UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	)	
	)	
Charles Mincey, Jr.,	)	Docket Number: SE 1305037
	)	
Respondent.	)	
	)	

INITIAL DECISION AND ORDER

Date: January 21, 2015

Before: Christine D. Coughlin, Administrative Law Judge, U.S. EPA[1]

Appearances:

For the Agency:
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National Oceanic and Atmospheric Administration,
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For Respondent:
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[1] 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. STATEMENT OF THE CASE

The National Oceanic and Atmospheric Administration ("NOAA" or "Agency") issued a Notice of Violation and Assessment of Administrative Penalty ("NOVA"), dated January 6, 2014, to Charles Mincey Jr. ("Respondent"). In the NOVA, the Agency alleged one count in which Respondent violated the Marine Mammal Protection Act ("Act" or "MMPA"), 16 U.S.C. § 1372(a)(2)(A), and sought to impose a total penalty of $6,500 against Respondent for this violation. Respondent timely requested a hearing before an Administrative Law Judge.

On February 18, 2014, I was designated as the Administrative Law Judge to preside over this matter. On March 10, 2014, I issued an Order to Submit Preliminary Positions on Issues and Procedures (PPIP) ("PPIP Scheduling Order"). In the PPIP Scheduling Order, I set forth various prehearing filing deadlines and procedures, and ordered the Agency to file its PPIP on or before April 11, 2014, and Respondent to file his PPIP on or before April 25, 2014. On April 10, 2014, the Agency filed its PPIP. On April 25, 2014, Respondent filed his PPIP. On May 29, 2014, I issued an Order Scheduling Hearing setting filing deadlines and scheduling the hearing to commence on July 15, 2014, continuing as necessary through July 16, 214, in Georgetown, South Carolina. On June 30, 2014, the Agency filed an Unopposed Motion for Judicial Notice of Agency's Penalty Policy, which I granted by Order dated July 1, 2014.

I conducted a hearing in this matter that began on July 15, 2014, and concluded on July 16, 2014, in Georgetown, South Carolina. The Agency presented Agency's Exhibits ("AX") 1 through 5, 7 and 8, 10 through 12, and 14 through 22, which were admitted into evidence. The Agency also presented the testimony of five witnesses: Albert Samuels, a Special Agent with NOAA's Office of Law Enforcement; Steven Pop, a former officer of the South Carolina Department of Natural Resources ("SCDNR") Law Enforcement Division; Benjamin Wolf, an observer; Jeff McClary, a member and volunteer with the South Carolina Marine Mammal Stranding Network; and Wayne McFee, a NOAA Research Wildlife Biologist who was deemed qualified to testify as an expert in Marine Mammal Biology. Respondent presented Respondent's Exhibits ("RX") 1 and 2, which were admitted into evidence. Respondent also presented the testimony of six witnesses: Dr. Kenneth H. Mincey, Respondent's son, a medical doctor and general surgeon who was deemed qualified to testify as an expert on general surgery of human beings and general medicine; David Lane, Respondent's grandson; Cynthia LeGette, Respondent's daughter; Betty B. Mincey, Respondent's wife; John C. Lane, Respondent's grandson; and Respondent. The parties also submitted a Joint Set of Stipulated Facts, Exhibits, and Testimony as Joint Exhibit ("JE") 1, which was admitted into evidence.

The Hearing Clerk of this Tribunal received the official transcript of the hearing in this case on July 30, 2014, and electronic copies of the transcript were sent to the parties on the same date.[2] A hard copy of the transcript was also mailed to Respondent's counsel on July 31, 2014. On August 1, 2014, I issued a Post-Hearing Scheduling Order, which set the following deadlines: August 29, 2014, as the deadline for any motions to conform the transcript to the actual testimony; September 19, 2014, as the deadline for the Agency's Initial Post-Hearing Brief;

[2] Citations herein to the transcript are made in the following format: "Tr. [page]."

October 3, 2014, as the deadline for Respondent's Initial Post-Hearing Brief; October 17, 2014, as the deadline for the Agency's Reply Post-Hearing Brief, and October 31, 2014, as the deadline for Respondent's Reply Post-Hearing Brief. On August 29, 2014, Respondent and the Agency each filed motions to conform the transcript to the hearing testimony. My ruling on those motions is set forth below.

On September 19, 2014, the Agency filed its Initial Post-Hearing Brief ("Ag. Ini. Br."). On October 3, 2014, Respondent filed his Initial Post-Hearing Brief ("Resp. Ini. Br."). On October 17, 2014, the Agency filed its Reply Post-Hearing Brief ("Ag. Rep. Br."). On October 31, 2014, Respondent filed his Reply Post-Hearing Brief ("Resp. Rep. Br.").

Ruling on Motions to Conform the Transcript

Given the uniqueness of certain evidentiary issues presented during the hearing, I urged the parties to submit Motions to Conform the Transcript in this matter, which were submitted on August 29, 2014. Tr. 290-91, 375-76. As background, it was determined on the second day of hearing that the Agency improperly seized Respondent's gill net, which was used as a demonstrative aid during the hearing, and an envelope containing documents issued to Respondent in 2007 relating to the Agency's Marine Mammal Authorization Program and Observer Program, which had been marked for identification as AE 6 and admitted into evidence earlier in the proceedings. Tr. 266-71, 289. The Agency candidly acknowledged that it did not possess the statutory authority under the Act to seize the items. Tr. 267-68, 271, 289. Respondent moved to "strike any reference to the net as it was used in this courtroom, as well as the documents that were introduced that were taken from [Respondent]." Tr. 288-89. Over objection by the Agency, I granted Respondent's motion at the hearing and I "struck any testimony or reference to the demonstrative use of the net during this evidentiary hearing" and I struck AE 6 from the record and "any testimony or reference to that exhibit during this evidentiary hearing." Tr. 289-90. In so doing, I advised the parties that since the Agency acknowledged it lacked authority to seize Respondent's gill net, I did not believe it appropriate for me to consider any testimony or reference to the demonstrative use of the net during the evidentiary hearing. Tr. 290. Likewise, since the Agency lacked authority to seize the envelope of documents that had been admitted into evidence as AE 6, I believed it appropriate to strike AE 6 from the record of evidence as well as any testimony or reference to that exhibit during the hearing.[3] *Id.* Thereafter, I encouraged the parties to file post-hearing motions to conform the

[3] Contrary to the Agency's suggestion, my rationale for these rulings was not based on exclusionary rule principles I believe to be inapplicable to civil proceedings. *See* Ag. Rep. Br. at 6. Rather, my rulings were based on the fact that the Agency, by its own admission, lacked authority to seize and possess Respondent's gill net and envelope of documents identified and previously admitted into evidence as AE 6. Consequently, the Agency should not have had the gill net available for its use during the evidentiary hearing and the Agency should not have had the envelope of documents, AE 6, available to be offered into evidence. For these reason, I ruled to strike AE 6 from the record of evidence and to strike any references or testimony during the hearing to the demonstrative use of the gill net and the stricken AE 6.

transcript to my rulings and to specify "by page and line" of the transcript the portions that each party believes should be removed. Tr. 291, 375.

I carefully reviewed the transcript in this matter and the Agency and Respondent's Motions to Conform the Transcript. I **GRANT IN PART** each party's motion as follows and conform the transcript accordingly. Grammatical corrections are made as follows.[4]

Page/Line	**Current**	**Corrected**
32/4	surf	shore
134/25	river	water
185/6	id	did
189/21	flukes to	flukes, and to
123/20	hurting	herding
235/10	override	overrule

Portions of the transcript that are stricken, in accordance with my evidentiary rulings discussed above, are as follows.

Page(s)	**Line(s)**	**Page(s)**	**Line(s)**
36	25	83	1-5, 16-25
37-40	all	84	1-3
41	9-25	86	12-17
42	all	99	11-19
43	1-7	108	9-10 (through "with it")
44	25	118	6-12
45	1-14, 18-25	142	2-6
46-47	all	143	20-25
48	1-6	144-145	all
75	19-20	146	1-5
76	10-17	147	13-25

[4] I note that two such corrections have been made sua sponte.

82	2 (starting "I believe") -5, 19-25	148	1-13

II. STATEMENT OF THE ISSUES

At issue is whether the Agency established, by a preponderance of the evidence, that Respondent violated the MMPA and implementing regulations by lethally "taking" a marine mammal, specifically a bottlenose dolphin, with a gill net on November 3, 2013. If liability for the charged violation is established, then I must determine the amount of any imposed civil penalty that is appropriate after an evaluation of factors including the nature, circumstances, extent, and gravity of the violation(s); Respondent's degree of culpability and any history of prior violations; and such other matters as justice may require.

III. FACTUAL BACKGROUND

The following is a recitation of the facts I have found in this matter based on a careful and thorough review of the evidentiary record.

Respondent owns a beachfront home in Garden City, South Carolina, where he spends part of his time, particularly during the fall when "the fishing is good." Tr. 333. Respondent has been a fisherman for about forty-three years. Tr. 334. In 2013, he held a South Carolina "over 65 gratis license" to fish recreationally, however, unlike in past years, he did not hold a separate gear license to allow him to fish with a gill net. Tr. 43-44, 336, 353-54, 364, RX 2, JE 1 at ¶ 10. A gill net is a type of flat net fishing gear. It is designed to hang vertically in the water column through the use of floats along the top of the netting line and weights along the bottom of the netting line. As targeted species of fish attempt to swim through the mesh netting of the gill net, the fish become caught in the mesh by their gills. Tr. 108, 354. In 2013, Respondent was using a 100-foot gill net with three-inch mesh to catch spot fish. Tr. 341, 367, JE 1 at ¶ 6.

On November 2, 2013, around late afternoon or early evening, Respondent set his 100-foot gill net in the ocean waters off the beach in front of his home. JE 1 at ¶ 6, Tr. 338. Respondent's wife ("Mrs. Mincey"), grandson David Lane ("Lane"), and Lane's wife, assisted Respondent with setting the gill net in the water. Tr. 243-44, 337-39, AX 2, AX 3. At that time, he recalled there being little to no ocean current in a northerly or southerly direction. In fact, he recalled "the water was coming straight in when we set it [the gill net]. Had it been going either way, we could not have set it." Tr. 370. Respondent used line to attach the shore-end of his gill net to a sand fence post in front of his property. Tr. 338-39. After setting the net, Respondent and his family returned to the house, had dinner, end eventually retired for the evening.[5] Tr. 339, 362-63.

[5] During the hearing, it was alleged that Respondent had violated aspects of state law with regard to the condition of his gill net and having left the set gill net in the water overnight, however such alleged violations of state law are not before me to decide. Tr. 97-100, AE 3.

On November 3, 2013, shortly after 7 a.m., Respondent, Mrs. Mincey, Lane, Lane's wife, and the Lanes' two children went to the beachfront to retrieve the gill net that had been set the prior evening. Tr. 340, 363, AX 7 at 1. As Respondent and Lane began to retrieve the net, they noticed a dead dolphin in the in-shore end of the net, meaning the end of the net that is in shallower water. Tr. 244-45, 326-27, 341, 369, AX 2, JE 1 at ¶ 8. Mrs. Mincey observed the dolphin in the shore-end of the net as the net was being retrieved from the water. Tr. 305-07. According to Respondent, one of the three-inch meshes of the net was on the dolphin's dorsal fin and the "dolphin was partially laying on the net," making it "a little bit tight." Tr. 341, 356, 366-67, 369. Respondent estimated the length of the dolphin to be about five and one-half feet. Tr. 341-42. Respondent was unable to roll the dolphin out of the net by himself, so Lane assisted him. Tr. 341, 356. At about this time, approximately 7:15 a.m., a bystander, Benjamin Wolf ("Wolf"), was walking along the beach with this dog, noticed the activity, and approached Respondent and his family. Tr. 129-30, AX 7 at 1. As he drew nearer to the net, Wolf observed a dead marine mammal, which he assumed was a dolphin, laying in or around the offshore portion of the net. Tr. 129-32, 141-43, AX 7 at 1. Wolf estimated the length of the dolphin to be about six feet. Tr. 150-51, AX 1 at 2. Wolf noticed netting "over the nose and head" of the dolphin. Tr. 131, 141, AX 7 at 1. However, Wolf observed that "[i]t didn't take a whole lot of effort to bring it [the net] out from underneath the dolphin." Tr. 132. Respondent and Lane "picked the net up and the dolphin roll[ed] out in the water and float[ed][6] off" in a southerly direction with the ocean current. Tr. 341, 356, 359, AX 2, AX 3.

After releasing the dead dolphin from his net, Respondent gathered up the fish caught in the net, brought the fish to his home, and stowed his gill net. Tr. 342-43, 368. As to net storage, Respondent does not fold his gill net in any particular way prior to stowing it; rather, it is his custom to "cram [the net] in a five-gallon bucket or a plastic container." Tr. 342, 359-360, 368. Prior to stowing the net, Respondent noted some damage to the net "where [the] dolphin was located" earlier. AX 2. He described the "damage" to the net as being "kinked," meaning that the net "wasn't real straight" and "looked like if something was in the net and had rolled it around." Tr. 357-59, 365-66. Respondent did not notify anyone of the dolphin in his gill net. JE 1 at ¶ 9.

Meanwhile, Wolf promptly telephoned a friend and requested that the local marine mammal stranding network be notified of the dead dolphin he observed. Tr. 131, 133, 183, AX 7 at 2. From the beach, Wolf continued to observe the dolphin for approximately 40 minutes as it drifted in a southerly direction along the coast until he left the area. Tr. 134, AX 2 at 4, AX 7 at 2. Shortly thereafter, at approximately 8:34 a.m., Wolf had a telephone conversation with a representative of the SCDNR and reported the dead dolphin he had observed in Respondent's net. AX 7 at 3. During that call, Wolf was advised that SCDNR had "already received a call

[6] According to Wayne McFee, a research wildlife biologist for NOAA, a dolphin will initially sink in the water when it dies and sometime thereafter will begin to float. Tr. 219-20. While research has not determined how long a dead dolphin will initially sink before it floats, McFee's opinion is that dolphins "don't stay down long . . . because we still get fresh dead animals with rectal temperatures that are up near . . . their core body temperature." Tr. 222-23. A rectal temperature was not taken of the necropsied dolphin because the laboratory's rectal thermometer was not operational at that time. *Id.*

about a dolphin pushing a dead calf (baby dolphin)." *Id*. Wolf returned to the area where he witnessed the dead dolphin in Respondent's net, recorded the address of Respondent's home, and then reported that address to SCDNR. *Id.*

Following Wolf's report, volunteers with the local marine mammal stranding network were engaged to begin searching for the dead dolphin Wolf had observed. Tr. 28-29, 159-60, 184, AX 12 at physical pages 3-4. Approximately three kilometers of beach, "from Garden City Beach pier south," was canvassed by the volunteers in their search. Tr. 185. Volunteers located a dolphin carcass approximately one mile south of Respondent's home at approximately Noon, in the surf zone on the beach. Tr. 52-54, 159-64, 184-85, AX 8 at 1. One of the volunteers, Jeff McClary ("McClary"), estimated the length of the dolphin carcass found on the beach to be about 8 feet. Tr. 166. He took photographs of the dolphin carcass and assisted in loading the carcass for transport to NOAA's Coastal Marine Mammal Stranding Assessments Program laboratory, a laboratory in which Wayne McFee ("McFee") works as a research wildlife biologist for NOAA. Tr. 165-66, 171, 186, AX 12. McFee also oversees the entire marine mammal stranding network for South Carolina and Georgia. Tr. 172. Apart from a reported stranding of a live pygmy sperm whale in another part of the state, neither McClary nor McFee were made aware of any other strandings on November 3, 2013, by the stranding network. Tr. 164, 185-86, AX 8 at 2.

McFee, who at the evidentiary hearing was deemed an expert in marine mammal biology based on his education, training, and experience in the field, received the dolphin carcass at his laboratory and later performed a necropsy of the animal. Tr. 171-83, 186, AX 22. According to McFee, a subadult male bottlenose dolphin carcass "in emaciated condition" arrived at his laboratory just after 3 p.m. on November 3, 2013, and he performed his necropsy of the dolphin at approximately 8:45 a.m. on November 4, 2013. Tr. 186, 204-05, 207, AX 8 at 1-2. McFee measured the length of the dolphin carcass to be 236.5 cm, or approximately 7 feet, 9 inches. AX 8 at 1. McFee measured the weight of the dolphin carcass to be 129.54 kg, or approximately 285 pounds. *Id.* McFee's necropsy of the dolphin carcass revealed, among other things, "multiple lacerations to the dorsal fin, flukes, and to the rostrum [jaw]," causes of which were "very consistent with monofilament[7] entanglement" particularly with regard to the lacerations found on the dorsal fin and flukes. Tr. 189-91, 216, AX 8 at 2. In McFee's experience, one will typically find lacerations on a dolphin's dorsal fin when it has been entangled in a monofilament net. Tr. 216-17. McFee found "subdermal hemorrhaging in a number of the lacerations," which suggested to him that the dolphin was alive when the laceration wounds were inflicted. Tr. 191-92, AX 8 at 2. McFee also found "a copious amount of foam coming from the bronchi" of the lungs of the dolphin, which could be described as "wet," and "a lot of sand" in the esophagus of the dolphin. Tr. 192-93, AX 8 at 3. McFee noted that a necropsy of a "typical dolphin stranding" would not reveal sand in the esophagus. Tr. 192. According to McFee, the presence of sand in this dolphin's esophagus was reminiscent of "[a]nimals . . . seen entangled in nets" and suggestive that the animal was "struggling at some point to be able to take that sand into [its] esophagus because [it] would normally not do that." Tr. 192-93. Samples of the dolphin's lungs

[7] Monofilament "is a plastic type of line that can be used . . . on fishing poles . . . or . . . in nets to catch fish." Tr. 191. "Gill nets are typically made of monofilament line, but they can also be made of other synthetic material or even cotton." *Id*.

and other areas examined as part of the necropsy were sent to the University of Illinois for histopathology testing, in part to confirm whether this animal died from drowning. Tr. 191-94, 209-10. Additionally, samples from the dolphin's lungs and other areas were also sent to the University of California for morbillivirus testing given the recent outbreak of morbillivirus in the bottlenose dolphin population along the east coast. Tr. 194, AX 8 at 14-15. From this necropsy, McFee concluded:

> Based on the stranding history of this animal being caught in a net, the copious amount of foam in the lungs, numerous gill net lacerations with associated hemorrhaging, and sand in the esophagus, it is suggestive of 'wet' drowning in the net. However, it was obvious that this animal was compromised and likely in a weakened state before the entanglement based on its emaciated condition and lack of food remains in the stomach, and possible left ventricular hypertrophy. This latter statement of body condition is typical of what is being seen along the US east coast bottlenose dolphin unusual mortality event that is occurring. Samples from this dolphin were sent on 7 November for morbillivirus testing.

Tr. 193, AX 8 at 4. While the wording of McFee's conclusions began with a premise — "Based on the stranding history of this animal being caught in a net" — he further explained:

> even if I know it's caught in a net I still don't know whether the animal was alive before it hit the net or was it dead and just floated into the net. That's why looking at the wounds to the dorsal fin and also the sand in the esophagus pointed me into the direction that this animal was alive in the net at some point and died in the net.

Tr. 219.

Results from the histopathology report completed by a doctor of veterinary medicine, Dr. Colegrove-Calvey, provided the following information:

> Morbillivirus infection was confirmed histologically in this dolphin and additionally there was histologic evidence of a secondary fungal pneumonia. . . . Based on the fibrosis noted in the lung, infection may have been at a more chronic stage in this animal. . . . Pneumonia was severe enough to have significantly impacted respiratory function in this individual.
>
> This carcass was reported to initially have been within a gill net off of a pier (per gross necropsy report). The lacerations noted on the dorsal fin grossly would fit with a net entanglement. Histologically there was evidence of inflammation and hemorrhage in this area, suggesting that the animal was alive for a least some time within the

> net. It is possible, though speculative, that significant viral infection weakened this animal such that it was more prone to an entanglement situation.

Tr. 195-7, AX 10 at 4.

A NOAA Special Agent, Al Samuels ("Samuels"), conducted an investigation of the reported dead dolphin found in Respondent's gill net on November 3, 2013. Tr. 23-28, AX 1. As part of the investigation, Samuels and former SCDNR sergeant, Steven Pop ("Pop"), interviewed Respondent at his home. Tr. 89-90, AX 1 at 5-6. Respondent cooperated throughout the process and voluntarily retrieved the gill net he had used on November 3, 2013, and presented the net, along with some paperwork, to Samuels and Pop for inspection. Tr. 32-36, AX 1 at 5-8, AX 14 through AX 18. Pop noted that Respondent stowed his gill net "in a very unusual fashion" in that "it was severely twisted upon itself . . . ." Tr. 107-08. As the gill net was inspected, the net was "wrapped over top of itself numerous times" and took two to three minutes to be straightened out. Tr. 35-36, 107-08, AX 1 at 7-8, AX 14 through AX 18. Respondent acknowledged that the gill net was twisted and "sort of kinked up" where the dolphin had been present in the net, which Respondent recalled being in the "in-shore" end of the net, meaning the end of the net that is closest to shore in shallow water. Tr. 365-69. However, he described the net as looking "ruffled up" and recalled that it took "just a few minutes" to stretch out the net so it could be measured, noting "[i]t wasn't tangled that bad." Tr. 369. However, Pop construed the twisted nature of the gill net as an indication that "a struggle . . . took place inside of the net." Tr. 107-08, AX 3.

Following the conclusion of NOAA's investigation, the Agency issued a NOVA to Respondent, dated January 6, 2014, in which Respondent was charged with violating the MMPA by "lethally 'taking' a marine mammal" by causing "the death of a bottlenose dolphin with a gillnet." The Agency seeks to assess a penalty of $6,500 for this alleged violation.

IV. PRINCIPLES OF LAW

Liability

Congress enacted the Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. §§ 1361-1423h, 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." 16 U.S.C. §§ 1361(1), (6); see Pub. L. No. 92-522, § 2, 86 Stat. 1027, 1027 (1972). To accomplish this objective, Section 102 of the MMPA and the implementing regulations[8] 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).

[8] At the time of the alleged violation, November 3, 2013, the applicable Code of Federal Regulations, or C.F.R., was the 2013 edition. It is this edition that I have utilized throughout this decision.

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 Act defines "waters under the jurisdiction of the United States" to mean:

> (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 Act 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. Agency regulations further define "take" to include "the restraint or detention of a marine mammal, no matter how temporary." 50 C.F.R. § 216.3.

Standard of Proof

To prevail on its claim that Respondent violated the Act and the regulations, the Agency must prove facts constituting the violation by a preponderance of reliable, probative, credible, and substantial evidence. 5 U.S.C. § 556(d); *Cuong Vo*, 2001 NOAA LEXIS 11, at *17 (NOAA Aug. 17, 2001) (citing *Dep't of Labor v. Greenwich Colleries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100-03 (1981)); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). To satisfy this standard of proof, the Agency may rely upon either direct or circumstantial evidence. 2001 NOAA LEXIS 11, at *17 (citing *Reuben Paris, Jr.*, 4 O.R.W. 1058 (NOAA 1987)).

This standard of proof "requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" *Winship*, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (quoting F. James, Civil Procedure 250-51 (1965))); *see also*, *Concrete Pipe and Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

"[A] preponderance of the evidence can be said to 'describe a state of proof that *persuades* the fact finders that the points in question are 'more probably so than not.'" *Id.* (quoting Mueller & Kirkpatrick, Evidence § 3.3 (1995) (emphasis added). "Evidence preponderates when it is more convincing to the trier of fact than the opposing evidence." *A.C. Aukerman Co v. R.L. Chaides Constr. Co*, 960 F.2d 1020, 1044-45 (Fed. Cir. 1992) (quoting McCormick on Evidence § 339 (2d ed. 1972) at 793). Thus, the Agency must demonstrate that the facts it seeks to establish are more likely than not to be true. *John Fernandez III & Dean V. Strickler*, 1999 NOAA LEXIS 9, at *8-9 (NOAA Aug. 23, 1999) (citing *Herman & MacClean v. Huddleston*, 459 U.S. 375, 390 (1983)).

V. ANALYSIS

Parties' Arguments as to Liability

The Agency argues that Respondent violated the MMPA by "taking" a bottlenose dolphin when "his net captured and killed a dolphin." Ag. Ini. Br. at 5-6. The Agency recounts that Respondent set his gill net in front of his beach house in Garden City, South Carolina, during the evening of November 2, 2013, and when he retrieved his gill net the following morning, there was a "dead bottlenose dolphin in it." *Id.* at 6-7. A bystander, Wolf, "approached Respondent and his family while the dolphin was still caught in the net," arranged notification of the dead dolphin to the state marine mammal stranding network, and "followed the carcass as it drifted south for approximately forty minutes, never seeing any sign of life." *Id.* at 7. Thereafter, "[a]round 1:00 pm, volunteers for the Stranding Network spotted the dolphin on shore one mile south of Respondent's house." *Id.* Following transport of the dolphin carcass to a NOAA laboratory, marine mammal expert, McFee, conducted a necropsy of the dolphin carcass and "concluded, based on ligature wounds in the skin, sand in the esophagus, and foam in the lungs, that the dolphin died in a gill net after a struggle to free itself in order to breathe." *Id.* at 8. Histopathology results from tissue analyses of the dolphin confirmed that "'the animal was alive for at least some time within the net.'" *Id.* (citing Tr. 195-97, AX 10).

The Agency contends that "Respondent's gill net was the proximate cause of the dolphin's death." *Id.* at 8. In support, the Agency asserts the following: Respondent conceded that he left his set gill net in the water overnight and testified that the net was twisted "where the dolphin was located;" McFee and Pop testified that the twisted section of the net was "consistent with a dolphin spinning to try to free itself;" "there is little doubt that the carcass found one mile south of Respondent's home was the same dolphin that he loosened from his gill net;" Wolf "watched the dolphin drift south along shore for forty minutes;" "the stranding location one mile south of Respondent's house was corroborated by a drift analysis performed by the Coast Guard the morning of November 3, 2013, predicting that the dolphin carcass would more likely strand on shore than float out to sea;" the "dolphin found had wounds consistent with a monofilament gill net of the kind used by Respondent;" and that "no other dolphins stranded in South Carolina on November 3." *Id.* Thus, the Agency urges that I impose a civil monetary penalty against Respondent because the "evidentiary record establishes that Respondent took a marine mammal by capture and by killing." *Id.* at 8-9.

Respondent disputes that he violated the MMPA. Respondent contends that the dolphin he found in his gill net was already dead and "had merely floated into the net." Resp. Ini. Br. at 4. He suggests that this dolphin "was likely one of hundreds that had washed ashore on the east coast due to a morbillivirus outbreak." *Id*. at 5. Further, he challenges any conclusion that the dead dolphin found in his net was the same dolphin later necropsied by McFee, asserting "[n]o evidence was propounded that indicated that the dolphin necropsied was the same dolphin discovered in Respondent's gill net" and further argues that "substantial and credible evidence" shows that there were two dolphins involved. *Id.* at 3, 5. In support of this theory, Respondent points out that "on-site eyewitnesses of the dolphin in the net, including . . . Wolf, testified that the dolphin . . . was roughly six (6) feet long," whereas the dolphin necropsied by McFee was

"reported to be nearly 8 feet . . . in length." *Id.* Further, the dolphin in Respondent's net "was easily removed and rolled from the net," whereas the necropsied dolphin was much too large [weighing around 285 pounds] to easily remove from the net." *Id.* at 3-4. Respondent argues that, contrary to the Agency's assertion that the dolphin had become entangled in his net, "[he] and his grandson were easily able to dislodge the dolphin from the net." *Id.* at 4. Additionally, Respondent notes that the dolphin that was necropsied was reported to have been "alive for some time in the net and had ligature marks," yet "[n]one of the witnesses" who observed the dolphin in Respondent's gill net testified to seeing such "lacerations or ligature[] marks that were present on the necropsied dolphin." *Id.* at 5. Lastly, Respondent highlights that on the morning of the incident when Wolf reported his observations to SCDNR, he was informed that SCDNR "'had *already* received a call about a dolphin pushing a dead calf,'" suggesting that "another call had been made that morning about another dolphin." *Id.* (citing AX 7 at 3).

Alternatively, Respondent argues that "[e]ven if the Court finds that the dolphins were the same, the Respondent did nothing that would constitute a 'take' under the MMPA." Resp. Ini. Br. at 6. In support, Respondent reiterates his theory that the dolphin was already dead "before it encountered the net" and that a "take" under the MMPA "anticipates an animal that is alive and not dead." *Id.*

Finally, Respondent raises due process challenges with regard to liability for the charged violation and the hearing I conducted in this matter. *Id.* at 8-10, 12-13. He takes issue with NOAA's evidentiary rule and the provision to allow hearsay evidence in an administrative proceeding, which allowed for some hearsay evidence to be admitted at hearing over his objections. *Id.* at 8-9. He notes that "counsel for the Respondent objected to the introduction of hearsay evidence on each occasion" and that I "correctly referred to the NOAA rule outlined above and then overruled each objection based upon it." *Id.* Respondent contends "the rule as applied in this case violates his rights under the Due Process Clause because it deprives him of the opportunity to cross-examine adverse witnesses." *Id*. at 9. Noting that the MMPA does not authorize the issuance of subpoenas, he argues "[a]lthough both parties were potentially prejudiced by this rule, only the Respondent had a Constitutional right to be able to compel witnesses to attend the hearing to testify on his behalf." *Id.*

Respondent also raises concerns with regard to a drift analysis that was offered by the Agency and admitted into evidence at AE 11. *Id*. Respondent asserts that the drift analysis "predicted that the dolphin released from the Respondent's gillnet would wash ashore south of Respondent's home" and that the Agency has relied on this drift analysis as "some proof that the dolphin located on the shore south of the Respondent's home was the dolphin released from his net." *Id.* Respondent makes the following arguments against such reliance:

> The drift analysis was for a human body in the water since that was the only model the Coast Guard had and was admitted through the testimony of Special Agent Samuels relying on his discussion with Nathan Downend of the US Coast Guard. . . . Downend did not run the analysis and told Samuels that Elizabeth Werner ran the analysis and that OSCS Matthew Caviness could explain the

> results of the analysis. . . . Neither Caviness nor Werner spoke with Samuels. Neither testified in the hearing.

Id. Respondent argues that the analysis should not have been admitted into evidence and that "giving the drift analysis any weight now that it has been admitted would violate his due process rights" since "[t]here was a lack of proper foundation, no explanation regarding any margin of error, and no explanation of how the analysis might differ since a dolphin was involved instead of a human." *Id.* Noting that neither party had the ability to subpoena witnesses under the MMPA, Respondent contends the Agency "suffered less prejudice . . . since most of its witnesses work for the Agency or for the federal government." *Id*. at 9-10. Further, Respondent desired to have the individual "who ran the drift analysis," Elizabeth Werner ("Werner"), testify at the hearing, however, the Agency had not intended to call her as a witness "out of judicial economy." *Id*. at 10. Respondent argues, "the Agency had the option to have her there and did not, while Respondent wanted her there and could not."[9] *Id.*

In reply, the Agency argues, "Respondent's theory that two dolphins stranded at his house on the same morning is not plausible" and "is contradicted by the record." Ag. Rep. Br. at 2. The Agency contends that Respondent's theory regarding two different dolphins "hinges on . . . Wolf's supposed estimate of the dolphin's length at the time of the disentangling" and argues that "[a]n estimate is just that — a guess — and even so, his guess of 'about six feet long' was not far off." *Id.* Contrary to Respondent's assertion that the necropsied dolphin was too heavy to have been easily removed from his gill net, as he contends was the case, the Agency argues that Respondent's own testimony was that "he 'was having trouble removing the dolphin from his net and needed help.'" *Id.* (citing Tr. 341). Further, Wolf's "contemporaneous statement describes the effort to remove the dolphin as two men 'pulling the net,' 'taking turns,' 'until the very end, when they pulled from multiple directions and from over the top of the nose' to dislodge the dolphin." *Id.* at 3 (citing AX 7 at 1-2). Moreover, the Agency asserts "Respondent offers no evidence to suggest that with the aid of the surf, two men could not dislodge dolphin of such weight from the net." *Id.*

Additionally, the Agency argues that Respondent's assertion that no witnesses observed ligature marks on the netted dolphin is inaccurate, pointing to Wolf's testimony "that he saw 'a couple of nicks . . . on the dorsal fin.' . . . from five yards' distance." *Id.* (citing Tr. 152, 154). The Agency asserts Wolf's testimony is consistent with the necropsy notes identifying "'thin lacerations' in several areas of the skin, including the dorsal fin." *Id.* (citing AX 8 at 2). Lastly, the Agency argues that "testimony at hearing clarified that no other dolphin standings were reported on November 3, 2013, despite . . . Wolf's written statement . . . that SCDNR had received a call about a dolphin pushing a dead baby dolphin" and that such a report "if truly made, was not made on November 3." *Id.* Further, "the dolphin caught in Respondent's net was a sub-adult, not a baby." *Id.* The Agency urges that the "weight of the evidence establishes that the dolphin that died in Respondent's net stranded on shore one mile south of his house." *Id.*

[9] I note that when asked whether Respondent happened to secure Werner to testify and whether Respondent intended to present her as a witness, counsel for Respondent replied: "I did not. I did not." Tr. 65.

In response to Respondent's argument — that even if the dolphin found in his net and the necropsied dolphin were the same dolphin, he did not "take" a marine mammal under the MMPA because the dolphin was already dead before it encountered his gill net — the Agency relies on the undisputed expert testimony presented at hearing as to the dolphin's cause of death, which established "the dolphin was alive when it was caught in the net." *Id*. at 4. The Agency notes that Respondent's theory that the cause of death of the dolphin was attributable to morbillivirus is speculative and in reliance upon "an article that was not admitted (or offered) at hearing." *Id.* The Agency acknowledges that while the (necropsied) dolphin suffered from morbillivirus, "the virus is not always fatal." *Id.* While "[t]he illness may have weakened the dolphin, . . . Respondent is not less liable under the law because the dolphin was sick." *Id.* Further, the record "contains evidence of a struggle to free the carcass . . . in addition to ample proof that the gill net was tightly twisted upon itself , evincing a struggle by a live dolphin to free itself" with acknowledgment by Respondent that "the twisting occurred where the dolphin was located." *Id.*

In response to Respondent's due process arguments, specifically with regard to "the rules governing administrative process, such as the admissibility of hearsay evidence" and "constraints by the underlying statute on the Judge's subpoena power," the Agency argues that such arguments may not be raised "in this forum," noting that under its regulations "'[t]he Judge has no authority to rule on constitutional issues or challenges to the validity of regulations promulgated by the Agency or statutes administered by NOAA."' *Id.* at 5 (citing 15 C.F.R. § 904.200(b)). Further, the Agency argues, citing various case law in support[10], that "in the administrative forum, the admission of hearsay does not violate due process, so long as it bears some indicia of reliability." *Id.* Further, the Agency asserts "[t]he rationale for admission of hearsay is that 'little harm can result from the reception of evidence that could perhaps be excluded . . . because the judge, trial or administrative, is presumably competent to screen out and disregard what he thinks he should not have heard, or to discount it for practical and sensible reasons.'" *Id*. at 5-6 (citing *U.S. Fish and Wildlife Service v. Tatum*, No. D 91-4, 1993 WL 495666, at *226-27 (F.W.S. July 2, 1993) (quoting *Multi-Medical Convalescent & Nursing Center v. NLRB*, 550 F.2d 974, 977 (4th Cir. 1977))).

As to the drift analysis at AE 11, the Agency maintains the "drift analysis remains corroborating evidence that the dolphin carcass that Mr. Wolf watched drift slowly south along shore for forty minutes is the same carcass that stranded on the beach one mile south of Respondent's house." *Id.* at 6. The Agency argues its decision not to call Werner to testify did not violate Respondent's due process. *Id*. The Agency contends "there is no evidence that Respondent ever attempted to contact Ms. Werner, who may have consented to testify" and points out that Respondent did not "propound expert testimony about the document [presumably referring to AE 11], despite receiving it from the Agency as early as February 25, 2014." *Id.* The Agency asserts, citing *Pavlik v. United States*, 951 F.2d 220, 224 (9th Cir. 1991) for support, that absent a showing of improper motives or the possession of exculpatory material, "'the due

[10] *Mastry's Bait and Tackle, Inc.*, No. SE020225FM, 2005 WL 3631282, at *15-16 (A.L.J. Nov. 17, 2005); *Roque*, No. NE970229FM/V, 1999 WL 1417458, at *38 (A.L.J. Apr. 30, 1999); *U.S. Fish and Wildlife Service v. Tatum*, No. D 91-4, 1993 WL 495666, at *228 (F.W.S. July 2, 1993).

process clause does not require the government to call witnesses simply for the sake of facilitating the defense's presentation of its own case.'" *Id.*

In his reply, Respondent reiterates his position that the Agency "failed to meet its burden of proof with the evidence it has submitted." Resp. Rep. Br. at 1. Respondent contends there is no direct evidence of liability and that the circumstantial evidence presented is "inconsistent at best." *Id.* at 2. Having failed to meet its initial burden of proof, the "burden of rebutting the Agency's evidence never shifted to the Respondent." *Id.* Respondent argues that the evidence presented did not establish "how long the dolphin was in the Respondent's net" and that a "definitive cause of death" of the necropsied dolphin was not established. *Id.* at 2-3, 5.

Respondent reiterates his concerns over his inability to "subpoena witnesses that could have testified to the credibility of the drift analysis" and expresses that such inability compromised his ability to prepare an adequate defense. *Id.* at 4. He also identifies specific concerns with regard to the foundational basis and reliability of the drift analysis. *Id.* In particular, Respondent questions the degree of accuracy of the analysis, noting that the computer model utilized a human being, not a dolphin. *Id.* He also notes that the qualifications or extent of training regarding Werner, the individual who ran the analysis, was not presented at the hearing, nor were the qualifications of the other Coast Guard officer ("Downend")[11] who communicated the results to Samuels. *Id.* Since neither Werner nor Downend were presented to testify at the hearing, Respondent was deprived of an opportunity to cross-examine them. *Id.* He argues that "[t]his is beneath the standard of fairness that should be upheld by the Court." *Id.*

Respondent renews his objections to the admission into evidence of the drift analysis at AE 11. *Id.* In support, he argues that the Agency's rule, which states that the "[f]ormal rules of evidence do not necessarily apply to the administrative proceedings, and hearsay evidence is not inadmissible as such," does not necessarily permit the introduction of hearsay evidence when that evidence lacks reliability. *Id.* Respondent argues that while hearsay is allowable when it is reliable, "[n]o evidence or testimony was offered to suggest that the hearsay evidence in the form of the drift analysis was reliable." *Id.* at 5. Thus, he argues the drift analysis should be rejected. *Id.*

Additionally, Respondent reiterates his earlier argument concerning the length of the dolphin, namely that the dolphin found in Respondent's net was estimated to be about 6 feet in length whereas the dolphin necropsied was measured to be 8 feet in length. *Id.* He reiterates the information provided to Wolf at the time of his report concerning another dead dolphin that had been reported and urges that I take note of that fact. *Id.* at 5-6. He also notes discrepancies in a factual question concerning in which end of Respondent's net the dolphin was found, noting that the weight of the evidence supports Respondent's contention that it was found in the shore-end or inshore part of the net, not the offshore end of the net as the Agency claimed. *Id.* at 6.

Discussion of Due Process Challenges

[11] Presumably, Respondent is referring to Lieutenant Nathan Downend, who transmitted the results of the drift analysis to Samuels. See Tr. 60-64.

The essence of Respondent's due process challenges appear to relate directly to the admissibility of hearsay evidence in this administrative proceeding and the resulting admission of certain pieces of evidence. As the Administrative Law Judge presiding over this matter, I am bound to follow the applicable laws and regulations that govern this proceeding. One such regulation is found within 15 C.F.R. Part 904, the Civil Procedures that apply to this proceeding. Subpart C of the Agency's Civil Procedures sets forth "the procedures governing the conduct of hearings and the issuance of initial and final administrative decisions of NOAA involving . . . civil penalty assessments . . . ." 15 C.F.R. § 904.200(a). These Civil Procedures provide that:

> All evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing. Formal rules of evidence do not necessarily apply to the administrative proceedings, and hearsay evidence is not inadmissible as such.

15 C.F.R. § 904.251(a)(2). Respondent has renewed his objections to the admission into evidence of the drift analysis at AE 11, arguing that it was unreliable evidence that should not have been admitted. While I decline to revisit my ruling on the admission of this piece of evidence, I have considered Respondent's arguments concerning the reliability of the drift analysis, namely the "lack of proper foundation, no explanation regarding any margin of error, and no explanation of how the analysis might differ since a dolphin was involved instead of a human,"[12] and construe them as arguments as to the amount of weight, if any, that I should afford this piece of evidence in my evaluation of the entire record of evidence. As mentioned during the course of the hearing,[13] one of my many obligations in presiding over a hearing is to weigh evidence. Thus, the admission alone of evidence does not resolve what amount of weight, if any, will be attributed to that evidence. That determination is made after a thorough and thoughtful review of the totality of the evidence presented during the administrative proceeding.

It is worth noting that "[r]egardless of the rules of practice as to the admissibility of hearsay evidence in the courts of the various jurisdictions, they do not govern or control the admissibility of such evidence in administrative hearings. It has been held that hearsay evidence is admissible in administrative hearings so long as the evidence upon which a decision is ultimately based is both substantial and has probative value." *See Jacobowitz v. United States*, 191 Ct. Cl. 444, 452 (1970) (citing *Morelli v. United States*, 177 Ct. Cl. 848, 853-54 (1966); *Montana Power Co. v. Federal Power Commission*, 185 F.2d 491, 497 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951); and *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 690 (9th Cir. 1949), *cert. denied*, 338 U.S. 860). "Hearsay evidence is admissible in administrative hearings, and such hearsay may be substantial evidence supportive of a finding adverse to the plaintiff." *Eades v. Sec. of HHS*, 1987 U.S. Dist. LEXIS 14698, at *9 (D.S.C. 1987) (citing *Richardson v. Perales*, 402 U.S. 389 (1971)).

With regard to Respondent's claim that the evidentiary rules that applied to his case "deprive[d] him of the opportunity to cross-examine adverse witnesses" (Resp. Ini. Post-Hrg. Br.

[12] Resp. Ini. Post-Hrg. Br. at 9.
[13] See Tr. 47-48, 65-66, 182, 189, 196.

at 9), I note that, with the exception of the drift analysis contained in AE 11 and the pathology report of AE 10 that was authored by Dr. Colegrove-Calvey who did not testify as a witness, Respondent was provided with the opportunity to conduct cross-examination of the witnesses who testified and authored the remaining Agency exhibits that were admitted into evidence. To the extent Respondent's arguments are attempts to challenge the constitutionality of the Agency regulations as well as the limitations on my subpoena authority under the MMPA, I am not authorized to make such constitutional determinations. As the Agency correctly noted in its reply brief, "[t]he Judge has no authority to rule on constitutional issues or challenges to the validity of regulations promulgated by the Agency or statutes administered by NOAA." 15 C.F.R. § 904.200(b); Ag. Rep. Br. at 5. Thus, I lack the authority to address Respondent's constitutional challenges to the subpoena limitations under the MMPA or the evidentiary standards set out in Agency regulations to which he objects.

Discussion of Liability

As previously discussed, the Act and its implementing regulations provide that it is unlawful for any person 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). 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. In this case, Respondent has been charged with lethally taking a marine mammal, namely a bottlenose dolphin, on November 3, 2013, with a gill net.

The parties entered into a joint set of stipulations that agreed to, among other things, the following: Respondent is a "person" within the meaning of the Act and subject to the jurisdiction of the United States; Respondent's activities on November 2 and 3, 2013, occurred in "waters or on lands under the jurisdiction of the United States" pursuant to the Act; bottlenose dolphins are marine mammals within the meaning of the Act; Respondent set a 100-foot gill net that he owned from the beach in front of his beachfront home on the evening of November 2, 2013; and, upon retrieving his gill net from water on the morning of November 3, 2013, Respondent discovered a bottlenose dolphin in the gill net. JX 1.

At issue is whether Respondent engaged in the lethal "taking" of a marine mammal with his gill net on November 3, 2013, in violation of the Act and Agency regulations. The Agency asserts that Respondent's gill net was the proximate cause of a bottlenose dolphin's death. Respondent, however, disputes that he violated the MMPA and asserts that the Agency failed to meet its initial burden in this case and to present sufficient evidence to establish such a violation. More to the point, he argues that the evidence presented by the Agency fails to establish that he caused the death of the dolphin he discovered in his gill net and that the dolphin found in his gill net was the same dolphin that was found one mile south of his home and necropsied by McFee.

The threshold question I had to resolve was whether the Agency met its initial burden of proof in this case. That is, whether the Agency established, by a preponderance of the evidence, that Respondent engaged in a lethal taking of a marine mammal with his gill net on November 3, 2013. I have concluded that the Agency did not meet its burden of proof in this case and,

therefore, I do not find Respondent liable for the charged violation of federal law. My rationale follows.

Implicit in the charged violation of this case — a "lethal taking" of a marine mammal — is the fact that the mammal was alive prior to the "taking" that caused its death. It is here that I have determined the Agency failed to satisfy its burden of proof. As to the dolphin found in Respondent's gill net on the morning of November 3, 2013, there is no dispute in the evidence presented that that dolphin was dead upon discovery. That fact has been established by both Respondent and Agency witnesses. *See* Tr. 129-32, 244-45, 305-07, 326-27, 341, 369, AX 2, AX 7 at 1.

To establish that the dolphin found in Respondent's gill net was alive prior to encountering the net, the Agency has presented and relied upon two reports. One report is the result of a necropsy performed by McFee on a bottlenose dolphin carcass that was found about one mile south of Respondent's home around noon on November 3, 2013, which arrived at McFee's laboratory at approximately 3 p.m. the same day. The necropsy was performed the following morning. Tr. 52-54, 159-64, 184-5, 207, AX 8. McFee was deemed an expert in marine mammal biology, based on his education, training, and experience in the field, including experience in performing roughly 600 necropsies of bottlenose dolphin. Tr. 171-183. During his necropsy, McFee noted multiple lacerations to the dorsal fin, flukes, and rostrum (jaw) of the dolphin that he believed to be consistent with net entanglement. Tr. 190-91, AX 8 at 2. He also found "subdermal hemorrhaging" on some of the lacerations that suggested the dolphin was alive when the laceration wounds were inflicted. Tr. 192, AX 8 at 2. Finally, he noted a "copious amount of foam" in the lungs, which he stated could be described as "wet," and "a lot of sand" in the esophagus of the dolphin that was atypical of a stranding, particularly regarding sand in the esophagus. Tr. 192-93, AX 8 at 3. The presence of sand in this dolphin's esophagus reminded McFee of animals he had seen entangled in nets that, through a struggle, take in sand they would not otherwise take into their esophagi. *Id.* He later explained during the hearing that the presence of "foam" or wetness in the dolphin's lungs, as opposed to water in the lungs, was not inconsistent with drowning. He explained that dolphins are "forced air breathers," meaning that breathing is done consciously, unlike in humans. Thus, if a dolphin were to become entangled in a net and unable to surface, the dolphin would not necessarily open its blowhole to breathe while it is underwater (which would otherwise allow water to enter the blowhole and lungs), but would hold its breath until it asphyxiates, hence a lack of water in its lungs. Tr. 209-10. This describes a "wet drowning" situation, a term that was used in his report. Tr. 209-10, 218, AX 8 at 4. Based on his necropsy of this dolphin, McFee opined in his conclusions that the "copious amount of foam in the lungs, numerous gill net lacerations with associated hemorrhaging, and sand in the esophagus" was "suggestive of 'wet' drowning in the net." AX 8 at 4.

Samples taken from the necropsied dolphin were further evaluated by a doctor of veterinary medicine, Dr. Colegrove-Calvey, the results of which were contained in a histopathology report. Tr. 191-4, AX 8, AX 10. In her evaluation, Dr. Colegrove-Calvey identified acute lacerations on the dolphin's skin and dorsal fin with hemorrhage on those areas and on the dolphin's jaw. AX 10, at 3-4. She noted that "morbillivirus infection was confirmed histologically in this dolphin." AX 10, at physical page 4. In her comments to the report, she remarked that the dolphin carcass "was reported to initially have been within a gill net off of a

pier" and that "lacerations noted on the dorsal fin grossly would fit with a net entanglement." She stated that "[h]istologically there was evidence of inflammation and hemorrhage in this area, suggesting the animal was alive for at least some time within the net." *Id.*

These reports, though not definitive, are consistent with one another in suggesting that, it is more likely than not, that the dolphin that was necropsied by McFee became entangled in a net while alive and died from such entanglement. I find this evidence to be compelling and not directly controverted by other competent and substantial evidence produced at hearing. However, in order to establish that Respondent engaged in the lethal taking of a bottlenose dolphin with his gill net on November 3, 2013, the preponderance of the evidence must establish that the dead dolphin discovered in Respondent's gill net around 7 a.m. on November 3, 2013, was the same dolphin carcass found approximately one mile south of his home around noon the same day and later necropsied by McFee. It is here, with this nexus, that I remain unconvinced.

In support of its contention that the dolphin found in Respondent's gill net was the same dolphin necropsied by McFee, the Agency relies on the fact that Wolf "watched the dolphin drift south along the shore for forty minutes," that "a drift analysis performed by the Coast Guard the morning of November 3, 2013, predict[ed] that the dolphin carcass would more likely strand on shore than float out to sea," and that the location of the necropsied dolphin carcass was "one mile south of Respondent's house." Ag. Ini. Br. at 8. Further, the Agency argues that "no other dolphins stranded in South Carolina on November 3." *Id.* The Agency also points out that the area of Respondent's net where the dolphin was found was twisted, which was "consistent with a dolphin spinning to try to free itself." *Id.* Further, the dolphin necropsied had "wounds consistent with a monofilament gill net of the kind used by Respondent." *Id.*

It is undisputed that Wolf observed the dolphin that was found in Respondent's gill net float in a southerly direction along the coast for about forty minutes after its discovery. However, it was not until several hours later, around noon, that a dolphin carcass was located about a mile south of Respondent's home near or on the shore. The Agency has argued that the drift analysis it offered into evidence, and that I admitted as part of AE 11, is corroborative evidence that the dolphin carcass later discovered is the same dolphin found earlier in Respondent's gill net. However, as Respondent correctly points out, the reliability of the drift analysis is questionable, if not wholly absent. Indeed, during the hearing I noted "foundational concerns" with the document given the fact that neither Werner, who conducted the analysis, nor Downend, who communicated the interpretative results to Samuels, testified about the drift analysis. Tr. 61-62, 65. In lieu of such testimony, Samuels testified at the hearing as to his communications with Downend and attempted to communicate to the Court the interpretative results of the drift analysis that were related to him by Downend. Tr. 62-64. To that end, Samuels testified:

> [The drift analysis is] a tool that the Coast Guard uses to assist them in locating a body in water. As the slides progress, I believe they're on an hourly basis. Blue No. 1 is the congestion. The Blue No. 1s indicate where it's more likely that a body would be found, and as shown here, this indicates that it would be more likely that a body would be found on the shore rather than in the water.

Tr. 60. It should be noted, however, that although Downend was reported to have explained to Samuels the interpretative results of the drift analysis, Samuels' Supplemental Investigation Report suggest a third individual, OSCS Mathew Caviness, as the person who could explain the screen shots of the drift analysis. The report states:

> On February 5, 2014, I received an e-mail message from USCG Lt. Nathan Downend, which identified Elizabeth Werner as the individual who conducted the drift analysis and OSCS Mathew Caviness as an individual who could further explain the screenshots. As explained to me by Lt. Downend, the proximity of the data points indicated a high degree of likelihood that the "person in the water" would be pushed ashore by the current and computer model projections.

AX 11 at 1 (internal footnote omitted), AX 1 at 5 n.2.

Samuels further explained at the hearing, as was indicated in his report, that Downend had pointed out that the computer program used for the drift analysis was modeled for a human being in the water, namely "a six foot person," not a dolphin. Tr. 63-64. I noted during the hearing that this drift analysis appeared to be a "technical document based on a computer program." Tr. 66.

> Factors that should be considered in evaluating the reliability of computer-based evidence include the error rate in data inputting, the integrity of data input, the integrity of hardware and software systems, and the security of the systems. The degree of foundation required to authenticate computer-based evidence depends on the quality and completeness of the data input, the complexity of the computer processing, the routineness of the computer operations, and the ability to test and verify the results of the computer processing.

Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 900.06(3) (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1997); *see also, Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534, 559-60 (D. Md. 2007) (discussing potential authenticity and reliability problems with computer-based evidence generally, and computer simulations specifically).

Here, I admitted the drift analysis found at AE 11 because it met, albeit barely, the standard for admissible evidence set forth in the Rules. 15 C.F.R. § 904.251(a)(2). However, ultimately, the Agency failed to present sufficient information about the drift analysis that might have proven it a reliable source of information from which to find that the dolphin caught in Respondent's gill net was the same dolphin found by the volunteers. For example, the effect(s) of having to substitute data input into the computer program — a six foot human being versus a nearly eight foot dolphin — was not explained. According to Samuels' report, the computer program presumably relied to some extent on water currents to predict the location of a "person

in the water," yet no information as to the actual water current on November 3, 2013, was presented at hearing. Further, the anatomical structure of a human being and a dolphin are vastly different, and presumably those differences would yield different results when interacting with water currents. Yet no explanation was offered at hearing to explain the impact those differences could have on the computer model predictions. Additionally, no explanation concerning details of the computer program itself (for example, the complexity of the program, the extent of its use in any particular industry, the reliability and acceptability of its use among a particular group, such as the Coast Guard, the frequency with which it is used in law enforcement) or the manner in which results were interpreted was provided. No information concerning the accuracy or margin of error with regard to the computer program was provided or whether results are tested and verified. Moreover, the very limited information conveyed by the only witness to testify about the drift analysis, Samuels, was attenuated in that it was several steps removed from the source of the information. After having considered all of these factors, I could not find sufficient reliability in the drift analysis. Accordingly, I afforded it no weight in my consideration of the evidence presented in this case.

The Agency also argues, in support of its position, that no other dolphin strandings were reported on November 3, 2013. However, evidence in the record suggests otherwise. While McClary and McFee testified that they were not made aware of any other marine mammal strandings on November 3, 2013 (apart from a report involving a live whale), the Agency's witness, Wolf, revealed through a written statement made on November 3, 2013 that another report involving a dolphin had been made to SCDNR. In his statement, Wolf explained that when he reported the incident he observed to SCDNR, he was informed that SCDNR had "already received a call about a dolphin pushing a dead calf (baby dolphin)." AX 7 at 3. The Agency has argued that "[t]his report, if truly made, was not made on November 3." Ag. Rep. Br. at 3. However, I do not find support for such a conclusion. The record does not reveal precisely when the claimed report was made to SCDNR, only that it had been made prior to Wolf's conversation, which occurred shortly after 8 am on November 3, 2013.[14] The fact that neither McClary nor McFee, both of whom are involved in the marine mammal stranding network activities in South Carolina, knew of this particular report to SCDNR does not discredit its existence. It could, however, suggest that not every marine mammal stranding in the state comes to the attention of these individuals. Thus, I find the Agency's argument on this point unpersuasive.

Lastly, the Agency points out that the area of Respondent's net where the dolphin was found was twisted, and that such twisting is consistent with a dolphin that was struggling to free itself from net entanglement. Further, the Agency asserts the necropsied dolphin had wounds that were consistent with lacerations caused by monofilament line, like Respondent's gill net. I note that, while it may be likely Respondent's gill net was made from monofilament, evidence presented at hearing did not establish this fact. Testimony revealed information about monofilament generally — that it is a plastic type of line that can be used on fishing poles or nets — and that gill nets are typically made from monofilament but can also be made with other synthetic material or cotton. Tr. 191. However, the actual composition of Respondent's gill net was not established. Nevertheless, I considered the fact that Respondent's gill net possessed some damage, namely twisted or "kinked" areas in the net where the dolphin had been found.

[14] Wolf completed and signed his statement on 3:45 p.m. on November 3, 2013. AX 7.

Though there were discrepancies as to which end of the net, offshore versus inshore, featured damage purportedly from a dolphin, Respondent acknowledged that there was damage to his net in the area of the net where the dolphin was found and testified that it "looked like if something was in the net and had rolled it around." Tr. 36, 84-87, 107-08, 117-18, 357-59, 365-66, AX 1 at 6-8, AX 2, AX 3, AX 14 through AX 18. At one point, he likened the description of the "kinked" portion of the net to the product of having an object, like the dolphin, rolled back and forth by the surf of the ocean, causing the net to become "kinked up" in that area. Tr. 357.

While part or all of the twisted or kinked damage to the net could have been caused by a live dolphin within the net, as the Agency contends, the evidence also shows that Respondent stowed his net by "cram[ming]" the net into a five gallon bucket or plastic container, which could also have contributed to the twisted nature of portions of the net. Tr. 342, 359-60, 368. In addition, Wolf described, both in his recorded statement the same date as the incident and in his testimony, that he observed Respondent "roll[] up the net," which appears to be corroborated by the photographic evidence in the record. Tr. 132, AX 7 at 2, AX 14 through AX 18. This, too, could have contributed to the twisted portions of the net. Given the various and plausible explanations for some or all of the twisted portions of the net, I am not convinced that it is more likely than not that the twisted portions of Respondent's net was the product of the dolphin spinning in the net to try to free itself from entanglement before it died.

Further, while the necropsied dolphin was identified as having lacerations on the dorsal fin, flukes, and rostrum (jaw) that were consistent with monofilament entanglement, no specific markings or wounds were noted by observers of the dolphin found in Respondent's gill net. For example, Wolf testified that when he observed the dolphin in Respondent's gill net from about a 5 yard distance, he observed no distinctive markings or any cuts or lacerations on the dolphin apart from "a couple of nicks" on the "dorsal fin." Tr. 151-52, 154. Respondent testified that there was a piece of mesh caught on the dolphin's dorsal fin, but nowhere else on the dolphin's body. Tr. 341, 366-67.

While it is possible that the dead dolphin found in Respondent's gill net on the morning of November 3, 2013, was the same dolphin located south of Respondent's home and necropsied by McFee, the standard of proof applicable in this case requires greater convincing than mere possibility. Indeed, the preponderance of the evidence standard requires that, to establish Respondent engaged in the lethal taking of a bottlenose dolphin on November 3, 2013, I must find it more convincing than not that the dolphin found in Respondent's net was the same dolphin later necropsied by McFee, i.e., that the dolphin in Respondent's net was decidedly alive before it encountered and was killed by Respondent's net. For the reasons explained above, particularly the lack of reliance I am able to place on the drift analysis at AE 11, I cannot reach such a conclusion in this case. Accordingly, I conclude that the evidence presented in this case fails to establish that Respondent engaged in the lethal taking of a marine mammal, namely a bottlenose dolphin, on November 3, 2013.

VI. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon thorough and careful review of the evidence presented in this proceeding, I make the following ultimate findings of fact and draw the following conclusions of law:

1. Respondent is a "person" as defined by the Marine Mammal Protection Act and is subject to the jurisdiction of the United States. 16 U.S.C. § 1362(10); JX 1.

2. Respondent owns an oceanfront home in Garden City, South Carolina, on the Atlantic Ocean. Respondent's activities on November 2 and 3, 2013, occurred in waters under the jurisdiction of the United States for purposes of the Marine Mammal Protection Act. 16 U.S.C. § 1362(15); JX 1.

3. Bottlenose Dolphins are marine mammals within the meaning of the Marine Mammal Protection Act. 16 U.S.C. § 1362(6); 50 C.F.R. § 216.3; JX 1.

4. On November 2, 2013, Respondent set his 100-foot gill net in the Atlantic Ocean from his oceanfront property. On the morning of November 3, 2013, Respondent found a dead bottlenose dolphin in his gill net.

5. The preponderance of the evidence does not establish that Respondent engaged in the lethal "taking" of a marine mammal, as defined in the Marine Mammal Protection Act and implementing regulations. 16 U.S.C. § 1372(a)(2)(A); 50 C.F.R. § 216.11(b).

VII. DECISION AND ORDER

Respondent is not liable for the charged violation in this case. Accordingly, no civil monetary penalty is imposed.

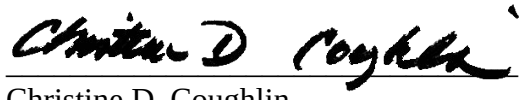
PLEASE TAKE NOTICE, that any petition for reconsideration of this Initial Decision must be filed with the undersigned within 20 days after the Initial Decision is served. 15 C.F.R. § 904.272. Such petition must state the matter claimed to have been erroneously decided, and the alleged errors and relief 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 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.



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

Dated: January 21, 2015
Washington, DC

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.

(l) 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.