marine reptiles, marine mammals and historical resources.” 15 C.F.R. § 922.3 (emphasis added).

“*Injure* means to change adversely, either in the short or long term, a chemical, biological or physical attribute of, or the viability of. This includes, but is not limited to, to cause the loss of or destroy.” 15 C.F.R. § 922.3. “*Seagrass* means any species of marine angiosperms (flowering plants) that inhabit portions of the submerged lands in the Sanctuary. Those species include, but are not limited to: *Zostera asiatica* and *Zostera marina*.”³ 15 C.F.R. § 922.81.

“Any person subject to the jurisdiction of the United States who violates [the NMSA] or any regulation or permit issued under [the NMSA] shall be liable to the United States for a civil penalty of not more than \$100,000⁴ for each such violation, to be assessed by the Secretary. Each day of a continuing violation shall constitute a separate violation.” 16 U.S.C. § 1437(d)(1)

NOAA has designated the GFNMS under the NMSA and codified this designation at 15 C.F.R. pt. 922 subpt. H. The GFNMS “encompasses an area of approximately 2,488 square nautical miles (3,295 square miles) of coastal and ocean waters, and submerged lands thereunder, surrounding the Farallon Islands and Noonday Rock along the northern coast of California,” “west of northern San Mateo, San Francisco, Marin and southern Sonoma Counties” and including Tomales Bay. 15 C.F.R. 922.80(a); Expansion of Gulf of the Farallones and Cordell Bank National Marine Sanctuaries, and Regulatory Changes, 80 Fed. Reg. 13078, 13078, 13081 (March 12, 2015) (Final Rule).

The GFNMS was first designated as a 1,282-square-mile national marine sanctuary in 1981 to “protect and preserve a unique and fragile ecological community, including the largest seabird colony in the contiguous United States and diverse and abundant marine mammals.” 80 Fed. Reg. at 13078. “The area supports a rich marine food web made up of many species of algae, invertebrates, fish, birds, and marine mammals. Some species are transitory, travelling hundreds, thousands or tens of thousands of miles to the region, such as endangered blue whales, albatross,

³ *Zostera marina* is commonly referred to as eelgrass. See AX4 at 7.

⁴ Since the statute’s enactment, this amount has been increased to \$183,629 to account for inflation. See 16 U.S.C. § 1437(d)(1); The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410 (as amended by the Debt Collection and Improvement Act of 1996, Pub. L. 104-134); 15 C.F.R. § 6.4(f)(15). See also Civil Monetary Penalty Adjustments for Inflation, 86 Fed. Reg. 1764 (Jan. 11, 2021) (Final Rule).

shearwaters, white and salmon sharks, while others live year round in the sanctuaries, such as Dungeness crab, sponges, other benthic invertebrates, salmon, many species of rockfish and flatfish, and harbor seals and harbor porpoises.” 80 Fed. Reg. at 13079.

In 2015, NOAA doubled the size of the GFNMS “to add national marine sanctuary protections to the globally significant coastal upwelling center originating off of Point Arena, which is the source of nutrient-rich upwelled waters that flow into GFNMS . . . via wind-driven currents” and to “conserve[] and protect[] critical resources by preventing or reducing human-caused impacts such as marine pollution, and wildlife and seabed disturbance.” 80 Fed. Reg. at 13079.

“The MPRSA . . . imposes a strict liability standard.” *Mattson*, 4 O.R.W. 202, 212 (NOAA 1985); *Midgett*, 7 O.R.W. 148, 151-52 (NOAA 1993) (MPRSA is a strict liability statute). The Act does not require intent or any level of culpability to be shown to find a violation. *Armstrong*, 7 O.R.W. 274, 278 (NOAA 1993).

b. Arguments Regarding Liability and Analysis

In the Agency’s Post-Hearing Brief (“Ag. Br.”), it notes that Respondent failed to appear for the hearing and that a default judgment was entered pursuant to 15 C.F.R. § 904.211(a)(2), thereby finding the facts as alleged in the NOVA to be true. Ag. Br. at 12. As such, liability for the charged violation is determined. Ag. Br. at 12. Nevertheless, the Agency points out that the evidence presented clearly demonstrates that Respondent violated the Act when his vessel, the F/V Marian, broke anchor, grounded, and “crushed eelgrass habitat in the GFNMS.” Ag. Br. at 12. I agree. The evidence presented at the hearing to further support the entry of a default judgment makes liability clear and well supported by the evidentiary record. As the Agency noted, Respondent acknowledged in his interview with Agent Tanner that his vessel broke anchor during a weather event that impacted the Tomales Bay area where his vessel was located. Mr. James’s eye-witness account, documented through photography and GPS data, of the F/V Marian’s grounding location and apparent damage from the grounding of the vessel provided the groundwork for NOAA’s assessment of the injury to the sanctuary resource within the GFNMS. NOAA’s conservative assessment of the extent of damage to the eelgrass and seafloor impacted by the F/V Marian’s grounding was significant. While “unable to quantify the full extent of sustained damages to the seafloor and eelgrass, the duration of the impacts, or the expected recovery rate,” NOAA was able to determine, through GIS-based photo analysis, that “damages to eelgrass and the seafloor occurred,” finding specifically that “a minimum of 976.71 square meters of GFNMS habitat was damaged including a minimum of 82.66 square meters of damaged eelgrass, not including an additional track line in the south the size of 16.85 meters.” Tr. 124, 127-28; AX 4 at 1. Respondent’s liability for the charged violation of federal law has, thus, been clearly established and supported by substantial evidence in the record.

V. PENALTY

a. Principles of Law Regarding Civil Penalty

There is no presumption in favor of the penalty proposed by the Agency, and an Administrative Law Judge (“ALJ”) is not “required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document.” *Nguyen*, Docket No. SE0801361FM, 2012 WL 1497024, at *8 (NOAA Jan. 18, 2012); *see also* 15 C.F.R. § 904.204(m). The ALJ 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 also* 15 C.F.R. § 904.108 (enumerating factors to be taken into account in assessing a penalty).

Having determined that Respondent is liable for the charged violations, I must determine the appropriate civil monetary penalty to impose, if any, for the violation. To this end, I have considered the factors set forth in the procedural rules governing this proceeding, set forth at 15 C.F.R. part 904, that provide, in pertinent part:

Factors to be taken into account in assessing a civil penalty, depending upon the statute in question, may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent’s degree of culpability, any history of prior violations, and ability to pay; and such other matters as justice may require.

15 C.F.R. § 904.108(a).

The NMSA provides for civil penalties of up to \$183,629 per violation, after adjusting for inflation. *See* 16 U.S.C. § 1437(d)(1);⁵ The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410 (as amended by the Debt Collection and Improvement Act of 1996, Pub. L. 104-134); 15 C.F.R. § 6.4(f)(15). *See also* Civil Monetary Penalty Adjustments for Inflation, 86 Fed. Reg. 1764 (Jan. 11, 2021) (Final Rule).

b. Arguments Regarding Civil Penalty and Analysis

Nature, Circumstances, Extent, and Gravity of the Alleged Violation

In its Post-Hearing Brief, the Agency urges that I impose “a substantial penalty large enough to deter Respondent, and others, from damaging sanctuary resources in the future.” Ag. Br. at 13. The Agency notes that “despite the availability of a mooring program to safely store a vessel on the water, Respondent chose to anchor his vessel for many months dangerously exposed to ocean storms and vulnerable to anchor failure.” Ag. Br. at 15 (citing Tr. 40-41, 48-49, 153-57; AX 4 at 10). The Agency asserts that when Respondent’s anchor was inadequate to keep his vessel secured during a common storm—a foreseeable event for which a responsible mariner would have taken precautions to avoid—his vessel ran aground on an eelgrass bed and caused destruction, injury, and loss of eelgrass, a significant and valuable sanctuary resource. Ag. Br. at 15.

⁵ As originally enacted, the statute provided for penalties of up to \$100,000 per violation.

Recounting that eelgrass is “a sanctuary resource and keystone species, fundamental for maintaining the habitat, ecological services, and natural assemblage of GFNMS,” the Agency makes the point that “damage to an even small area of eelgrass had adverse consequences on the GFNMS.” Ag. Br. at 15 (citing Tr. 152-53). Here, however, the grounding of Respondent’s vessel “caused substantial harm to sanctuary resources” and specifically “damaged a minimum of 976.71 square meters of eelgrass and adjacent habitat including its critical underground rhizome root structure” of which “at least 82.66 square meters of visible, flowering eelgrass were damaged” when the large vessel “dragged across a protected eelgrass bed.” Ag. Br. at 15 (citing Tr. 114-18, 125-26, 145-52; AX 4; AX 5).

Recognizing that “the GFNMS is a marine area of special national significance designated as a National Marine Sanctuary” and “home to thirty-six species of marine mammals and the feeding grounds of the largest sea bird colony in the contiguous United States,” the Agency highlights that this Sanctuary is a “true biological hot spot.” Ag. Br. at 16 (citing Tr. 133, 135-38; AX 4 at 6-7). The Agency points out that “[t]he eelgrass beds of Tomales Bay are a cornerstone of the GFNMS biological productivity by leveraging the nutrients supplied from the upwelling cell” — “a rare oceanic current that brings cold, nutrient rich water from the ocean depths to the surface” that “provides the nutrients needed to support the Sanctuary’s extraordinarily productive food chain that feeds its vast biodiversity.” Ag. Br. at 16 (citing Tr. 135-38; AX 4 at 6). Further, “eelgrass provides abundant food, shelter, spawning grounds, and nursery for many . . . important species of fish that make up the GFNMS food chain . . . [and] sustains numerous other invertebrate species that form the basis of the local food chain. . . .” Ag. Br. at 16 (citing Tr. 138-39, 140-43; AX 4 at 6-9). Additionally, eelgrass enhances water quality. Ag. Br. at 16 (citing Tr. 140-43; AX 4 at 7). Given this significant function, the Agency argues that “[m]aintaining eelgrass is disproportionately important for the ‘habitat, and ecological services, of the natural assemblage of living resources’ in the GFNMS.” Ag. Br. at 16 (quoting 16 U.S.C. § 1431(a)(4)(C)).

Noteworthy is that “eelgrass beds are highly susceptible to damage,” and “[o]nce damaged, eelgrass may not recover for a year or more if it recovers at all.” Ag. Br. at 17 (citing Tr. 151; AX 4 at 7, 9). The Agency notes that “California has lost ninety percent of its eelgrass” and that “Tomales Bay is one of only five major eelgrass beds in the state of California.” Ag. Br. at 17 (citing Tr. 157-58; AX 4 at 7). The damage to the eelgrass beds from Respondent’s vessel grounding are, thus, significant given that the “F/V Marian scrapped, scoured, and crushed a long strip through the keystone eelgrass beds.” Ag. Br. at 17. The Agency argues that the “grounding injured or destroyed innumerable individual eelgrass plants, disrupted the bed’s interconnected underground rhizome root network” and potentially displaced or killed organisms that were living in the bed. Ag. Br. at 17 (citing Tr. 139-41, 151-55; AX 4).

I find the Agency’s arguments, and the substantial evidence in the record supporting those arguments, compelling. The evidence presented by the Agency demonstrates the particular significance of the GFNMS and of its eelgrass beds. Indeed, it is an area deemed a “biological hot spot” because of its unique features and diverse habitat, as the Agency has highlighted in its arguments. The evidence also revealed it is

one of few on the West coast that is a UNESCO-designated wetland of international importance. The eelgrass beds within the GFNMS hold special importance for a number of reasons. As the Agency noted, California has lost the majority of its eelgrass — a species that is highly susceptible to damage — leaving only a small number of remaining eelgrass beds, including those within Tomales Bay. As such, damage to these eelgrass beds is of particular concern. Additionally, the evidence presented reveals that eelgrass is considered a “keystone species” given that it serves as the basis of food and/or shelter to other species in the food chain and that, among other benefits, it contributes to cleaner waters. Thus, damage to this uniquely significant species has far-reaching consequences and adverse impacts through the extensive food chain it serves. Further, the extent of the damage done to the eelgrass beds by Respondent’s grounding of the F/V Marian is extensive, even by NOAA’s conservative measurements. Accordingly, I have carefully considered these factors and the supporting evidence in the record, and I have appropriately accounted for this in my penalty assessment.

Respondent’s Culpability

In its Post-Hearing Brief, the Agency argues that Respondent was, at a minimum, negligent in committing the violation in this case. Ag. Br. at 18. The Agency notes that Respondent was a commercial fisherman and professional seaman and, as such, should have known basic seamanship and how to properly secure his vessel during common storms. Ag. Br. at 18 (citing Tr. 46-47; AX 1 at 2-3). The Agency asserts that, while not intentional, Respondent’s actions “demonstrate at least a negligent disregard for sanctuary resources” by failing to take reasonable steps to anchor more securely to avoid a grounding incident and by anchoring near known eelgrass beds. Ag. Br. at 18 (citing Tr. 39; AX 1 at 3). Further, Respondent left his vessel anchored and unattended for extended periods of time, including at the time of this incident, in a marine weather environment in which storms on the Pacific Ocean are expected. Ag. Br. at 18 (citing AX 1 at 3; AX 4 at 1). The Agency contends that “Respondent’s decision making caused [the] grounding.” Ag. Br. at 18.

I find the Agency’s arguments convincing. The evidence presented revealed that the weather event that preceded with F/V Marian’s grounding was not unusual and that storms in the region are fairly common. Tr. 58-59. Nevertheless, Respondent left his anchored vessel unattended on many occasions and for periods of time, including at the time of this incident. He also anchored his vessel near seagrass protection zones and failed to avail himself of alternative, and more secure, mooring options within the bay. See Tr. 153-57; AX 4 at 4, 10. I agree with the Agency that Respondent’s actions in this regard were negligent. Respondent failed to exercise the degree of care that a prudent seaman would exercise under similar circumstances, and his lack of care directly contributed to the grounding of his vessel and damage to the Sanctuary and to its eelgrass beds in particular. Accordingly, I have considered the degree of Respondent’s culpability in my penalty assessment.

History of Violations, and Other Matters as Justice May Require

The Agency notes that it is not aware of any prior violations assessed against Respondent, and this factor should therefore not impact my penalty assessment. Ag. Br. at 19. It also notes that Respondent did not raise an ability to pay defense or otherwise provide financial information to support such a claim and, as such, this factor need not be considered in my penalty assessment as Respondent is presumed to have the ability to pay the civil penalty. Ag. Br. at 19.

The Agency urges that I should consider “Respondent’s actions after the incident.” Ag. Br. at 19. Specifically, the Agency contends that Respondent “did not take any responsibility or acknowledge the gravity of his actions after the grounding” and failed to notify the Sanctuary of the grounding. Ag. Br. at 20. Rather, Respondent anchored his vessel to another area within Tomales Bay and “near more eelgrass.” Ag. Br. at 20. Further, the Agency points out that, apart from requesting a hearing, Respondent has not engaged in these proceedings and “has never indicated any intention of ensuring NMSA compliance in the future, nor even an intention of mitigating the risk to the sanctuary resources in the protected waters on which he parked his boat.” Ag. Br. at 20.

I agree that an inability to pay a penalty is not a defense that was raised in this case, and thus, that factor has no bearing on my penalty assessment. I have considered the Agency’s other arguments concerning Respondent’s actions following this incident and find that they lend further support for the Agency’s assertion that Respondent acted negligently, which I have accounted for in my penalty assessment. Respondent’s failure to engage in the proceedings following his hearing request, while understandably frustrating to the Agency, does not persuade me to enhance the penalty in this case. I would be remiss in failing to note that throughout the early stages of this proceeding, an incorrect address for Respondent had been identified by the Agency and thereafter used by this Tribunal, all of which might have impacted Respondent’s receipt of certain orders and filings and participation in the proceedings. As set out in the procedural history of this decision, this Tribunal identified the address discrepancy and took steps to rectify the issue prior to conducting a hearing in this matter, thereby curing any procedural defects in this case. Aside from this and prior to hearing, appropriate sanctions were imposed when I barred Respondent from submitting certain evidence at hearing.⁶ Further, as the party instituting this civil enforcement action against Respondent, it is the Agency that bears the burden of proof in this case, regardless of the extent of involvement by a respondent.

Based on my review of the evidence presented and the factors to be considered in assessing a penalty, I assess a civil monetary penalty of \$5,000 for Respondent’s violation of federal law as charged in the NOVA.

VI. DECISION AND ORDER

Respondent is liable for the charged violation in this case. A civil monetary penalty of \$5,000 is imposed for the charged violation. Once this Initial Decision

⁶ See Order Barring Respondent from Submitting Certain Evidence at Hearing (March 26, 2021).

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 Decision reviewed by the NOAA Administrator must be filed with the Administrator within 30 days after the date this Initial Decision is served and in accordance with the requirements set forth at 15 C.F.R. § 904.273. A copy of 15 C.F.R. §§ 904.271-273 is attached.

PLEASE TAKE FURTHER NOTICE, that this Initial Decision becomes effective as the final Agency action 60 days after service, unless the undersigned grants a petition for reconsideration or the Administrator reviews the 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.



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

Dated: November 30, 2021
Washington, D.C.