



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

IN THE MATTER OF:)	DOCKET NUMBER
Ocean Conquest LLC, and)	
Benjamin Brown Maughan III,)	PI1101249, F/V Ocean Conquest
Respondents.)	
)	

INITIAL DECISION AND ORDER

Date: July 6, 2015

Before: Susan L. Biro, Chief Administrative Law Judge, U.S. EPA¹

Appearances: For the Agency:

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National Oceanic and Atmospheric Administration
U.S. Department of Commerce
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For Respondents:

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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.

I. PROCEDURAL HISTORY

On November 1, 2012, the National Oceanic and Atmospheric Administration (“NOAA” or the “Agency”) issued a Notice of Violation and Assessment of Administrative Penalty (“NOVA”) to Benjamin Brown Maughan III and Ocean Conquest LLC (“Ocean Conquest”) (collectively, “Respondents”). NOVA at 1. The NOVA charges Mr. Maughan and Ocean Conquest with one count of violating the Marine Mammal Protection Act (“MMPA”). *Id.* Specifically, the Agency alleges that on or about October 27, 2010, Mr. Maughan and Ocean Conquest knowingly set their purse seine fishing gear on a live whale, thereby taking a marine mammal on the high seas, in violation of 16 U.S.C. § 1372(a)(1) and 50 C.F.R. § 216.11(a). *Id.* at 1–2. The Agency proposes a penalty of \$11,000 to be assessed jointly and severally against Respondents Maughan and Ocean Conquest. *Id.* at 2. The NOVA advised Respondents of their right to request a hearing before an Administrative Law Judge (“ALJ” or “Judge”) within thirty days of receiving the NOVA. *Id.* at 2–3.

By letter dated January 4, 2013, Respondents, acting through counsel, James P. Walsh, Esq., requested a hearing. NOAA forwarded the NOVA and the hearing request to this Tribunal by letter dated February 8, 2013. An Assignment of Administrative Law Judge and Order to Submit Preliminary Positions on Issues and Procedures (PPIP) (“PPIP Order”) was issued on February 21, 2013, designating the undersigned to preside in this matter and setting forth various prehearing filing deadlines and procedures. The parties were directed to file their PPIPs no later than March 29, 2013. Respondents filed their PPIP on March 19, 2013. The Agency filed its PPIP on March 26, 2013.

On June 4, 2013, a Hearing Order was issued, which set forth certain prehearing filing deadlines and scheduled the hearing to begin on September 17, 2013. On June 6, 2013, the Headquarters Hearing Clerk issued a Notice of Hearing Location, announcing the San Diego, California location for hearing.

On June 14, 2013, letters were sent to NOAA and to Respondents inviting the parties to participate in this Tribunal’s Alternative Dispute Resolution program, which has just been approved for use in NOAA proceedings. By e-mail dated June 24, 2013, Respondents declined the invitation and requested that the matter proceed to hearing.

On August 29, 2013, the parties filed their Joint Stipulation of Facts (“Stip.”). On August 31, 2013, Respondents filed a Hearing Memorandum addressing the Agency’s claims against Respondents under the MMPA.

The hearing in this matter was held on September 17, 2013, in San Diego, California.² At the hearing, the Agency offered the testimony of one witness, Albinus Banakori. Respondents did not call any witnesses. Twenty-six Joint Exhibits (“JX”) and one Court’s Exhibit (“CX 1”) (the parties’ Joint Stipulation of Facts) were admitted into the record. Tr. at 5. The parties stipulated that as to each Joint Exhibit, “there are no objections as to foundation, authenticity or

² Citations herein to the transcript of the hearing are in the following format: “Tr. at [page].”

relevancy,” however “both NOAA and Respondents reserve the right to argue the weight that should be given to any admitted evidence.” Stip. ¶ 30.

On September 25, 2013, the parties filed a Joint Submission of Amended Joint Exhibits “[i]n order to remove certain Personally Identifiable Information from the administrative record.” The substitutions were made as requested, and the original pages submitted at the hearing identified by the Joint Submission were destroyed.

A copy of the transcript of the hearing was received by this Tribunal on October 18, 2013. On October 24, 2013, electronic copies of the transcript were e-mailed to the parties, and the undersigned issued a Post-Hearing Scheduling Order, which set deadlines for the filing of motions to conform the transcript to the actual testimony, and post-hearing briefs.

On November 8, 2013, the parties filed a Joint Motion to Conform Hearing Transcript to Testimony, which was granted by Order dated December 3, 2014. The Agency, on behalf of the parties, filed on December 11, 2013, a copy of a video that was shown at the hearing for illustrative purposes only, and not for admission into evidence. Tr. 6-8, 36-47.

On November 22, 2013, the Agency filed its Post-Hearing Brief (“Agency’s Brief” and “AB”). Respondents filed their Post-Hearing Brief (“Respondents’ Brief” and “RB”) on December 16, 2013. On January 3, 2014, the Agency filed its Post-Hearing Reply Brief (“Agency’s Reply” and “ARB”), and on January 16, 2014, Respondents filed their Post-Hearing Reply Brief (“Respondents’ Reply” and “RRB”).

II. APPLICABLE LAW AND REGULATIONS

A. Liability

In 1972, Congress enacted the MMPA, 16 U.S.C. §§ 1361–1423, as amended, in response to the public’s growing concern over the continued survival of marine mammals.³ Congress recognized 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,” that “marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic,” and that “the primary objective of their management should be to maintain the health and stability of the marine ecosystem.”⁴ In furtherance of this goal, the

³ See H.R. REP. NO. 92-707, at 12 (1972) (Conf. Rep.) (“The Committee was impressed by the wide support for the principle of broader and more adequate protection for marine mammals . . .”). As broadly stated in the House Conference report, Congress passed the MMPA “to prohibit the harassing, catching and killing of marine mammals by U.S. citizens or within the jurisdiction of the United States, unless taken under the authority of a permit issued by an agency of the Executive Branch.” *Id.* at 11.

⁴ Marine Mammal Protection Act of 1972, Pub. L. No. 92-522 § 2, 86 Stat. 1027, 1027–28 (codified at 16 U.S.C. § 1361(1), (6)).

MMPA imposes a moratorium on the “taking” of marine mammals, with limited exceptions. 16 U.S.C. § 1371(a) (the exceptions include: the taking of a marine mammal in accordance with a permit for scientific research, public display, photography, and other specific purposes; taking in accordance with a permit *or* authorization to incidentally take marine mammals in the course of commercial fishing operations; and taking with a permit in the course of a specified activity other than commercial fishing).

Specifically, the MMPA declares it “unlawful— (1) for any person subject to the jurisdiction of the United States or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas” 16 U.S.C. § 1372(a)(1). This prohibition is also contained in the MMPA’s implementing regulations:

§ 216.11 Prohibited taking.

Except as otherwise provided in Subparts C, D, and I of this Part 216 or in Parts 228 or 229, it is unlawful for:

(a) Any person, vessel, or conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas

50 C.F.R. § 216.11 (2010).

To “take” is defined by the MMPA as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” 16 U.S.C. § 1362(13). The term is further defined in the pertinent regulations as follows:

Take means to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammal. This includes, without limitation, any of the following: The collection of dead animals, or parts thereof; the restraint or detention of a marine mammal, no matter how temporary; tagging a marine mammal; the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal; and feeding or attempting to feed a marine mammal in the wild.

50 C.F.R. § 216.3 (2010). The MMPA defines “harassment” as:

. . . any act of pursuit, torment, or annoyance which –

(i) has the potential to injure a marine mammal or marine mammal stock in the wild; or

(ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral

patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.

16 U.S.C. § 1362(18)(A).

The incidental take exception to the moratorium on taking, referenced in MMPA Section 1371(a)(2), is more fully set forth in Section 1387, entitled, “Taking of marine mammals incidental to commercial fishing operations.” 16 U.S.C. §§ 1371(a)(2), 1387. Therein, Congress established a regulatory scheme for the issuance of incidental take “authorizations” under which properly permitted commercial fishermen could obtain such “authorizations” to incidentally take marine mammals in the course of commercial fishing operations. 16 U.S.C. § 1387(c)(2).

According to the regulations promulgating this provision of the Act, set forth at 50 C.F.R. Part 229, “incidental” means, “with respect to an act, a non-intentional or accidental act that results from, but is not the purpose of, carrying out an otherwise lawful action.” 50 C.F.R. § 229.2 (2010).⁵ The intentional, lethal take of any marine mammal is strictly prohibited “unless imminently necessary in self-defense or to save the life of a person in immediate danger.” 50 C.F.R. § 229.3(f); *see also* 16 U.S.C. § 1387(a)(5).

B. Penalty

The MMPA provides, in pertinent part, that “[a]ny person who violates any provision of this subchapter or . . . regulation issued thereunder . . . may be assessed a civil penalty by the Secretary of not more than \$10,000 for each such violation.” 16 U.S.C. § 1375(a)(1).

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, resulted in the Secretary increasing the maximum civil penalty to \$11,000 per MMPA violation. 15 C.F.R. § 6.4(e)(10) (2010).

To determine the appropriate penalty, NOAA regulations 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 violation, and ability to pay; and such other matters as justice may require.

15 C.F.R. § 904.108(a).

⁵ Congress delegated authority to the Commerce Department to “prescribe such regulations as are necessary and appropriate to carry out the purposes” of the MMPA. 16 U.S.C. § 1382(a); *see also* § 1373(a) (establishing the procedures for promulgating regulations to carry out the purposes of the MMPA).

III. FACTUAL BACKGROUND

The following findings of fact include matters that have been stipulated by the parties and those that have been deemed proven, material, and relevant, based upon review of the evidentiary record and an assessment of the witness's credibility. Specific credibility findings and analysis of the evidence are presented in the Discussion section below.

The F/V Ocean Conquest ("Vessel") is a large-scale tuna purse seine⁶ fishing vessel hailing from Pago Pago, American Samoa, which measures approximately 209-feet long and weighs 1,416 gross tons. Stip. ¶ 16; JX 2; JX 4; *see* JX 19 at 182. The Vessel has a carrying capacity of 1,488 tons of fish and carries a crew of approximately 40 persons. Stip. ¶ 16. The Vessel has a helicopter onboard to assist in finding schools of fish. Tr. 54; JX 13 at 159; JX 19 at 189, 192, 194, 201. At the time of the alleged violation, the Vessel was a properly documented United States purse seine fishing vessel in possession of a High Seas Fishing Permit and an authorization issued pursuant to Section 118 of the MMPA, 16 U.S.C. § 1387, for the incidental taking of marine mammals in the course of commercial fishing operations. Stip. ¶¶ 13-14; JX 20-21.

At all times relevant to the alleged violation, the Vessel was owned by Ocean Conquest and operated by Captain Maughan. Stip. ¶¶ 2-3. Captain Maughan completed and signed the South Pacific Regional Purse-Seine Logsheets for the trip at issue in this Count. JX 13 at 155, 158-59; JX 15 at 166. Additionally, at all relevant times for the Count contained in the NOVA, Chia Pin Wu, a citizen of Taiwan, served as the fishing master on board the Vessel.⁷ Stip. ¶ 21; JX 11 at 135; JX 13 at 154-55. Neither Respondent Ocean Conquest nor Captain Maughan has had any violations of the MMPA in the past five years. Stip. ¶ 28.

Pursuant to federal regulations, purse seine vessels operating in the western and central Pacific Ocean in 2010 were required to carry fishery observers on all fishing trips. Stip. ¶ 18. Fishery observers were tasked with the collection of scientific data and the documentation of fishing activities. *Id.* NOAA utilized fishery observers provided by the Pacific Islands Forum Fisheries Agency ("FFA"), an intergovernmental agency of seventeen Pacific Island nations

⁶ "Purse seine" is a type of fishing whereby a large open hanging netting is deployed in the water via small skiff boats to encircle an entire school of fish and then the bottom lead line on the net is pulled in or "pursed" to capture the fish and avoid them escaping by swimming downward. *See* 50 C.F.R. § 300.91 (purse seine fishing involves "gear consisting of a lead line, cork line, auxiliary lines, purse line and purse rings and of mesh net webbing [is] fashioned in such a manner that it is used to encircle fish, and in addition prevent their escape under the bottom or lead line of the net by drawing in the bottom of the net by means of the purse line so that it forms a closed bag."); 50 C.F.R. § 300.211 ("Purse seine means a floated and weighted encircling net that is closed by means of a drawstring threaded through rings attached to the bottom of the net."). *See also* Stip. ¶ 17.

⁷ "The fishing master on a purse seine vessel is the officer responsible for directing the crew and deploying/retrieving fishing gear and catch during purse seine fishing operations, under the supervision of the U.S. Captain." Stip. ¶ 21.

created to facilitate regional cooperation and coordination between those nations in regards to marine fishery policy and management. Stip. ¶ 19.

At all times relevant to the alleged violation, the FFA observer onboard the Vessel was Albinus Banakori. Stip. ¶ 20. Mr. Banakori is a citizen and resident of Papua New Guinea, and had been a fishery observer for nine years at the time of the hearing. Tr. 22–23. Mr. Banakori has participated in “[t]hirty-plus trips” as an observer. Tr. 23; JX 12 at 147. Prior to sailing with the Ocean Conquest, Mr. Banakori trained at fishery cadet school, where he was trained to work as a crewman on a fishing vessel, and subsequently served as a crew member of a carrier vessel for nine months. Tr. 24. Then, he trained at the Fishery College Kavieng in Papua New Guinea, where he was schooled in purse seine and long line fishing boats, as well as identification of fish species and marine mammals. Tr. 25–26; JX 10 at 127.

Mr. Banakori typically records his observations in the following manner while on a fishing trip: “During the set, I have my pocket-sized notebook [in] which I put the time of the set and the position of the set and the activities, and then after the set, when the set is completed, I transfer them into the PS-2 and then PS-3.” Tr. 28. The PS-2 form is his daily log, entitled “SPC/FFA Regional Purse-Seine Observer Daily Log,”⁸ where he records the activity of the vessel “at the end of the day” based on what he wrote in his notebook. Tr. 29-30; JX 5. The PS-3 form, entitled “SPC/FFA Regional Purse Seine Observer Set Details,” is where he records at the end of the day the “catch details for that particular set that day,” which is also based on his earlier notes. Tr. 32; JX 8.

Mr. Banakori creates other records at the end of each day of the trip. First, he keeps a trip diary, where he writes about what happened during the day “in more detail” than he wrote in his notebook. Tr. 30; JX 6. Another, Form GEN-2, entitled “SPC/FFA Regional Observer Species of Special Interest,” is where Mr. Banakori records what species of special interest, if any, where in some way involved with the fishing operations that day. Tr. 31; JX 7 at 54. And GEN-3, “SPC/FFA Regional Observer Vessel Trip Monitoring Record,” is completed each day to record “compliance issues.” Tr. 31-32; JX 7 at 55.

At the end of the entire fishing trip, Mr. Banakori fills out the “Purse Seine Trip Report,” which consists of a written summary of the entire trip. Tr. 33; JX 9. Each form is confidential; during their training, the observers are instructed not to share their information with the crew of the fishing boat. Tr. 33-34.

It has been stipulated that on October 27, 2010, between approximately 10:46 a.m. and 12:12 p.m. local time (between 00:46 a.m. and 2:12 a.m. Coordinated Universal Time (“UTC”)), the Vessel made a purse seine fishing set (“Set 9”) on the high seas of the Pacific Ocean. Stip. ¶¶ 22-23; Tr. 47–48. At this time, “the Vessel, by and through the crew and officers of the Vessel, made a purse seine fishing set on two live whales.” RB 17 at ¶ 25. See JX 6 at 43; JX 7 at 54; JX 8 at 64; JX 9 at 98, 110; JX 10 at 129–32; JX 11 at 136–139; JX 12 at 148, 151–52; JX

⁸ “SPC” refers to the Secretariat of the Pacific Community. The United States, 22 Pacific island countries, and others make up the Pacific Community. See <http://www.spc.int/en/about-spc/history.html>. The SPC publishes these standard forms for use by FFA. *Id.*

18 at 178; Tr. 47–50, 60–62. What follows is a more specific description of events based on the facts found in this proceeding.

Observer Banakori was “in the bridge” at the front of the ship on the F/V Ocean Conquest during the investigation of Set 9. Tr. 48-49. While the captain of a fishing vessel typically is “in the bridge observing” (but not giving commands “because the fishing master is in control of fishing operations”), Captain Maughan “wasn’t [in the bridge] at that time” and instead “was in his cabin.” Tr. 53; JX 10 at 129; JX 11 at 137; JX 13 at 155.⁹ Mr. Wu, the fishing master, was “up at the top control” or “top deck” / “navigating bridge,” and “on the bridge with” Mr. Banakori during Set 9. Tr. 52, 76, 82-83; JX 11 at 137. Mr. Wu would have been looking in the same direction as Mr. Banakori was looking, and he was utilizing binoculars. Tr. 83; JX 11 at 137-38.

Mr. Banakori first saw the school of tuna and two whales associated with that school, through binoculars, at the time when the Vessel was approximately five miles away from the school. Tr. 69, 82. The Vessel transited in the direction of the school. JX 10 at 129 (“*When did you first notice the whales? vessel change course / heading straight?*”); Tr. 69. Mr. Banakori saw birds over the tuna school, and saw “the two species of whales also there coming up,” i.e., porpoising, or “coming up” out of the water. Tr. 50. He also saw them blowing water up in the air, both from a distance with the aid of the binoculars, and then closer, without them. Tr. 52. When the school and whales were less than a mile away, Mr. Banakori no longer needed binoculars to see them. Tr. 82. He determined the whales were pygmy sperm whales. Tr. 53. The Vessel’s translator was with Mr. Banakori when he saw the whales, and mentioned the presence of the whales to Mr. Banakori. JX 10 at 129. The translator asked Mr. Banakori if he saw the whales and Mr. Banakori answered in the affirmative. Tr. 68.

When the Vessel approached the school, the fishing master circled the school multiple times. JX 10 at 129; Tr. 67; JX 5 at 19 (the PS-2 Form suggests that the investigation was taking place at or around 10:41 a.m., when the Vessel was investigating a fish school associated with two live whales); JX 11 at 137-38 (“He was investigating the school and kept going around in circles, in and out of the bridge at that time.”).

Approximately twelve minutes passed between Mr. Banakori’s first sight of the whales and the beginning of the set. JX 10 at 129. At approximately 10:46 a.m., the Vessel initiated a set on the school and the whales associated with it by releasing the skiff. JX 8 at 64 (the PS-3 Form reflects that the start of set (“skiff off”) was at 10:46 a.m.; comments read: “Set net on tuna species associated with live whale.”); JX 5 at 19 (the PS-2 Form reads: 10:46 a.m., activity code for “Set,” the codes for “Whale” and “Seen from vessel”); JX 6 at 43 (in his trip diary, Mr. Banakori noted that at 10:46 a.m., “[t]wo lives whales were spotted with tuna school so second

⁹ Captain Maughan told NOAA Agent Raterman that he is usually “in the pilot/wheel house prior to a set, but sometimes he is in his room/cabin which is ten (10) to fifteen (15) feet from the pilot house. He has a speaker in his room/cabin and is always in the pilot house within two (2) minutes when a set warning has been made. He observes each set from the pilot house and records all the information himself, as that is his job.” JX 13 at 155-56.

set conducted.”); JX 9 at 98 (“The Set #09 conducted on two live whales on 27/10/10 at 1046 hrs.”).¹⁰

At the start of the set, the Vessel’s helicopter took off “straight to the school of fish” to help drive the fish into the net. JX 10 at 132. The helicopter was in the air for approximately 30 minutes. *Id.* During this time, “the noise caused by the helicopter caused the whales to submerge for a time during the set” temporarily. *Id.*; JX 11 at 137-38, 42. The crew began pursing the net (turned the “winch on”) at approximately 10:55 a.m. JX 8 at 64. The whales were inside the net during this time of “net rolling,” i.e., “when power block start[s] to inhaul the net.” JX 10 at 129, 131-32; JX 7 at 54; JX 9 at 110 (“There were two of them swimming inside the enclosed purse net and it is possible to identify them.”). Pursing, or closing of the bottom of the net (the part deepest in the water) was completed (“rings up”) at 11:24 a.m. JX 8 at 64. There was no attempt to free the whales until after the net closed. JX 10 at 130; JX 11 at 138.

The whales were in the enclosed net for approximately one to two hours before they were released by the crew.¹¹ JX 10 at 129, 131; JX 11 at 138. In order to get the whales out of the net, the crew “pushed the cork [line] down” with the aid of two auxiliary boats. Tr. 55; JX 9 at 110; JX 11 at 136. At least one auxiliary boat “made physical contact with the whales to assist in forcing them out.” JX 11 at 139. This contact, the noise of the boat, and the net being held down, “allowed the whales to escape.” *Id.* The whales did not appear to be injured and were freed before the crew began “net stacking,” i.e., when “they started to pull the surplus net using cargo winches to create a good fish bag that is access[i]ble to do brailing.” JX 10 at 131; Tr. 62; JX 9 at 98 (“the crew get them freed before net stacking and they were alive.”); JX 9 at 110 (“No the species did not harm in any way which the auxiliary boat operators went out and drive them out of the net before net stacking.”); JX 7 at 55 (on Form GEN-3, Mr. Banakori did not check the “yes” or “no” box for the statement “Catch species of special interest” “because they freed whale away and it’s not being caught”).

The crew began the brailing process (scooping the fish out of the net) at 1:27 p.m., and the set was completed (“skiff on board”) at 2:12 p.m. JX 8 at 64. The set resulted in a catch of approximately 60 metric tons of skipjack tuna and 10 metric tons of yellowfin tuna, which together had an approximate ex-vessel value of \$40,765.80. Stip. ¶¶ 25, 27; Tr. 56. There was no lethal taking of a whale during Set 9. Stip. ¶ 26.

In March 2011, Special Agent Charles Raterman, who has served with NOAA’s Office of Law Enforcement for more than thirteen years and is based in Guam, reviewed FFA observer reports from the Vessel’s fishing trip, including Mr. Banakori’s records. JX 19 at 183.

¹⁰ It should be noted that just because a certain detail, e.g., the time the skiff was released, is mentioned in several of these separate forms filled out by Mr. Banakori, does not necessarily mean that that detail is more true or accurate simply due to it being written repeatedly. Most of the data recorded in the forms, e.g., PS-2, PS-3, the Purse Seine Trip Report, and in the trip diary, are reiterations of the same information from the same single source – the notes Mr. Banakori took while the set was conducted in his notebook.

¹¹ See n.14.

On September 9, 2011, almost a year after the fishing trip in question, Agent Raterman e-mailed Mr. Banakori a questionnaire pertaining to his records and recollection of that trip. JX 10; JX 19 at 182. Mr. Banakori completed, signed and dated the form "11/10/2011." JX 10 at 134.

On April 13, 2012, approximately one and a half years after the fishing trip, Agent Raterman interviewed Mr. Banakori by telephone and created a memorandum of that interview. JX 11. Mr. Banakori reviewed Agent Raterman's interview memorandum and signed it. JX 12.

On April 19, 2012, Agent Raterman interviewed Captain Maughan by telephone and memorialized it. JX 13. Agent Raterman wrote that Mr. Maughan stated he does not keep a personal log or diary on fishing trips, and the only documents he would have maintained from the trip in question would be the Regional Purse Seine Logsheets and the vessel log or diary, "which were still on the vessel." JX 13 at 155. Mr. Maughan was unable to specifically recall Observer Banakori serving aboard the Ocean Conquest, nor was he able to recall any interactions with whales during his time aboard the F/V Ocean Conquest. JX 13 at 156, 160-61. In what is presented as the vessel log book page for October 27, 2010, Joint Exhibit 14, there is nothing written to indicate anything about an interaction with whales. JX 14 at 164. In the South Pacific Regional Purse-Seine Logsheets entry for this set, Captain Maughan recorded a school association code of 2, indicating "feeding on baitfish," and did not write code 6, which indicates "live whale." JX 15 at 166.

Officer Raterman completed an Offense Investigation Report dated April 26, 2012. JX 19. Therein, he noted that fishing master Wu no longer works for the company and has not been available for interview. *Id.* at 207.

IV. DISCUSSION AS TO LIABILITY

In order to prevail on its claim against Respondents, the Agency is required to prove facts supporting the alleged violation by a preponderance of "reliable, probative, and substantial evidence." NOAA Docket No. SW030133, 2005 NOAA LEXIS 2, at *36 (ALJ, Apr. 20, 2005) (citing *Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 276 (1994); *Steadman v. S.E.C.*, 450 U.S. 91, 98 (1981)); *see also* 5 U.S.C. § 556(d); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). This standard requires the "trier of fact to believe the existence of a fact is more probable than its nonexistence." *Creighton*, NOAA Docket No. SW0301332005, 2005 NOAA LEXIS 2, at *36 (citing *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993)).

Facts constituting the violation of law may be established by either direct or circumstantial evidence. *Watson*, NOAA Docket No. PI0900579, 2010 NOAA LEXIS 8, at *10 (ALJ, July 17, 2010) (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764-765 (1984)). The Administrator has recognized that the ALJ is in the "best position to make credibility determinations when faced with conflicting testimony." *Black*, NOAA Docket No. PI0904340, 2013 NOAA LEXIS 6, at *54-55 (ALJ, Aug. 22, 2013) (citing *F/V Twister, Inc.*, NOAA Docket Nos. NE0602397FM/V, NE0601409FM/V, 2009 NOAA LEXIS 11, at *12

(NOAA Nov. 24, 2009). The judge's responsibility is "to hear the testimony of the witnesses and determine credibility based on the facts and circumstances surrounding the proffered testimony as well as the witnesses' demeanor." *Barker*, NOAA Docket No. NE030107FM/V, 2004 NOAA LEXIS 11, at *10 (ALJ, Feb. 11, 2004) (quoting *Town Dock Fish*, 6 O.R.W. 580 (NOAA App. 1991)). Inconsistent and unsubstantiated testimony from witnesses detracts from their credibility, and the judge determines the weight to be afforded such evidence. *Id.*

Once the Agency has proven the allegations contained in the NOVA by a preponderance of the evidence, the burden of proof shifts to the respondent to produce evidence that rebuts or discredits the evidence presented by the Agency. *Id.* (citing *Steadman*, 450 U.S. at 101 (1981)).

To establish that Respondents violated the MMPA as alleged in Count 1, the Agency must establish, by a preponderance of the evidence, that: (1) Respondents are persons subject to the jurisdiction of the United States; (2) Respondents engaged in the "take" of a marine mammal; (3) the take occurred on the "high seas"; and (4) the take was not authorized under Section 1387 of the MMPA as a permissible "incidental take" in the course of commercial fishing operations. *See* 16 U.S.C. § 1372(a)(1).

The parties have stipulated that each Respondent – Captain Maughan and Ocean Conquest – are persons subject to the jurisdiction of the United States under the MMPA, and that the Vessel is a U.S. flagged vessel. *Stip.* ¶¶ 12-13; RB 10 at ¶¶ 9-10. Respondents acknowledge that the Vessel, "by and through the crew and officers of the Vessel," set on two live whales during Set 9.¹² RB at 17 at ¶¶ 25-26. Further, Respondents do not dispute that the activities during Set 9 met the statutory and regulatory definition of "take."¹³ The parties have also stipulated that the activities giving rise to the count alleged in the NOVA, Set 9, occurred on the high seas of the Pacific Ocean. *Stip.* ¶ 23; RB 1 at ¶ 20. At all times relevant to Count 1, the Vessel was authorized, pursuant to Section 118 of the MMPA, 16 U.S.C. § 1387, to "incidentally take" marine mammals in the course of commercial fishing operations. *Stip.* ¶ 14. Ultimately, the parties disagree about whether Respondents "knowingly" set their gear on the whales, and whether the take was a permissible "incidental take" or an illegal take.

¹² Pursuant to MMPA regulations, whales are marine mammals: "Marine mammal means those specimens of the following orders, which are morphologically adapted to the marine environment, and whether alive or dead, and any part thereof, including but not limited to, any raw, dressed or dyed fur or skin: Cetacea (whales, dolphins, and porpoises) and Pinnipedia, other than walrus (seals and sea lions)." 50 C.F.R. § 216.3 (2010).

¹³ "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), 1362(18)(a). The definition includes "the restraint or detention of a marine mammal, no matter how temporary" and "the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal." 50 C.F.R. § 216.3 (2010). Further, "harassment" includes "any act of pursuit, torment, or annoyance which . . . has the potential to injure . . . or . . . disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering." 16 U.S.C. § 1362(18)(A).

Count 1 of the NOVA alleges that “Respondents knowingly set their purse seine fishing gear on a live whale, in violation of applicable law.” NOVA at 1. A set made “knowingly” on whales, that is, when the crew sees the whales before setting and sets anyway, cannot be an “incidental” take, the Agency contends. AB 7-8; ARB 4. While the Vessel possessed an incidental take authorization, such permission “does not apply to intentional takes.” AB 8. Given the regulatory definition of “incidental” – “with respect to an act, a non-intentional or accidental act that results from, but is not the purpose of, carrying out an otherwise lawful action” – and Observer Banakori’s recorded observations and testimony, Respondents must be found to have set on the whales knowingly, and therefore, the set cannot be not excused as an “incidental” take. AB 8-9; 50 C.F.R. § 229.2.

Respondents argue that the Agency failed to prove the illegal take by first challenging Mr. Banakori’s “suppositions and second hand conclusions.” RB at 4. “[T]he observer admits that the captain did not see the whales,” and “only *assumes* that the fishing master saw the whales before the set because he saw them.” *Id.*; RRB 1-2. Simply because the translator saw the whales “does not indicate . . . that the fishing master in fact saw the whales and then chose to set on the tuna.” RB at 5. Instead, Captain Maughan’s recollections show that “any set on the whales was purely incidental to the regular fishing operations.” RB 6. While he is not required to keep contemporaneous records of the fishing sets, Captain Maughan’s Logsheet features nothing to indicate that a live whale or any mammal was associated with Set 9, and no one mentioned the whales’ presence to him at the time. RB 5-6. Plus, whale behavior is unpredictable and they can submerge for several minutes without detection; the Agency must show “at least some firmer evidence that Respondents knew where the whales would be when they set the net” in order to meet its burden of proof that the set on whales was done knowingly. RB 6; RRB 3.

Second, Respondents argue that their conduct was authorized under the MMPA. RB at 7. “Setting on the whales was not the purpose of the fishing activity in question . . . and there is no evidence that Respondents purposefully targeted and chased the whales.” *Id.*; RRB at 3. Because catching the whales was a *result* of their actions but not the *purpose*, the take was “incidental” to their fishing operations and therefore, permitted. RRB at 4. Alternatively, even if it is found that Respondents knowingly set their gear on whales, such intentional takes are authorized as “incidental” to their fishing operations as a matter of law. RB 7 (“the Agency’s regulations erroneously apply the MMPA, which allows ‘incidental, intentional’ takes provided there is not lethal taking and no targeted species is involved”); RRB 4-5.

A. Did NOAA prove by a preponderance of the evidence that Respondents knowingly set their fishing gear upon the whales?

The MMPA imposes strict liability for “taking” a protected marine mammal. *Creighton*, NOAA Docket No. SW030133, 2005 NOAA LEXIS 2 (ALJ, Apr. 20, 2005) (the “Marine Mammal Protection Act is a strict liability statute, and no specific intent is required Whether a respondent appreciates the consequences of his or her actions is irrelevant since voluntary actions are sufficient to constitute a violation of the MMPA.”). “The term ‘knowingly’ has been construed . . . to require only the commission of voluntary acts which cause or result in the violation.” *Simmons*, NOAA Docket No. SE 1104779, 2013 NOAA LEXIS 10, at *20 (ALJ,

Aug. 30, 2013); *Kuhn*, 5 O.R.W. at 414 (finding that a knowing violation results from an affirmative act when the consequences of that act are foreseeable, even if not intended); *Huber*, NOAA Docket No. 133-285, 1994 NOAA LEXIS 35, at *3 (ALJ, Apr. 12, 1994) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 588 (1971), which held that “knowingly” related to knowledge of facts not the law); *United States v. Jonas Bros. of Seattle, Inc.*, 368 F. Supp. 783 (D. Alaska 1974) (requiring only a showing that the acts involved were voluntary and intentional)).

The preponderance of the evidence, based on Observer Banakori’s personal observations, shows that Respondents knowingly set on whales. Mr. Banakori was a credible witness at the hearing, despite his imperfect English, appearing to answer questions sincerely from his recollection and his notes about what happened on October 27, 2010. The records of his observations, created contemporaneous to the events in question and shortly thereafter, were the most persuasive evidence in the record. His notes were organized and clearly written for the most part, albeit brief at times, and exhibit his aptitude as a fisheries observer. The record shows that he has a lot of experience being a purse seine fishery observer, and before the fishing trips at issue, had received training on purse seine fishing and species identification. Tr. 23-27. When presented with the questionnaire and interviewed by Agent Raterman, his answers, in the main, corroborate and are consistent with each other in terms of most of the pertinent details and the general description of the set at issue, and when they are not, it appears due to misunderstanding of the question or the normal forgetfulness that occurs from the passage of time, and not due to anything suggesting insincerity, fabrication, or unreliability.¹⁴

According to such evidence, as set forth in the Factual Background above, during the investigation stage, i.e., *before* the skiff was released and the set officially began, members of the crew and the fishing master were more likely than not aware of the presence of a whale or whales swimming around or among the school. *See, e.g.*, Tr. 66-68; JX 10 at 130 (“They can visibly see them from their naked eyes when doing investigation.”); JX 11 at 137 (the fishing master was “on the bridge with him” “and could easily see the whales.”). Before the Vessel had transited the distance of approximately five miles to reach the school, Mr. Banakori was situated similarly as Mr. Wu on the bridge, they both were using or had access to binoculars, and were looking in the general direction of the school of fish, lively with the presence of birds and the whales, which were porpoising and blowing water. Tr. 48–50, 52, 69, 76, 82-83; JX 11 at 137-38; JX 10 at 129. The Vessel’s translator, who was with Mr. Banakori when he saw the whales, mentioned the presence of the whales to Mr. Banakori. JX 10 at 129. The translator asked Mr. Banakori if he saw the whales and Mr. Banakori answered in the affirmative. *Id.*; Tr. 68. In his interview with Agent Raterman, he asserts that the presence of the whales ultimately did not deter Mr. Wu from directing the crew to set:

¹⁴ Even though there were several discrepancies, none caused me to question his credibility or the reliability of Mr. Banakori’s testimony overall; and some were irrelevant anyway to a liability determination. For example, in the questionnaire, Mr. Banakori first answers “one hour” and then later, answers “2 hours” to questions about how long the whales were trapped in the net. JX 10 at 129, 131. While this is a substantial difference in time, it does not make a difference to this decision whether the whales were in the net for one or two hours, both of which appear plausible given the other evidence.

BANAKORI stated that he believed the fish master saw the whales in the school of tuna as he was actively looking at the school with a set of binoculars. He was investigating the school and kept going around in circles, in and out of the bridge at that time. BANAKORI stated that he could easily see the whales with his naked eyes. Although the fish master did not say anything to BANAKORI that he understood, his actions caused BANAKORI to believe that he saw the whales well prior to making the set. He stated that the fish master does not speak English.

[]

BANAKORI stated that he believes the vessel targeted the school of fish even though they also noticed the whales with the school of tuna. He stated that they chose to set on the school anyway.

JX 11 at 137-38; *see also* JX 12; JX 10 at 129; Tr. 67 (Mr. Wu was “going around in circles” during the investigation stage); JX 5 at 19 (whales were visible at 10:41 a.m., and at 10:46 a.m., a mere five minutes later, the set began).

There are other circumstantial factors that bolster Mr. Banakori’s conclusion that the fishing master and others on the bridge saw the whales prior to setting. For example, as Respondents stress, the approximately 40-person crew’s sole interest on the trip was to catch tuna; and the process of purse seine fishing requires the careful attention of the fishing master and several members of that crew. Stip. ¶¶ 16-17; RB at 7. Each set was therefore of key interest to all on board, and would have been monitored at all times by the fishing master, who no one disputes “is the officer responsible for directing the crew and deploying/retrieving fishing gear and catch during purse seine fishing operations.” Stip. ¶ 21. It is reasonable to infer that the crew members, particularly the master, focused their attention on the one tuna school that was being investigated, and that more than a few witnessed the whales porpoising prior to the set, as the translator did. There is no evidence that during Set 9 an unexpected event or occurrence diverted their attention. Further, given Mr. Banakori’s experience and training, it is unlikely that he would mistake a whale for something else, or misidentify whale behavior, such as the porpoising. Ultimately, the kind of direct evidence of Mr. Wu’s awareness of the whales prior to the sets that Respondents say is lacking in the record is not necessary to find that Respondents knowingly set on the whales.

Respondents argue that “even if the whales were seen at some point during the investigation, the agency presented no evidence that Respondents knew with some degree of certainty that the whales would turn up in the net as it was closing.” RRB at 2. This point is irrelevant. The moment where a take occurs is the point at which “the restraint or detention of a marine mammal, no matter how temporary” begins, or when “the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal” is initiated, pursuant to Agency regulations set forth at 50 C.F.R. § 216.3 (2010). Per the MMPA, a take is also initiated at the start of “any act of pursuit, torment, or annoyance which . . . has the potential to injure . . . or . . . disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or

sheltering.” 16 U.S.C. § 1362(18)(A). Therefore, as a matter of law, I cannot agree that a “knowing” take did not occur merely because a fishing master hopes or guesses that submerged whales will not “turn up in the net,” *when he saw them associated with the tuna immediately prior to initiating the act of harassment or detention, i.e., when releasing the skiff.*

The Agency’s evidence shows it is more likely than not that Mr. Banakori, Mr. Wu, and members of the Vessel’s crew saw the two whales associated with the school of tuna that the Vessel was investigating, and that the fishing master knowingly conducted a purse seine set on that school of fish and the associated whales.

B. Have Respondents successfully discredited or rebutted the Agency’s case?

Respondents contend “the evidence does not show that Respondents saw the whales prior to the set.” RB at 2. They argue the Agency is making the “broad leap” from Mr. Banakori’s “secondhand testimony” and “speculation . . . that they *must* have seen the whales,” to a finding that they *did* see the whales and purposely set on them. RB at 5; RRB at 2. The Agency does rely heavily on Mr. Banakori’s belief that the others saw the whales, and defends his credibility: “Banakori has no motive to misrepresent what he observed; he stood to gain nothing from reporting what he did, and everything to lose if he were found to have given false evidence.” ARB 4. Second, while Mr. Banakori did not ask the Captain or the fishing master if they saw the whales prior to the set, and did not discuss the matter with them, doing so is not his responsibility nor his prerogative. ARB 1-3. His “detailed, contemporaneous” records of the set should be given more weight than Captain Maughan’s “belief,” as stated to Agent Raterman in 2012, that no whales were associated with the set. ARB 3-4.

There are many reasons to give weight to Mr. Banakori’s assertions about what happened, despite Respondents’ challenges, and not to give weight to Mr. Maughan’s assertions about what happened. First, Mr. Banakori was present on the Vessel on the date and time at issue, and was specifically tasked with observing the species being investigated, other “species of special interest,” the crew’s activities, and all fishing operations. He took notes as he observed, in a setting where he could reasonably ascertain who else was present, what their function was, and certainly, what they could reasonably see from the same vantage point that he had, using the same tools that he had. There is nothing in the record to indicate there were any interpersonal problems between Mr. Banakori and the crew, Mr. Wu, or Captain Maughan, that would have impacted the reliability of Mr. Banakori’s records or testimony.

Captain Maughan, on the other hand, created no records that are in evidence besides his sparse logbook and Logsheet, and importantly, at the time of his interview in 2012, he did not recall anything about the trip. Captain Maughan told Agent Raterman that he could not recall “the particular trip in much detail,” nor any interactions with any whales during the set at issue, nor even the observer of the trip, Mr. Banakori. JX 13 at 154-57. This comports with Mr. Banakori’s recollection that Captain Maughan “was not on the bridge . . . and was in his cabin” during the set. JX 11 at 137. In response to Mr. Banakori’s claim that he was absent, Captain Maughan denied it, stating that normally he is on the bridge for every set, and if for some reason he is not there prior to a set, he would be in his room and could come out “in two (2) minutes” with binoculars to look at the school. JX 13 at 157, 159-60. I agree that Captain Maughan

should not be faulted for his inability to remember the fishing trip, however, that fact necessitates deferring to Mr. Banakori and finding that Captain Maughan was likely in his cabin and not on the bridge prior to the set. Because he was absent for the set, no weight will be given to the various explanations and defenses that he advanced in his interview about what happened, e.g., his assertion that if the Vessel did set on a whale, “it was incidental” or “it would be because the tuna boils would cause such a frenzy on the ball of bait that they would not see the whales as they stay down for up to twenty (20) to twenty five (25) minutes feeding on the bait.” JX 13 at 156, 160-61. Captain Maughan also asserted that if the crew had to hold down the net to release the whales as is alleged, that would have been “disastrously close to the end of the operation,” and he’s sure he would have recorded an event like that in the vessel log book. JX 13 at 158. Captain Maughan’s log book (JX 14 at 164) and his Logsheet both lack indications that whales were present during Set 9, but that does not mean whales were not there. In the log book, there is no specific area to note a whale association besides “Remarks,” whereas there are several opportunities on Observer Banakori’s forms to note and describe such associations. JX 14 at 164. In the Logsheet, there are eight different “School Association Codes,” from which it appears only one may be selected and entered at a time for a line entry, even if more than one code happened to apply. JX 15 at 166. The code selected by Captain Maughan for the October 27, 2010, entry is “2,” “feeding on baitfish,” and not “6” for “live whale” which Respondents cite as evidence that there were no whales in fact present during the set. However, just because the tuna being investigated or set upon were feeding on baitfish does not mean that there was not also a “drifting log, debris or dead animal” (code “3”) associated with the school, or that there was not also a “live whale” swimming around the school (code “6”). There is nothing in the record to show that the various “associations” are mutually exclusive. Another one of Captain Maughan’s claims not worthy of weight is that there could not have been whales present because “if they were seen, the observer is supposed to tell me right away,” and “everyone knows to report anything of that nature and they have meetings concerning this responsibility.” JX 13 at 157. In their Reply Brief, Respondents acknowledge that observers actually have no duty to report associations of marine mammals to the captain or any crew. RRB at 2. Observers are there merely to neutrally observe compliance, not assure it. Plus, whether anyone told Captain Maughan is irrelevant, considering the evidence that Mr. Wu was aware of the whales prior to directing the set.

Respondents also suggest that the whales were not seen prior to or at the time of net setting because they can submerge for several minutes without detection and their behavior is unpredictable. RRB at 3. The Agency must show “at least some firmer evidence that Respondents knew where the whales would be when they set the net” in order to meet its burden of proof that the set on whales was done knowingly. RB 6; RRB 3. However, it has already been found that the whales were visible to Mr. Banakori at 10:41 a.m., and therefore, more likely than not also visible to Mr. Wu at that time, and at 10:46 a.m., a mere five minutes later, Mr. Wu initiated the set. JX 5 at 19. In such a short amount of time, it is not reasonable to think the whales had left the immediate area and would not be restrained or disturbed by the purse seine net. And even though Mr. Banakori reported that the whales “were temporarily submerged due to the noise from the helicopter,” that was “during the net setting,” not before the set, which is the critical time for determining whether the crew “knowingly” set. JX 11 at 142, at 138 (“the noise caused by the helicopter caused the whales to submerge for a time *during the set*” (emphasis mine)); JX 13 at 156. Because “the helicopter assisted in driving the tuna *into the*

net,” the net must have already been in the water surrounding the school, at least partially. JX 12 at 148 (emphasis mine).

Finally, Respondents cite the Initial Decision in *Wilson and Alaska Yacht Charters, M/V Alaskan Story*, NOAA Docket No. AK1100576, 2013 NOAA LEXIS 11, at *33-34 (“*Wilson*”) (ALJ, Jun. 13, 2013), to support their argument that “more evidence than that presented by the agency should be required to find Respondents’ actions were indeed intentional.” RRB at 3. In my penalty analysis in that case (specifically about the respondents’ culpability, a penalty factor under 15 C.F.R. § 904.108(a)), I held that photographs showing the respondents were liable for navigating their vessel too close to whales “do not prove Respondent actually intended that result,” and the respondents therefore should not be assessed a penalty amount that would be more appropriate for violators exhibiting the culpability level of “intentional” as opposed to “reckless.” *Wilson* at *34. The liability and penalty determinations in these proceedings are separate, as the MMPA and the Rules of Practice direct. 16 U.S.C. § 1375(a)(1) (only a “person who violates any provision of this subchapter or . . . regulation issued thereunder . . . may be assessed a civil penalty”); 15 C.F.R. § 904.271(a); 15 C.F.R. § 904.108(a) (once liability is found, an appropriate penalty must be determined in accordance with specific penalty factors). The finding in *Wilson* cited by Respondents does not apply to this liability discussion.

The preponderance of the relevant, material, reliable, and probative evidence shows that by the acts of its crew, the Vessel knowingly set its purse seine fishing gear on two live whales on October 27, 2010.

C. Were these knowing sets on whales excused by Respondents’ MMPA Section 118 incidental take permit?

In their Post-Hearing Brief, Respondents state that “the agency’s regulations erroneously apply the MMPA, which allows ‘incidental, intentional’ takes provided there is no lethal taking and no targeted species is involved.” RB at 7. In support thereof, they refer to the arguments set out in Respondents’ [Pre] Hearing Memorandum; Marine Mammal Protection Act Issues, dated August 29, 2013 (hereinafter “Memorandum” or “Memo.”). Therein, Respondents insist that “Section 118 of the MMPA . . . authorizes incidental takes that, by definition, include negligent, accidental, and intentional acts.” Memo. at 2-3. Also, they argue “the MMPA is replete with . . . examples of Congressional intent to allow certain incidental, but intentional takings in commercial fishing operations.” *Id.* at 9. Respondents next assert that “NOAA’s definition of the term ‘incidental’ in § 229.2 is inconsistent with other related regulatory definitions and contrary to the plain words of the statute.” *Id.* 15. Further, they contend that the separate penalty provisions in the MMPA commercial fisheries regulations show that Congress only intended to forbid intentional lethal takes. *Id.* at 16.

To the extent Respondents challenge the Agency’s regulations as inconsistent with the statute, this Tribunal does not have the jurisdiction to render a ruling on that matter and those arguments are not discuss herein. 15 C.F.R. § 904.200(b); *Creighton*, 2005 WL 1125361, at *21 (Apr. 20, 2005) (citing *Lobster Co., Inc., et al.*, 2002 NOAA LEXIS 2 (NOAA Feb. 21, 2002); *O’Neil*, 1995 NOAA LEXIS 20 (NOAA June 14, 1995)). Additionally, because as discussed below, it is found that the incidental take exemption regulations offer a clear definition of

“incidental,” it is not necessary to explore Congressional intent. Therefore, the discussion here is limited to the question of whether Respondents’ knowing sets on whales constitute “incidental takes” as those words are defined in the Agency’s incidental take regulations.

“Incidental” means, “with respect to an act, a non-intentional or accidental act that results from, but is not the purpose of, carrying out an otherwise lawful action.” 50 C.F.R. § 229.2. As previously discussed, the term “take” includes harassment, capture, the temporary restraint or temporary detention of a marine mammal, and any intentional act that results in disturbing or molesting a marine mammal. 50 C.F.R. § 216.3.

Respondents assert that the purpose of their net setting was to catch tuna. RB at 4. The whales ended up in the net merely as a “*result of* the lawful set and thus, incidentally and permitted under the MMPA.” *Id.* Applying the MMPA as the Agency attempts to here, Respondents argue, “would prevent tuna fishing altogether anytime there was a whale seen in the same ocean as a tuna school – an untenable result given whales and tuna coexist in the same waters and neither are controllable.” *Id.* at 5.

Respondent’s interpretation of the Agency’s position and regulations is both over dramatic and incorrect. As an exception to the moratorium, the MMPA allows for the “incidental taking of marine mammals in the course of commercial fishing.” 16 U.S.C. § 1387(a)(1). The term “incidental” modifies the particular act of “taking,” so substituting the term “take” for the generic term “act” in the text, one may define “incidental” as follows to provide a framework for analyzing the facts at bar:

Incidental means, with respect to a [taking], a non-intentional or accidental [taking of a whale] that results from, but is not the purpose of, carrying out an otherwise lawful action [i.e., setting the net on a school of tuna].

50 C.F.R. § 229.2 (modifications made).

The regulatory history of the incidental taking exemption shows that this is a proper framework from which to analyze whether the takes here were “incidental.” On August 30, 1995, the Agency published a Final Rule implementing the incidental take exemption. 60 Fed. Reg. 45,086 (Aug. 30, 1995). The rules were designed “to implement the new management regime for the **unintentional taking of marine mammals** incidental to commercial fishing operations,” as permitted under the MMPA. *Id.* (emphasis added). In response to a comment, the Agency wrote that a primary purpose of the Section 118 exemption is to ensure that commercial fisherman “may **accidentally** seriously injure or kill marine mammals incidental to their commercial fishing operations so long as the level of serious injury and mortality does not severely impact marine mammal populations.” 60 Fed. Reg. at 45,088 (emphasis added).

The Rule’s history features discussion about the definition of “incidental, but not intentional, take,” and “incidental mortality,” which were later removed from the Rule and replaced with the definition of just “incidental”:

The proposed definition of incidental, but not intentional, take is the nonintentional or accidental taking of a marine mammal that results from, but is not the purpose of, carrying or an otherwise lawful action. The proposed definition of incidental mortality is the non-intentional or accidental death of a marine mammal that results from, but is not the purpose of, carrying out an otherwise lawful action. **The phrase “incidental, but not intentional” is intended to mean accidental taking.** The words ‘not intentional’ should not be read to mean that persons who ‘know’ that there is *some possibility* of taking marine mammals incidental to commercial fishing operations or other specified activities are precluded from doing so.

60 Fed. Reg. 31,666, 31,675 (June 16, 1995) (emphasis added).

Despite Respondents’ concern that tuna fishing would be practically foreclosed if their incidental taking authorization were limited to truly accidental takes, it does not appear that such a restriction would be so debilitating. Observer Banakori was present for several successful sets on the Vessel, over several weeks of fishing, and only one time was a whale reported as being associated with a school being investigated. There is no testimony or evidence in the record showing that if commercial fishermen generally, or Respondents specifically, follow the Rule as NOAA interprets it, that is, avoid knowingly setting the net on a whale-associated school, that they will be forced to go out of business, stop fishing, experience a significant decrease in profits, fish a shorter season, have to change equipment or undergo a major outreach program to communicate new rules to staff, or experience any other serious injury or setback.

In conclusion, the Agency has shown by a preponderance of the evidence that Respondents, through the actions of the crew of the Vessel, knowingly set purse seine fishing gear on whales on October 27, 2010. This take of marine mammals was not an accident, but as the facts illustrate was instead an intentional take not permitted under Respondents’ Section 118 authorization to incidentally take pursuant to their commercial fishing operations. Respondents, therefore, are hereby found liable for one count of violating the MMPA, 16 U.S.C. § 1372(a)(1), and 50 C.F.R. § 216.11(a), and may be assessed a civil penalty in accordance with 16 U.S.C. § 1375(a)(1).

V. DISCUSSION AS TO PENALTY

The MMPA provides, in pertinent part, that “[a]ny person who violates any provision of this subchapter or . . . regulations issued thereunder . . . may be assessed a civil penalty by the Secretary of not more than \$10,000 for each such violation.” 16 U.S.C. § 1375(a)(1). 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, resulted in the Secretary increasing the maximum civil penalty to \$11,000 per violation. 15 C.F.R. § 6.4(e)(10) (2010).

As to the presiding officer’s penalty assessment, the Rules provide:

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 violation, and ability to pay; and such other matters as justice may require.

15 C.F.R. § 904.108(a).¹⁵

There is no presumption in favor of the penalty proposed by the Agency. 15 C.F.R. § 904.204(m); *see* Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,361, 35,361 (Jun. 23, 2010). Nor is the Administrative Law Judge required to state good reasons for departing from the Agency's analysis. 75 Fed. Reg. at 35,631. Rather, the presiding ALJ may assess a civil penalty de novo, "taking into account all of the factors required by applicable law."¹⁶ 15 C.F.R. § 904.204(m); *Pauline Marie Frenier*, NOAA Docket No. SE1103883, 2012 NOAA LEXIS 11, at *11 (ALJ, Sept. 27, 2012).

A. The Agency's Arguments

The Agency seeks to assess a penalty in the amount of \$11,000 against Respondents Ocean Conquest and Captain Maughan, jointly and severally, for the MMPA violation, which is the maximum that may be assessed. NOVA at 2.

As its reasons, the Agency states first that there is "no doubt that the large-scale purse seine fishery in the central and western Pacific Ocean is a high value fishery, and the catch from a single fishing set has the potential to be valued at tens, or even hundreds, of thousands of dollars." AB at 10 (citing Tr. 55-56; Stip. ¶ 25). Even if the maximum penalty is imposed for setting on a whale, the profits from such fishing trips would far outweigh that amount, and the Agency is concerned the penalties are "nothing more than a cost of doing business" for the purse seine fleet. AB at 10; ARB at 9. In this case, Set 9 yielded 60 metric tons of skipjack tuna and 10 metric tons of yellowfin tuna, which had an ex-vessel value of \$40,765.80. Stip. ¶ 25. If the

¹⁵ Agency regulations state that if a respondent asserts an inability to pay the penalty, "the respondent has the burden of proving such inability by providing verifiable, complete, and accurate financial information to [the Agency]." 15 C.F.R. § 904.108(c). No Respondent in this proceeding has asserted such a claim.

¹⁶ The Agency published a penalty policy that it has decided may be applied in all civil enforcement cases "charged on or after its issuance on March 16, 2011." NOAA Office of the General Counsel, Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions, http://gc.noaa.gov/documents/031611_penalty_policy.pdf. Because the Agency issued its NOVA on November 1, 2012, the policy could, therefore, presumably be used as guidance in the instant case. However, neither the Agency nor Respondents made reference to the policy in their arguments regarding the appropriateness of the proposed penalty, the policy was not admitted as evidence, nor did any party move the undersigned to take official notice of the document. Therefore, the analysis here will focus on the relevant statutory and regulatory factors.

maximum penalty were imposed, Respondents would still have profited by \$29,765.80 for their illegal set on whales, which the Agency argues is “clearly insufficient motivation to continue on with their illegal activity.” AB at 10. Violators of the law “enjoy a significant competitive advantage over the other participants from the U.S. fleet who make the effort to comply with the requirements of the law.” ARB at 9. In support of imposing the highest penalty possible, the Agency cites the initial decision in the consolidated matters of *Matthew James Freitas, et al.*, NOAA Docket No. PI0904338, 2013 NOAA LEXIS 4 (Aug. 23, 2013) (“*Freitas*”), which also involved the intentional encirclement of whales by purse seiners. AB at 9. In that decision, the U.S. Coast Guard ALJ presiding assessed the maximum penalty for sets where no fish were even caught because the potential economic gain was so high. *Id.*

Ultimately, the Agency argues that the assessment of an \$11,000 penalty “reflects – as much as is possible given the potential profits from such illegal activity – the gravity, nature and circumstances of the alleged violation” and operates towards “achieving the goal of reducing negative impacts on marine mammal species from man’s activities.” *Id.* (citing 16 U.S.C. § 1361).

B. Respondents’ Arguments

Respondents argue generally that the Agency’s proposed penalties are “out of line with the facts in this case.” RB at 7. Respondents maintain that they did not seek out, chase, kill or harm the whales, but instead helped them escape. *Id.* at 7-8. The penalty sought “ignores the realities of purse seine fishing,” in that tuna sets typically take between two and four hours, during which time the ocean conditions are “constantly changing and uncontrollable” and “whales may unexpectedly pop up in the middle of the set” or be hidden by the tuna. RB at 8 (citing Stip. ¶ 17; JX 13 at 156).

Respondents dispute the Agency’s “misplaced” justification for a high penalty, stating that “the value of the catch at issue here is admittedly low” (only 70 metric tons out of a maximum 300 metric tons), and that Set 9 “was not a ‘good fishing set’ for a purse seine vessel the size of OCEAN CONQUEST.” *Id.* at 8 (citing Stip. ¶ 25; Tr. at 55-56). Assessing the “excessive” penalty proposed here would result in there being “nothing left to distinguish a case where someone intentionally and maliciously seeks out and/or kills the whales while setting on tuna.” *Id.* at 7-8. In support of a lower penalty than the maximum, Respondents cite to a press release describing a case where a lower penalty was imposed where marine mammals were physical harmed, and they cite to the *Wilson* decision, where a \$5,000 penalty was imposed for a “reckless” Endangered Species Act violation. RB at 8-9; RRB at 5.

Respondents have no prior violations of the MMPA within the previous five years, and argue that they were engaged in otherwise lawful fishing. *Id.* at 7-8; Stip. ¶ 28.

Finally, Respondents challenge the Agency’s assertion that a maximum penalty is needed to deter future violations and that Respondents will just factor the penalty into their “cost of doing business.” RRB at 5. The opposite is true, they argue, as illustrated by their decision to challenge the NOVA here. *Id.*

C. Analysis

Nature, Circumstances, Extent, and Gravity of the Violation

The two whales involved were restrained, albeit temporarily, but not for less than one hour, by encirclement of the Vessel's purse seine net. The evidence shows, additionally, that the whales were chased towards the net as it was circling them by the disturbing noise of the helicopter, and then later were chased out from the net by the Vessel's auxiliary boats, resulting in further harassment. These conditions would appear extremely disturbing to the animals.

I am particularly troubled by the impression the record gives that on the Vessel, there is no check on the fishing master's intentions to catch tuna, specifically to catch as much tuna as possible regardless of the occasional yet foreseeable result of harassing marine mammals. Captain Maughan, who oversees the ship and its compliance with laws, but does not direct the fishing, attested that he is almost always present during sets, but he was apparently not present for this one, where over the course of hours, two whales were subject to circling by various vessels during the investigation, set upon, chased by a helicopter, and chased out of the net. It appears that if he were present during the set, the Captain probably would have a difficult time communicating with Mr. Wu effectively about what was happening and what might be the best course of action to avoid the whales. Policies and practices aboard the Vessel do not appear in place to ensure compliance with the MMPA, or at least foster an environment where judgments about whether a set may be illegal are discussed and not made unilaterally by the fishing master.

In consideration thereof, I find that a substantial penalty is appropriate for this violation, the nature, circumstances, extent and gravity of which are very serious.

Respondents' Degree of Culpability, History of Prior Violations, and Such Other Matters as Justice May Require

It has been established that the fishing master is wholly responsible for conducting the fishing activities, whereas the captain "is responsible for the safety of the crew and ship," which includes "ensuring that all laws are observed." Stip. ¶ 21; Tr. 52-53 ("Fishing master is in overall command of the fishing operation during the fishing set. He tells the crew what to do and what not to do, especially on fish set."); JX 13 at 154. Respondent Ocean Conquest, the owner of the operation and employer of the crew, also bears responsibility for the actions of its employees and the apparent lack of attention to these matters manifested in the record as noted above. That Respondent Maughan allegedly holds meetings with observers where he instructs them to inform him of any problems, that "[t]he observer would have told him if there were whales" as this "is the protocol on every vessel that he knows," and that he "believes that the observers even sign a document" to this effect, reflects his misunderstanding of the observer's role, as well as an serious underestimation of his responsibilities as the captain in charge of compliance with laws. JX 13 at 157-61. There is simply nothing in the record to support

Captain Maughan's assertion that if someone had told him about the whales, "we would have never set." JX 13 at 157; JX 19 at 198, 207.¹⁷

Economic benefit and deterrence are important considerations in cases such as this one where the fishery is high value and competitive, and all Respondents stood to benefit from noncompliance. In Set 9, Respondents landed \$40,765.80 worth of tuna. Stip ¶ 27. Even assessing the maximum penalty of \$11,000, Respondents will still have realized an economic benefit of \$29,765.80, based on the facts before me. The Rules of Practice provide that a civil penalty may be increased for commercial violators in order "to make a civil penalty more than a cost of doing business." 15 C.F.R. § 904.108(b); *see also Pesca Azteca, S.A. de C.V.*, NOAA Docket No. SW0702652, 2009 NOAA LEXIS 10, at *39 (ALJ, Oct. 1, 2009), *aff'd* 2010 NOAA LEXIS 3 (Mar. 1, 2010) (Order by Administrator); *Silvia*, NOAA Docket No. NE030119FM/V, 2005 NOAA LEXIS 1, at *17-18 (ALJ, Mar. 17, 2005). While this Initial Decision takes no position on whether Respondents in fact view potential MMPA penalties for setting on live whales as a "cost of doing business," the penalty in this matter must deter Respondents and others from adopting such an attitude. *See Churchman*, NOAA Docket No. SW0703629, 2011 NOAA LEXIS 2, at *60-61 (ALJ, Feb. 18, 2011) ("The deterrent effect of a monetary sanction can thus be accomplished in these cases by imposing a significant sanction against each Respondent that encompasses not only the value of the unlawful catch but also an additional amount. . . . [A] sanction amount should be large enough to alter the economic calculus that might lead Respondents and other participants in the fishery to simply account for any possible sanction as the cost of doing business.").

The parties agree that Respondents have no record of MMPA violations in the past five years, and that no whale was killed by the Vessel's interactions with them. Stip. ¶¶ 26-28. Nevertheless, in light of the need to both remove the economic benefit derived from Respondents' violation of the law and to deter future violations, I find that a penalty of \$11,000 is appropriate.

D. Conclusion

After weighing the factors outlined in 15 C.F.R. § 904.108(a), it is hereby found that Respondents, as a result of violating the MMPA as alleged in Count 1 of the NOVA, are liable for the civil penalties ordered below.

¹⁷ In his Offense Investigation Report, Agent Raterman reported that he spoke with Timothy Park, the FFA Observer Program Manager, concerning responsibilities of FFA observers, who explained, "it is not the observer[']s responsibility to directly report any alleged violations to the captain, vessel crew[,], or vessel owner while serving as an FFA observer." JX 19 at 204.

ORDER

Pursuant to 16 U.S.C. § 1375(a)(1), a total penalty of **\$11,000** is hereby **ASSESSED** against Respondents Ocean Conquest LLC, and Benjamin Brown Maughan III, jointly and severally, for one count of violating the Marine Mammal Protection Act, 16 U.S.C. § 1372(a)(1), and 50 C.F.R. § 216.11 (2010).

Once this Initial Decision becomes final under the provisions of 15 C.F.R. § 904.271(d), Respondents will be contacted by NOAA with instructions as to how to pay the civil penalty imposed herein.


PLEASE TAKE NOTICE, that any petition for reconsideration of this Initial Decision must be filed with the undersigned within **20 days** after the Initial Decision is served. 15 C.F.R. § 904.272. Such petition must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. *Id.* Within **15 days** after a petition for reconsideration is filed, any other party to this proceeding may file an answer in support or in opposition. The undersigned will rule on any petition for reconsideration.

PLEASE TAKE FURTHER NOTICE, that any petition to have this Initial Decision reviewed by the NOAA Administrator must be filed with the Administrator within **30 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.



Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency¹⁸

Dated: July 6, 2015
Washington, DC

¹⁸ As stated above, the Administrative Law Judges of the U.S. EPA are authorized to hear cases pending before the Agency pursuant to an agreement effective September 8, 2011.

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

15 CFR 904.271-273

§ 904.271 Initial decision.

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

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

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

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

(4) A statement of further right to appeal.

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

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

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

- (1) Otherwise provided by statute or regulations;
- (2) The Judge grants a petition for reconsideration under § 904.272; or
- (3) A petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative under § 904.273.

§ 904.272 Petition for reconsideration.

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

§ 904.273 Administrative review of decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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