



## **I. PROCEDURAL HISTORY**

On May 31, 2011, the National Oceanic and Atmospheric Administration (“NOAA” or the “Agency”) issued a Notice of Violation and Assessment of Administrative Penalty (“NOVA”) to Lawrence Wagner and AACH Holding Co. No. 2, LLC<sup>2</sup> (“AACH”) (collectively, “Respondents”). NOVA at 1; Amended NOVA at 1. The NOVA charges Mr. Wagner and AACH with five counts of violating the Marine Mammal Protection Act (“MMPA”). NOVA at 1-2. Specifically, the Agency alleges that on five different dates in 2010 – April 12, April 20, April 21, April 25, and April 27 – Respondents knowingly set their purse seine fishing gear on whales while operating the fishing vessel (“F/V”) Isabella, thereby “taking” a marine mammal species on the high seas in violation of 16 U.S.C. § 1372(a)(1) and 50 C.F.R. § 216.11(a). NOVA at 1-2. For the five charges, the Agency proposes a total penalty of \$37,000<sup>3</sup> be assessed jointly and severally against Respondents. NOVA at 3-4; Amended NOVA at 1. The NOVA advised Respondents of their right to request a hearing before an Administrative Law Judge (“ALJ”) within thirty days of receiving the NOVA. NOVA at 3-4.

By letter dated December 13, 2012, Respondents, acting through counsel James P. Walsh, Esq., requested a hearing.<sup>4</sup> NOAA forwarded the NOVA and hearing request to this Tribunal on January 13, 2014.<sup>5</sup> The Tribunal, on January 22, 2014, invited the parties to participate in Alternative Dispute Resolution, but Respondents declined the offer by email on January 28, 2014.

The undersigned was designated to preside in this matter on February 4, 2014 and issued an Order to Submit Preliminary Positions on Issues and Procedures (“PPIP Order”) on February 12, 2014. The Agency, as ordered, filed its Preliminary Positions on Issues and Procedures (“PPIP”) on March 14, 2014. Respondents timely filed their PPIP on March 24, 2014. On April 17, 2014, a Hearing Order was issued that set forth certain prehearing filing deadlines and set a

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<sup>2</sup> The caption of the NOVA and certain other documents in the record refer to “AACH Holding Co., LLC” as a Respondent in this case. However, the proper name of the party that owns the F/V Isabella is AACH Holding Co. No. 2, LLC. The Agency corrected this error when it filed an amended NOVA on November 18, 2014. Amended NOVA at 1.

<sup>3</sup> This amount was reduced from \$49,000, as noted below.

<sup>4</sup> At the time, Mr. Walsh appears to have represented only AACH. However, the applicable procedural rules provide that “[a] hearing request by one joint and several respondent is considered a request by the other joint and several respondent(s).” 15 C.F.R. § 904.107(b). Further, Mr. Walsh and Gwen L. Fanger, Esq., subsequently filed a notice of appearance on behalf of Mr. Wagner on February 18, 2014. Ms. Fanger submitted a notice of withdrawal from this case on August 21, 2015.

<sup>5</sup> Respondents did not request a hearing within 30 days of the NOVA being issued. However, the Agency did not object to the timing of the hearing request, and any objection to its lateness is waived.

hearing date.<sup>6</sup> The parties filed a Joint Stipulation of Facts (“Stipulations” and “Stip.”) on May 23, 2014.

The Agency amended the NOVA on November 18, 2014. In its amended filing, the Agency lowered its proposed penalty from \$49,000 to \$37,000 by reducing the proposed penalties for Counts 3 and 5. *See* Amended NOVA at 1. A few days later, on November 25, 2014, the parties amended their Stipulations, and Respondents amended their PPIP on November 26, 2014.

The hearing in this matter was held December 9, 2014, in San Diego, California.<sup>7</sup> At the hearing, the Agency offered the testimony of Kevin Sterling Painter, a special agent in NOAA’s Office of Law Enforcement, and Rogermoor Jennet, who served as an observer on the F/V Isabella during the time of the alleged violations. One witness testified on behalf of Respondents: Joseph Parisi, the fishing master aboard the F/V Isabella during the time period relevant to the allegations.<sup>8</sup> Four Joint Exhibits (“JE”) and one Agency Exhibit (“AE 1”) were admitted into the record.<sup>9</sup> Tr. at 8-9. Further, the undersigned incorporated into the record testimony from Antonio Gustavo Alvarez, Jr., a manager of the F/V Isabella who testified in a companion case, *Tony DaSilva and AACH Holding Co. No. 2 LLC*, NOAA Docket No. PI1100830.<sup>10</sup> Tr. at 104-05. The undersigned also incorporated from *Tony DaSilva* the exhibit referred to in that hearing as “RX 1,” which is the “AACH Holding Co. No. 2, LLC Financial Statement” for the year ended Dec. 31, 2010. Tr. at 104-05.

This Tribunal received a copy of the hearing transcript on December 29, 2014. On January 7, 2015, electronic copies of the transcript were emailed to the parties, and the next day the undersigned issued a Post-Hearing Scheduling Order that set deadlines for the filing of post-hearing briefs and motions to conform the transcript to the actual testimony.

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<sup>6</sup> The hearing, originally scheduled for June 2014, was postponed and rescheduled by Order dated June 2, 2014, due to certain concerns regarding the availability of funds under the NOAA/EPA interagency agreement. It was then further rescheduled by Order dated October 1, 2014, upon the Agency’s motion due to unavailability of several of its key witnesses.

<sup>7</sup> Citations to the hearing transcript are in the following format: “Tr. at [page].”

<sup>8</sup> Although he has never appeared in a caption to filings in this matter, Master Parisi was initially described as if he were a respondent in the NOVA’s narrative explanations of the five counts. NOVA at 1-2. However, he is not a Respondent in this case. Counsel for the parties confirmed this during a pre-hearing conference and referred also to the Stipulations, which do not include Master Parisi as a party to this proceeding.

<sup>9</sup> The item Agency Exhibit 1, the Agency’s case file and related attachments, was also adopted as a Joint Exhibit. Tr. at 8. It will be referred to in this Initial Decision as AE 1.

<sup>10</sup> A third companion case to this case and to *DaSilva* is *Fournier*, NOAA Docket No. PI1100409. The hearings in these three cases were held *seriatim*.

On February 20, 2015, the Agency filed its post-hearing brief (“Agency’s Brief” and “AB”). On March 6, 2015, Respondents filed their post-hearing brief (“Respondents’ Brief” and “RB”). On March 20, 2015, the Agency filed its post-hearing reply brief (“Agency’s Reply Brief” and “ARB”), and on April 3, 2015, Respondents filed their post-hearing reply brief (“Respondent’s Reply Brief” and “RRB”).

On August 18, 2015, the Agency filed a Notice of Supplemental Authority and attached an Order and Memorandum Opinion from *Black v. Pritzker*, No. 14-782, 2015 U.S. Dist. LEXIS 104694 (D.D.C. Aug. 10, 2015).

## II. APPLICABLE LAW AND REGULATIONS

### A. Liability

In 1972, Congress enacted the MMPA in response to the public’s growing concern over the continued survival of marine mammals. Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. §§ 1361-1423).<sup>11</sup> 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,” 16 U.S.C. § 1361(1), and that “marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic,” and “the primary objective of their management should be to maintain the health and stability of the marine ecosystem,” 16 U.S.C. § 1361(6). As such, Congress imposed a permanent “moratorium” on the taking of marine mammals commencing from the effective date of the MMPA. 16 U.S.C. § 1371(a); *see also Safari Club Int’l v. Jewell*, 720 F.3d 354, 357 (D.C. Cir. 2013) (“The MMPA establishes a ‘stepwise approach’ to the conservation of marine mammals. At step one, the statute imposes a general ‘moratorium on the taking and importation’ of all marine mammals, regardless of the species’ scarcity or abundance.”) (citations omitted). In particular, Congress declared 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.”<sup>12</sup> 16 U.S.C. § 1372(a) (emphasis added); *Stip.*, ¶ 4.<sup>13</sup>

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<sup>11</sup> Marine mammals are animals “which are morphologically adapted to the marine environment,” and include whales, dolphins, and porpoises as well as seals and sea lions. 50 C.F.R. § 216.3.

<sup>12</sup> The phrase “high seas” is not defined in the MMPA, but the Magnuson-Stevens Fishery Conservation and Management Act defines “high seas” as “all waters beyond the territorial sea of the United States and beyond any foreign nation’s territorial sea, to the extent that such sea is recognized by the United States.” 16 U.S.C. § 1802(20).

<sup>13</sup> This prohibition is also contained in the MMPA’s implementing regulation at 50 C.F.R. § 216.11 (“Except as otherwise provided in subparts C, D, and I of this part 216 or in part 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.”).

The term “take” as defined by the MMPA means “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” 16 U.S.C. § 1362(13); Stip., ¶ 5. The term is further defined in the 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; Stip., ¶ 5. 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 MMPA delineates certain limited “exceptions” to the imposed moratorium on the taking of marine mammals. 16 U.S.C. § 1371(a). Particularly relevant here is the exception under Section 118 of the MMPA that allows for the “incidental taking of marine mammals in the course of commercial fishing operations” by vessels of the United States and permitted fishing vessels.<sup>14</sup> 16 U.S.C. § 1387(a)(1); *see also* 16 U.S.C. § 1371(a)(2); Stip., ¶ 6. Congress further established a regulatory scheme within the MMPA for the application for and issuance of Section 118 “authorizations” by the Secretary of Commerce to properly permitted vessels engaged in specified commercial fisheries.<sup>15</sup> 16 U.S.C. § 1387(c)(2); Stip., ¶ 8. The MMPA then states:

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<sup>14</sup> The other exceptions include, for example, the taking of a marine mammal in accordance with a permit for scientific research, public display, and photography purposes. 16 U.S.C. § 1371(a)(1).

<sup>15</sup> Although it granted this exception to the moratorium for commercial fishing operations, Congress indicated a clear intent for the exception *not* to undermine the overall purpose of the MMPA, stating immediately thereafter that “[i]n any event it shall be the immediate goal that the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate within 7 years after the date of enactment of this section [enacted April 30, 1994].”

If the owner of a vessel has obtained and maintains a current and valid authorization from the Secretary under this section and meets the requirements set forth in this section, including compliance with any regulations to implement a take reduction plan under this section, the owner of such vessel, and the master and crew members of the vessel, shall not be subject to the penalties set forth in this title for the incidental taking of marine mammals while such vessel is engaged in a fishery to which the authorization applies.

16 U.S.C. § 1387(c)(3)(D).

According to the regulations implementing this section of the MMPA, 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; Stip., ¶ 7.<sup>16</sup> 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); Stip., ¶ 9.

#### **B. Penalty**

The MMPA provides, in pertinent part, that “[a]ny person who violates any provision of this title 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 inflation adjustment procedures set forth by the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890, as amended, resulted in the Secretary increasing the maximum civil penalty to \$11,000 per MMPA violation. *See* 15 C.F.R. § 6.4(f)(10) (reflecting the increased maximum civil penalty for MMPA violations pursuant to these adjustment procedures).

To determine the appropriate penalty, NOAA regulations provide, in pertinent part:

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16 U.S.C. § 1387(a)(1); *see also* 16 U.S.C. §§ 1371(a)(2), 1387(b)(1). Further, the MMPA goes on to direct the Secretary of Commerce to establish a program to monitor incidental mortality and serious injury of marine mammals during the course of commercial fishing. 16 U.S.C. § 1387(d). Specifically, the Secretary may place observers on vessels to obtain mortality and injury rate statistics that can be used to “identify changes in fishing methods or technology that may increase or decrease incidental mortality and serious injury.” *Id.* Collection of this data provides a basis for “take reduction plans” to reduce incidental mortality or serious injury of marine mammals. *See* 16 U.S.C. § 1387(f).

<sup>16</sup> Congress delegated authority to the Secretary of Commerce 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* 16 U.S.C. § 1373(a) (establishing the procedures for promulgating regulations to carry out the purposes of the MMPA).

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).

### **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 witnesses' credibility. Specific credibility findings and analysis of the evidence to the extent required are presented in the Discussion section below.

The F/V Isabella is a large-scale purse seine fishing vessel that operates in the western Pacific Ocean, where it uses purse seine fishing gear to catch tuna species. Stip., ¶¶ 20-21. At more than 200 feet in length, the vessel weighs nearly 1,600 tons and can carry more than 1,000 tons of fish with a crew of 23. Stip., ¶ 21. The F/V Isabella hails from Pago Pago, American Samoa and is properly documented by the United States Coast Guard. Stip., ¶¶ 18, 21.

During the period of the alleged violations, the F/V Isabella was owned by AACH, and Mr. Wagner was its captain. Stip., ¶¶ 2-3. Both AACH and Captain Wagner are "persons" subject to the jurisdiction of the United States under the MMPA. Stip., ¶ 17; *see also* 16 U.S.C. § 1362(10) (defining the term "person" for purposes of the MMPA). The F/V Isabella possessed a High Seas Fishing Permit and an authorization under Section 118 of the MMPA that allowed for the incidental taking of a marine mammal in the course of commercial fishing operations. Stip., ¶ 19; *see also* 16 U.S.C. §§ 1374, 1387 (addressing MMPA authorization for the incidental taking of marine mammals during commercial fishing operations).

A purse seine fishing set on the F/V Isabella generally occurs in the following manner: The vessel deploys a net three-quarters of a mile long that hangs vertically in the water (the bottom edge is weighted and the top edge is buoyant). A large motorized skiff and smaller motor boats are used to extend the net around a school of fish; this takes about seven to nine minutes. The skiff and motor boats then hold the net in place while it is pursed from the bottom to prevent fish from escaping. Next, the net is pursed at the top as it is slowly pulled back toward and onto the vessel. The fish are then brailed out of the net and onto the deck of the vessel for storage in holds below deck. The entire process takes two to four hours. Stip., ¶ 22.

Purse seine fishing vessels operating in the western and central Pacific Ocean in 2010, such as the F/V Isabella, were required by federal regulations to carry "fishery observers." Stip., ¶ 23. These observers collect scientific data and document the vessel's fishing activities. Stip., ¶ 23. In this case, the Agency used fishery observers provided by the Pacific Islands Forum Fisheries Agency ("FFA"). Stip., ¶ 24. The FFA is an intergovernmental agency of seventeen Pacific Island nations created to facilitate regional cooperation and coordination among member nations with respect to marine fishery policies and management. Stip., ¶ 24.

As noted above, the observer on board the F/V Isabella when the alleged violations occurred was Roger Moor Jennet. Stip., ¶ 25. Mr. Jennet is a citizen of the Republic of the Marshall Islands. Stip., ¶ 25; Tr. at 64. He worked as an observer from 2008 to 2011 for the Marshall Islands Marine Resources Authority, conducting seven trips on purse seiners and two on longline fishing vessels flagged under the United States or the Marshall Islands. Tr. at 65-66. During the fishing trip at issue, between March 2, 2010 and June 13, 2010, Mr. Jennet was aboard the F/V Isabella, where he observed 47 purse seine fishing sets.<sup>17</sup> Tr. at 68, 70; AE 1 at 17; Stip., ¶ 25. He boarded the vessel in Ecuador, where it was being repaired, and sailed with it west to the fishing grounds before ending the trip in American Samoa. AE 1 at 4.

Part of Mr. Jennet's duties involved the preparation and completion of a workbook and report, including various standardized forms. Tr. at 68; AE 1 at 15-172, 181-86, 200-339. This included general information about the vessel and the trip, recorded on Form PS-1 (AE 1 at 15-25); log entries documenting the activity of each day, recorded on Form PS-2 ("Observer's Log") (AE 1 at 26-124); details about each set made by the vessel, recorded on Form PS-3 ("Set Details") (AE 1 at 125-72); sightings of species of special interest, including turtles, whales, dolphins, and birds, recorded on Form Gen-2 ("Species of Special Interest") (AE 1 at 181-86); a report summarizing events of the trip filled out when it's over (AE 1 at 200-45); a daily diary completed at the end of each day ("Observer's Diary") (AE 1 at 246-335); and a weekly report and various notes (AE 1 at 336-39). Tr. at 70-74. Mr. Jennet completed his daily Observer's Log entries at the end of each day based on notes he made throughout the day and during fishing activity. Tr. at 71. Mr. Jennet said he mainly is supposed to serve as a "monitor" on fishing vessels "and be the eyes for the government." Tr. at 90. Prior to becoming an observer he received three months of training "[t]o know the observer workbook, how to fill out the observer workbook and daily diary and to identify some species like tuna, whales." Tr. at 66. However, he does not complete any kind of investigations, nor does he have law enforcement training. Tr. at 90. Additionally, Mr. Jennet's first language is Marshallese, but he learned English in school and writes his reports in English. Tr. at 67.

Also sailing with the F/V Isabella was Joseph Parisi, the fishing master. Stip., ¶ 26. Master Parisi lives in Pago Pago, American Samoa. Tr. at 94. He has been a commercial fisherman for 42 years and has fished the central and western Pacific Ocean since 1982. Tr. at 94. He holds various fishing licenses from the United States Coast Guard. Tr. at 94-95. In his position on the F/V Isabella, Master Parisi was the officer responsible for directing the crew and deploying/retrieving fishing gear and catch during purse seine fishing operations under Captain Wagner's supervision. Stip., ¶ 26.

In his testimony, Master Parisi did not discuss the specific incidents at issue here. Rather, he testified about his general practices when fishing. He said he generally encounters one of three situations: whales feeding on bait with no fish associated; fish feeding on bait with no

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<sup>17</sup> The parties stipulated that Mr. Jennet observed fishing sets on the F/V Isabella between February 2, 2010 and March 13, 2010. Stip., ¶ 25. This second date appears to be a scrivener's error, as it is outside the period in which the violations occurred. Also, Mr. Jennet's workbook reflects departure and return dates of March 2, 2010 and June 13, 2010, and he credibly testified that those were the actual dates of the trip. Tr. at 70.

whales; or fish and whales together, “where the school of fish is in one spot, and you’ll see a whale a mile or two away.” Tr. at 96-97. When focusing on a set, Master Parisi is “looking for fish” and “not...for marine mammals,” whose behavior is unpredictable. Tr. at 97. Once he begins a set and the net goes out, Master Parisi stated that:

My main objective is I concentrate on the school of fish[.]...It kind of takes up all my concentration. So once I focus on that school of fish, that’s all I’m focused on and the net going off the back of the boat until I get back around to the skiff. Once I get back to the skiff, connect the two ends of the net, and we start pursing, then my eyes go other places.

Tr. at 98-99. Master Parisi also described how he would react if he spotted a marine mammal either before or after he started to set his nets:

If I see one associated with a school, I’ll leave it alone. I’ll stop the boat and wait. I’ve waited hours for a whale to leave a school. Sometimes they do. Sometimes they don’t. I’ve seen whales that are in the area, but they’re not close to, so I try to make my set as fast as possible before they come in. And then there’s been times when we’ve set the net and they’ve come in out of nowhere. They just pop up, and there’s not much I can do about it. Once I’m committed, I’m committed. The net is going out, and there’s nothing I can do to stop it without risking the safety of the crew.

Tr. at 97-98.

Master Parisi further claimed he has never killed a marine mammal in a net since he started fishing in 1982. Tr. at 99. He also testified that in this case he had not intended to find fish using a whale or to catch a whale while fishing. Tr. at 99.

In June 2010, Mr. Jennet met in Honolulu, Hawaii with Kevin Sterling Painter, a special agent with NOAA’s Office of Law Enforcement in Pago Pago, American Samoa. Tr. at 19, 26. Agent Painter interviewed<sup>18</sup> Mr. Jennet about his trip on the F/V Isabella and obtained a copy of the observer’s reports. Tr. at 26, 77-78; AE 1 at 349-53. Agent Painter interviewed Captain Wagner by email on September 30, 2010. Tr. at 29, 43; AE 1 at 381-84. Notably, Agent Painter testified that it is his practice to not show vessel captains observer reports during investigations. Instead, he indicated that in interviews with vessel captains he describes the content of observer reports. Tr. at 39-40. Vessel captains typically do not see observer reports at the end of trips. Tr. at 40.

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<sup>18</sup> During the in-person interview, Agent Painter took notes of Mr. Jennet’s responses to his questions, and subsequently typed the questions and answers and sent them to Mr. Jennet to review for accuracy. Tr. at 26-27. Mr. Jennet later signed the document and it was faxed back to Agent Painter. Tr. at 27; AE 1 at 349-53.

Agent Painter also testified, based on his own knowledge and experience, about fishing operations in a broad sense: The fishing master “generally” occupies the crow’s nest or “tuna tower” when searching for fish. Tr. at 32, 33. This is “the highest part of the mast, and it’s an area up very high where people can position themselves...to get a really good view of what’s going on below, where the fish are at, and searching for fish out there closer to the horizon possibly.” Tr. at 32. The fishing master or vessel captain might also stand on the port bridge wing during a fishing set. Tr. at 34. This is an outdoor platform adjacent to the bridge area from which the vessel is controlled. Tr. at 33-34. The vessel can also be steered from the outdoor bridge wing, “where you can see right over to the side . . . [to] your target for trying to catch fish.” Tr. at 33-34. Typically the fishing master or the captain will operate the vessel from this position during a set. Tr. at 34-35.

When the F/V Isabella set its nets, Mr. Jennet said he would typically stand outside the bridge on the port side – the port bridge wing. Tr. at 86-87. Either Master Parisi or Captain Wagner – depending on who was controlling the vessel – would usually be standing three to four feet away, Mr. Jennet testified. Tr. at 88-89; *see also* AE 1 at 350 (Mr. Jennet telling Agent Painter that when a fishing set was made, he was normally positioned “[o]n the port side of the bridge, directly behind the port side vessel controls that Lawrence Wagner operated”). There was nothing to block their view or prevent them from seeing the whales, he said. Tr. at 89. Mr. Jennet testified that the crow’s nest provided an even better view. Tr. at 89-90. Viewed from the vessel, whales are distinguishable from tuna because they are larger, Mr. Jennet testified, and spray water when they’re on the surface. Tr. at 85-86. At the times he saw them, “[the whales] were at the school when the ship made the set, and they were closing the top of the net. They were right in the school – I mean in the net with the tuna.” Tr. at 86. Generally, during a fishing set, Captain Wagner’s role was to “control the boat as directed by Master Parisi,” who was typically up in the “tuna tower” where “he had a very good view of the tuna schools.” AE 1 at 350-51.

As Agent Painter testified, setting purse seine nets around marine mammals can kill or injure them when they get caught in the net. Tr. at 35-36. It also disrupts their movement and feeding as they “go somewhere to try to escape the net.” Tr. at 36. Of the 47 fishing sets that the F/V Isabella made between March 2, 2010 and June 13, 2010, five are the basis for the MMPA violations alleged here. The parties have agreed there were no lethal takings of any whales associated with these fishing sets. Stip., ¶¶ 35, 41, 47, 53, 59.<sup>19</sup>

#### **IV. BURDEN OF PROOF**

To prevail on its claim against Respondents, the Agency must prove facts supporting each of the alleged violations by a preponderance of “reliable, probative, and substantial evidence.” *Creighton*, 2005 NOAA LEXIS 2, at \*35-36 (NOAA Apr. 20, 2005) (citing 5 U.S.C. § 556(d); *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* 15 C.F.R. § 904.251(a)(2) (addressing admissibility of evidence). This standard requires the “trier of fact to believe the existence of a fact is more

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<sup>19</sup> Stipulation 59 states there was no lethal taking of a whale “on December 11, 2010.” The Tribunal presumes this date to be a scrivener’s error, as the correct date is April 27, 2010.

probable than its nonexistence.” *Creighton*, 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 violations of law may be established by either direct or circumstantial evidence. *Watson*, 2010 NOAA LEXIS 8, at \*10 (NOAA July 17, 2010) (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764-65 (1984)). The Administrator has recognized that the ALJ is in the “best position to make credibility determinations when faced with conflicting testimony.” *Black*, 2013 NOAA LEXIS 6, at \*6 (NOAA Aug. 22, 2013) (citing *F/V Twister, Inc.*, 2009 NOAA LEXIS 11 (NOAA App. Nov. 24, 2009)). The ALJ’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*, 2004 NOAA LEXIS 11, at \*10 (NOAA 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 ALJ determines the weight to be afforded such evidence. *Id.* (quoting *Reidar Rasmussen Fishing Corp.*, 1995 NOAA LEXIS 11, at \*14 (NOAA Apr. 25, 1995); *Tepley*, 1995 NOAA LEXIS 5, at \*3 (NOAA App. Jan. 31, 1995)).

“[A]fter the Agency proves the allegations contained in the NOVA by a preponderance of reliable, probative, substantial, and credible evidence,” the burden shifts to the respondent to produce evidence to rebut or discredit the Agency’s evidence. *Watson*, 2010 NOAA LEXIS 8, at \*10 (citing *Steadman v. S.E.C.*, 450 U.S. 91, 101 (1981)).

Here, the Agency has alleged five violations of 16 U.S.C. § 1372(a)(1) and 50 C.F.R. § 216.11(a). As indicated above, that statutory provision states that “[e]xcept as provided in section [ ] . . . 118, it is 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).<sup>20</sup> Section 118, in turn, provides for grant of authorization upon application to a vessel engaged in commercial fishing that “shall allow the incidental taking of marine mammals.” 16 U.S.C. § 1387(c)(2)(A), (c)(2)(C). Further, subsection (c)(3)(D) of Section 118 provides, in pertinent part:

If the owner of a vessel has obtained and maintains a current and valid authorization from the Secretary under this section and meets the requirements set forth in this section, including compliance with any regulations to implement a take reduction plan under this section, the owner of such vessel, and the master and crew members of the vessel, shall not be subject to the penalties set forth in this title for the incidental taking of marine mammals while such vessel is engaged in a fishery to which the authorization applies.

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<sup>20</sup> The regulations reiterate the statutory requirement: “Except as otherwise provided in subparts C, D, and I of this part 216 or in part 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(a).

16 U.S.C. § 1387(c)(3)(D).

As such, to establish that Respondents violated the MMPA as particularly alleged in each of the five counts, it is undisputed that the Agency bears the burden of establishing, by a preponderance of the evidence, that: (1) Respondents are “persons subject to the jurisdiction of the United States;” (2) Respondents engaged in a “take” of a marine mammal; and (3) the take occurred on the “high seas.” The parties have stipulated that both Respondents – AACH and Captain Wagner – are persons subject to the jurisdiction of the United States under the MMPA. Stip., ¶ 17. They have further stipulated that the five sets at issue all occurred on the “high seas.” Stip., ¶¶ 30, 37, 43, 49, 55. At the time the sets were made, the F/V Isabella possessed an authorization issued under Section 118 the MMPA that permitted the incidental taking of marine mammals in the course of commercial fishing operations. Stip., ¶ 19; *see also* 16 U.S.C. § 1387(a)(1) (establishing authorization for taking of marine mammals incidental to commercial fishing operations). Therefore, there are two issues remaining to be determined for each count: whether a “take” of a marine mammal occurred during each set and, if so, whether the takes were “incidental” in the course of commercial fishing operations. *See* 16 U.S.C. §§ 1372(a)(1), 1387. The Tribunal will assume, without deciding, that the Agency has the burden of proof on both issues. *See Fournier*, NOAA Docket No. PI1100409, slip op. at 8-12 (NOAA Sept. 21, 2015) (Initial Decision) (discussing allocation of burden to prove a taking is *not* incidental).

## V. WHETHER A TAKING OF MARINE MAMMALS OCCURED

### A. Evidence of Respondents’ Engaging in “Taking” of Marine Mammals

#### Count 1

Count 1 of the NOVA alleges that on or about April 12, 2010, “Respondents knowingly set their purse seine fishing gear on a whale, in violation of applicable law.” NOVA at 1. As the parties have stipulated, at 9:38 a.m. local time (2033 Coordinated Universal Time (“UTC”)) on April 12, 2010, the F/V Isabella made a purse seine set, Set No. 10, on a school of skipjack tuna on the high seas of the Pacific Ocean. Stip., ¶¶ 29-31. The vessel landed 136.1 metric tons of fish with an ex-vessel value of not less than \$182,000. Stip., ¶¶ 31-32.

In support of the alleged violations in this Count, the Agency called Mr. Jennet as a witness. Mr. Jennet identified portions of his workbook that he said indicated the involvement of a marine mammal in Set No. 10. Mr. Jennet confirmed that for this set, he recorded in his Observer’s Log on April 12 a school association code of “6” for “live whale.” Tr. at 75-76; Stip., ¶ 34; AE 1 at 62, 341. That same day, Mr. Jennet further described the encounter in his Observer’s Diary:

The captain decided to make a set on this school what was associated with a whale (Black Fish). It was hard to identify what type of black fish was that in the net. But they dragged out the whale with the light boat....There were some ripped off on the net when they were hauling in the net.

AE 1 at 282, 347. He elaborated at hearing: "I must have meant that they were trying to drive out the fish, the whale, because they never dragged [a whale] out [of the net]." Tr. at 76-77. Mr. Jennet also recorded evidence showing Set No. 10 was made on a whale, including his notation on a Set Details form that "[n]o other species were landed on deck, there was one whale (black fish), but they already dragged it out with the light boat." AE 1 at 135. Likewise, on a Species of Special Interest form, Mr. Jennet described the whale as "[d]ark color, and looks pretty much like short finned pilot whale." AE 1 at 181, 343. According to that form, no whale was caught in the net or landed on deck, but they "were just feeding on the school [and] they got out before closing the bottom of the net." AE 1 at 181, 343.

During the hearing, Mr. Jennet additionally confirmed the accuracy of his interview responses to Agent Painter regarding Set No. 10. Tr. at 78-80. He told the agent:

When the fishing master initially investigated the school of tuna there were 3 whales feeding on the same bait fish as the school of tuna. When we made our set only one whale remained on the surface of the water feeding on the bait fish. I called it a "Black Fish" because I couldn't tell if it was a Short Finned Pilot Whale or a False Killer Whale. These types of whales [are] commonly referred to [as] Black Fish Whales. When we returned to Pago Pago, I looked at a Species Identification Book, and realized that the whales I saw were False Killer Whales.

AE 1 at 351. During the interview, Mr. Jennet added that the whale "escaped from the net. Probably dived down before the net was pursed." AE 1 at 351. Moreover, he told Agent Painter, the whales were easily seen because "[t]hey were on the surface of the water feeding on bait fish." AE 1 at 351-52.

As indicated above, Master Parisi did not testify about specific events, and Captain Wagner did not testify at all. Captain Wagner did, however, provide written responses to Agent Painter's emailed interview questions. See AE 1 at 381-84. Regarding Set No. 10 and Mr. Jennet's report that a Short Finned Pilot Whale had to be dragged out of the net by a light boat, he stated in part to Agent Painter:

The whale that the observer reported seeing we commonly call "black fish" and skipjack do not stay in an area very long after they show up because they prey on skipjack. Usually we see them outside the sack while we are brailing as they seem to be drawn to the bloody water. In the last ten years, I don't think I've seen them inside the net at any time. A school of skipjack would not be in the vicinity of pilot whales and I do not believe this incident occurred as reported.

AE 1 at 382. The South Pacific Regional Purse Seine Logsheet (“Vessel Log”)<sup>21</sup> entry associated with this set shows a school association code of “2” for “feeding on baitfish” and not “6” for “live whale.” Stip., ¶ 33; AE 1 at 387.<sup>22</sup>

## Count 2

Count 2 of the NOVA alleges that on or about April 20, 2010, “Respondents knowingly set their purse seine fishing gear on [a whale], in violation of applicable law.” NOVA at 1-2; Amended NOVA at 1. As the parties have stipulated, at 5:40 p.m. local time on April 20, 2010 (0429 UTC on April 21, 2010), the F/V Isabella made a purse seine set, Set No. 24, on a school of yellowfin tuna on the high seas of the Pacific Ocean. Stip., ¶¶ 36-38. The vessel landed 95.2 metric tons of fish with an ex-vessel value of not less than \$150,000. Stip., ¶¶ 38-39.

At hearing, Mr. Jennet identified portions of his workbook that he said indicated the involvement of a marine mammal in Set No. 24. Tr. at 80-81. In his Observer’s Diary that day, Mr. Jennet noted three whales associated with a school of fish the F/V Isabella was investigating:

These three whales were like feeding on this school (breaching) and these three species pretty much looks like FALSE KILLER Whale....The captain decided to make our set number 24...and during this set I could still see the whales except that this times only one inside. And those two [whales] maybe got out long before we closed the rings.

AE 1 at 290, 365; Tr. at 80. In a Species of Special Interest form, Mr. Jennet described the whales as black False Killer Whales. AE 1 at 183, 363. “There were three (3) when we were investigating the schools, but at the time we made the set I only saw one (1),” he wrote. “We were investigating a school associated with these 3 mammals and they were (breaching), like they were feeding along in this free school.” AE 1 at 183, 363; Tr. at 80-81. In his Observer’s Log, Mr. Jennet recorded a species code of “6,” indicating the school of fish was associated with a “live whale” during Set No. 24. AE 1 at 70, 361; Tr. at 81.

In his subsequent interview with Agent Painter, Mr. Jennet stated “[t]he school of tuna was associated with three False Killer Whales. They were feeding on the same bait fish as the school. They were feeding on the surface of the water. Easy to see them. When [Master Parisi] made the set there was only one visible. It escaped.” AE 1 at 352.

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<sup>21</sup> The Vessel Log, which is signed by Master Parisi, shows what the vessel was doing, where it caught its fish, the type and quantity of fish caught, the time and day of fishing, and other operational details. AE 1 at 385-92; Tr. at 29-30.

<sup>22</sup> Pages 386 through 392 of AE 1 were replaced at hearing with copies identical to the pages initially presented, except that the new copies were signed by Master Parisi and showed two additional days of steaming logged at the end of the trip. Tr. at 7-8, 49. The new pages do not display Bates stamp page numbers but are enumerated in this decision as if they continued the pagination sequence of AE 1.

Captain Wagner, in his email response to Agent Painter, said that whales are often seen in the presence of fish the vessel is targeting, and that is one of the factors that is considered when the vessel sets its nets:

The observer is correct in stating that the whales are easily seen, however there are times when the whales will leave as they sense the vessel approaching or as the vessel is getting in position to set while the fish are boiling. Normally, the presence of whales does not make a Captain abandon his effort....Even if a whale is in the net, it will almost always dive under the net or go through the net unharmed. Our nets are light and even the heaviest sections are no obstacle for a whale to penetrate. I haven't seen an instance of a whale being captured in a purse seine net. [Master Parisi] has 30 years or more experience running fishing boats and in this instance...whales showed up in the net. I have to believe that he thought he had a clear shot and took it.

AE 1 at 383. The Vessel Log entry associated with this set shows the school association code of "2" for "feeding on baitfish" and not "6" for "live whale." Stip., ¶ 40; AE 1 at 388.

### Count 3

Count 3 of the NOVA alleges that on or about April 21, 2010, "Respondents knowingly set their purse seine fishing gear on [a whale], in violation of applicable law." NOVA at 2; Amended NOVA at 1. As the parties have stipulated, at 4:50 p.m. local time on April 21, 2010 (0339 UTC on April 22, 2010), the F/V Isabella made a purse seine set, Set No. 25, on the high seas of the Pacific Ocean. Stip., ¶¶ 42-43. The vessel did not land any fish from this set. Stip., ¶ 44.

At hearing, Mr. Jennet identified portions of his workbook that he said indicated the involvement of a marine mammal in Set No. 25. Tr. at 81-82. In his Observer's Diary that day, Mr. Jennet noted a whale associated with a school of fish the F/V Isabella was investigating:

[T]his time only one mammal was feeding on this school. This was a FALSE KILLER whale....[I]t was mostly breaching all the time while feeding....The Fishing Captain decided to make a set on [the school of fish]...but as soon as the whale found an escape spot it escaped from inside the net along with the whole school. And it didn't landed on deck along with other species.

AE 1 at 291, 371; Tr. at 81. In a Species of Special Interest form, Mr. Jennet described a False Killer Whale that was short and black. AE 1 at 184, 369; Tr. at 81. "It looked healthy when we set on it, and as soon as it got out of the net all the fish got out," he wrote. AE 1 at 184, 369; Tr. at 81. In his Observer's Log, Mr. Jennet recorded a species code of "6," indicating the school of fish was associated with a "live whale" during Set No. 25. Stip., ¶ 46; AE 1 at 71, 367; Tr. at 81-82.

During his interview with Agent Painter, Mr. Jennet said “[t]he school of tuna was associated in one False Killer Whale. It was feeding near the surface of the water, and breached several times. Once again it was easy to see. The whale and the school of tuna escaped when the net was deployed.” AE 1 at 352. Mr. Jennet told Agent Painter that after this set was made, Captain Wagner asked him if he had a copy of the marine mammal rules; Mr. Jennet did not have one. “[Captain Wagner] was worried about the whale sets, because he was the licensed captain.” AE 1 at 352.

In Captain Wagner’s response to Agent Painter’s question regarding Set No. 25, he wrote “[s]ame response as [response for Set No. 24],” where he had indicated that “whales showed up in the net.” AE 1 at 383. The Vessel Log entry associated with this set shows the school association code of “2” for “feeding on baitfish” and not “6” for “live whale.” Stip., ¶ 45; AE 1 at 388.

#### Count 4

Count 4 of the NOVA alleges that on or about April 25, 2010, “Respondents knowingly set their purse seine fishing gear on [a whale], in violation of applicable law.” NOVA at 2; Amended NOVA at 1. As the parties have stipulated, at 4:10 p.m. local time on April 25, 2010 (0258 UTC on April 26, 2010), the F/V Isabella made a purse seine set, Set No. 31, on the high seas of the Pacific Ocean. Stip., ¶¶ 48-49. The vessel did not land any fish from this set. Stip., ¶ 50.

At hearing, Mr. Jennet identified portions of his workbook that he said indicated the involvement of a marine mammal in Set No. 31. Tr. at 82. In his Observer’s Diary that day, Mr. Jennet noted a whale associated with the school of fish the F/V Isabella was investigating: “And I don’t know if the captain wanted to kill these species or not cause this is the fourth times he made set on a whales, lucky they never got caught inside.” AE 1 at 295, 375; Tr. at 82. In his Observer’s Log, Mr. Jennet recorded a species code of “6,” indicating the school of fish was associated with a “live whale” during Set No. 31. Stip., ¶ 52; AE 1 at 75, 373; Tr. at 82. Mr. Jennet did not complete a Species of Special Interest form for this set, he testified, because he “must have forgot” to fill one out at the end of the trip. Tr. at 83-84.

Captain Wagner, responding to Agent Painter’s emailed questions, said the set was made “on a raft or payao (floating tank)...in the morning, in the dark, and there were no whales involved.” AE 1 at 383. The Vessel Log entry associated with this set shows the school association code of “2” for “feeding on baitfish” and not “6” for “live whale.” Stip., ¶ 51; AE 1 at 388.

#### Count 5

Count 5 of the NOVA alleges that on or about April 27, 2010, “Respondents knowingly set their purse seine fishing gear on [a whale], in violation of applicable law.” NOVA at 2; Amended NOVA at 1. As the parties have stipulated, at 3:23 p.m. local time on April 27, 2010 (0311 UTC on April 28, 2010), the F/V Isabella made a purse seine set, Set No. 33, on the high

seas of the Pacific Ocean. Stip., ¶¶ 54-55. The vessel did not land any fish from this set. Stip., ¶ 56.

At hearing, Mr. Jennet identified portions of his workbook that he said indicated the involvement of a marine mammal in Set No. 33. Tr. at 82-83. In his Observer's Diary that day, Mr. Jennet noted a whale associated with the school of fish the F/V Isabella was investigating: "[F]rom the way I see those two whales looks like (SWH). And as soon as the whales find a way out all the fish went out too." AE 1 at 297, 379; Tr. at 82-83. In his Observer's Log, Mr. Jennet recorded a species code of "6," indicating the school of fish was associated with a "live whale" during Set No. 33. Stip., ¶ 58; AE 1 at 77, 377; Tr. at 83. As with Set No. 31 in Count 4, Mr. Jennet said he forgot to complete a Species of Special Interest form for this set at the end of the trip.

In Captain Wagner's emailed response to Agent Painter regarding this set, he wrote that "[t]he set we made...was on a log...in the morning, in the dark, and there were no whales involved." AE 1 at 383. The Vessel Log entry associated with this set shows the school association code of "2" for "feeding on baitfish" and not "6" for "live whale." Stip., ¶ 57; AE 1 at 388.

#### **B. The Arguments of the Parties on whether an unlawful "taking" occurred**

The MMPA, the Agency asserts, provides for a "limited exception" to the general take prohibition allowing for "incidental taking of marine mammals in the course of commercial fishing" by those issued an authorization certificate by NOAA. AB at 2 (citing 16 U.S.C. § 1387(a)(1)); *see also* ARB at 2. The Agency argues that in each count, Respondents engaged in a "taking" because setting a purse seine net around a marine mammal "has the potential to injure," the MMPA defines acts with the potential to injure as "harassment," and harassment is a taking, even if the mammal is not injured or killed. ARB at 2 (citing 16 U.S.C. § 1362(18)(A), (C)-(D)). Further, the Agency contends the takings were not "incidental" to Respondents' commercial fishing activity because that term is defined by regulation as "a *non-intentional or accidental act* that results from, but is not the purpose of, carrying out an otherwise lawful action." ARB at 2 (citing, *inter alia*, 50 C.F.R. § 229.2). Here, the Agency alleges, Respondents knowingly set their purse seine gear on whales in the process of capturing tuna, so their actions were not subject to the exception to the general take prohibition. ARB at 3-4. Any contrary argument is "illogical, contrary to the purposes of the Act, and cannot be correct," NOAA asserts. ARB at 3.

In their Post-Hearing Briefs, Respondents make a three-pronged argument that the Agency has failed to establish a *prima facie* case that they violated the MMPA. RB at 1-2. First, they state, their actions fall within the MMPA exemption because their authorization to incidentally take marine mammals during permitted fishing "includes both negligent and even intentional acts," and the whales were not lethally taken, "harmed in any way," or listed as an endangered, threatened, or depleted species. RB at 1; *see also* RRB at 1-2 (MMPA authorization "authorizes Respondents to set on whales" and permits "certain 'knowing' or 'not unexpected acts'"). Second, "when applying regulations as a whole," Respondents contend their conduct did not violate the MMPA. RB at 1. Third, they argue that NOAA failed to demonstrate that

Respondents deliberately targeted or chased the whales to catch tuna; rather, the whales just incidentally “show[ed] up alongside the tuna.” RB at 2, 9.

**C. Did NOAA prove by a preponderance of the evidence that Respondents engaged in a taking by knowingly setting their fishing gear upon the whales?**

As discussed above, the definition of “take” in the MMPA encompasses actions “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” 16 U.S.C. § 1362(13). The regulations implementing the MMPA specify that the definition of “take” includes “the restraint or detention of a marine mammal, no matter how temporary.” 50 C.F.R. § 216.3. Further, the term “harass” is defined by the MMPA 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 MMPA imposes strict liability for civil violations, such as the unlawful “taking” of a protected marine mammal. *See Creighton*, 2005 NOAA LEXIS 2, at \*39 (“[T]he ‘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.”) (quoting *Cordel*, 1994 NOAA LEXIS 15, at \*7 (NOAA Apr. 11, 1994)). In the present matter, however, the Agency has alleged that Respondents violated the MMPA by “knowingly” setting purse seine fishing gear on whales. NOVA at 1-2. “The term ‘knowingly’ has been construed . . . to require only the commission of voluntary acts which cause or result in the violation.” *Simmons*, 2013 NOAA LEXIS 10, at \*19 (NOAA Aug. 30, 2013) (quoting *Huber*, 1994 NOAA LEXIS 35, at \*9 (NOAA Apr. 12, 1994)); *see also Kuhn*, 5 O.R.W. 408 (NOAA 1988) (finding that a knowing violation results from an affirmative act when the consequences of that act are foreseeable, even if not intended).

The preponderance of the evidence shows that Respondents did knowingly “take” whales during the five sets at issue. Mr. Jennet’s testimony and contemporaneous writings made it clear that Respondents knew there were whales associated with and among the tuna *before* they set their nets, and as such it was very likely that the whales could be restrained, detained, or annoyed by their nets. As Mr. Jennet stated: “[The whales] were at the school *when the ship made the set*, and they were closing the top of the net. They were right in the school – I mean in the net with the tuna.” Tr. at 86 (emphasis added). Further, the whales were, in fact, restrained or detained, at least temporarily, by Respondents’ nets and/or harassed by Respondents’ setting of the nets, an

act of annoyance that could injure the whales or potentially disturb the whales by disrupting behavioral patterns, including migration, breathing, and feeding. *See* Tr. at 35-36 (Agent Painter testifying that encirclement of whales in the net with the tuna disturbs their feeding, impedes their movement, and can cause death or injury in the process of escaping); *see also* *Balelo v. Baldrige*, 706 F.2d 937, 938 (9th Cir. 1983) (noting that when nets are pursed, capturing tuna and porpoises, the air-breathing porpoises sometimes are drowned or injured); *Comm. for Humane Legislation, Inc. v. Richardson*, 414 F. Supp. 297, 300 (D.D.C. 1976) (noting that when caught in a net, some porpoises, air-breathing mammals, drown as a result of shock, physical injury, or the refusal to abandon other porpoises entangled in the net).

This Tribunal found Mr. Jennet's sworn testimony very credible, in that despite his imperfect English, he appeared to answer questions sincerely and with certainty. Further, the records of his observations that he created contemporaneously with the events in question significantly corroborate his testimony. *See* Tr. at 75-85; AE 1 at 15-172, 181-86, 200-339. These records, created and submitted in the ordinary course of his work before any violations were raised by NOAA, are detailed, consistent, and fair. Additionally, Mr. Jennet had experience as an observer on purse seine vessels and received several months of training for his position. Tr. at 65-66. Respondents have suggested no motive for Mr. Jennet to have fabricated his observations and the Tribunal sees none in the record.

Respondents offered almost no evidence at hearing directly contradicting Mr. Jennet's factual description of the five sets on whales. As noted above, Captain Wagner did not testify at hearing, and Respondents' only witness, Master Parisi, testified in generalities rather than specifics.<sup>23</sup> Further, Respondents did not introduce into evidence any contemporaneous records that directly contradicted Mr. Jennet's testimony or written description of events. In contrast to the contemporaneously documented records from Mr. Jennet, the only substantial written account of events in the record from Respondents is Captain Wagner's unsworn email responses in his interview with Agent Painter.<sup>24</sup> AE 1 at 381-384. In these answers, provided several months after the voyage, Captain Wagner is unconvincing. With respect to Count 1, he responds with argument rather than recalled fact. AE 1 at 382 ("A school of skipjack would not be in the vicinity of pilot whales and I do not believe this incident occurred as reported."). Regarding Counts 2 and 3, Captain Wagner admitted that "whales showed up in the net." AE 1 at 383. For Counts 4 and 5, he states that "there were no whales involved." AE 1 at 383. These appear to be

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<sup>23</sup> Respondents argue that Mr. Jennet's testimony was also general rather than specific to the sets at issue. To some extent, that is true. However, Mr. Jennet also produced records contemporaneous to the events he witnessed that provide detail related to each violation. Master Parisi offered no such similar documentation.

<sup>24</sup> Notably, the record also contains the Vessel Log, submitted by Respondents, which reflects the school association code of "2" for "feeding on baitfish" and not "6" for "live whale" for each of the relevant sets. AE 1 at 387-88; *see also* Stip., ¶¶ 33, 40, 45, 51, 57. The Vessel Log, however, does not reflect a substantive account of the five sets in dispute, and contains no narrative description of these sets. *See* AE 1 at 387-88. Further, as addressed below, the Vessel Log entries regarding the five sets in dispute are found not to be credible, and are entitled to little, if any, evidentiary weight. *See infra* note 25.

the only assertions that directly contradict Mr. Jennet's version of events, and they are accompanied by very little detail. AE 1 at 383. But such unsworn, generalized, self-serving denials cannot and do not outweigh the sworn, credible testimony of Mr. Jennet and his contemporaneous records. Moreover, unlike the observer, Respondents have a motive for, at the very least, failing to recall the violations, as Captain Wagner acknowledges to Agent Painter in his memorandum that he was aware "that it was forbidden to intentionally set the net on a marine mammal." AE 1 at 382.

Respondents challenge what they characterize as the Agency's "unsubstantiated conclusions based on generalizations" as to what they may or may not have seen before making the sets, noting Master Parisi's general testimony that he is "focus[ed] on making the set and capturing the fish and not looking for marine mammals." RB at 10 (citing Tr. 97, 98-99). They further argue: "It does not follow that [Master Parisi] or Captain Wagner necessarily saw the same thing that the observer saw...because the whales are constantly swimming, diving, and moving around." RB at 10; *see also* RRB at 5-6. The Respondents also challenge Mr. Jennet's characterization of the whales being "associated" with the tuna, asking, "did he mean that they were a mile away or swimming towards the tuna, away from the tuna, with the tuna or otherwise acting in a predictable way such that Respondent would have known not to set on the tuna?" RB at 9-10. On this basis, they claim it cannot be concluded that Respondents intentionally set on the whales. *Id.* at 10.

These arguments, however, are simply not supported by the weight of the evidence. In Set No. 10 in Count 1, the whale had to be driven out from the net by a light boat, making it implausible that Master Parisi or Captain Wagner were not aware of its presence before the net was set. AE 1 at 282, 347; Tr. at 76-77. As to Counts 2 and 3, Captain Wagner admitted to Agent Painter that "[t]he observer is correct in stating that the whales are easily seen, however there are times when the whales will leave as they sense the vessel approaching or as the vessel is getting into position to set while the fish are boiling. Normally, the presence of whales does not make a Captain abandon his effort." AE 1 at 383. Specifically as to these counts, Captain Wagner states that "I have to believe that [Master Parisi] thought he had a clear shot [to set the nets] and took it." AE 1 at 383. In short, Captain Wagner makes clear it was not a problem of visibility or recognizing the whales' presence but rather a failed gamble that the nets could be set before "whales showed up" inside. AE 1 at 383. The only specific disagreements with Mr. Jennet's whale sightings during sets in Counts 4 and 5 are Captain Wagner's post hoc claims to Agent Painter that "there were no whales involved."<sup>25</sup> AE 1 at 383. On this point, Mr. Jennet's written observations, made contemporaneously, deserve more weight than after-the-fact denials asserted by an individual under investigation and facing a potentially steep financial penalty for setting on whales.

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<sup>25</sup> The Tribunal notes that the Vessel Log entries in the record that appear to contradict Mr. Jennet's Observer's Log are not credible: On occasions that Captain Wagner admitted to Agent Painter that "whales showed up in the net," AE 1 at 382-83, the corresponding Vessel Log entries show only a school association code of "2" for "feeding on baitfish," AE 1 at 387-88. Thus, these Vessel Log entries deserve little, if any, evidentiary weight regarding the five sets in dispute.

Significantly, Master Parisi does not, for any of the five counts, dispute any of the specific facts as stated by Mr. Jennet. His testimony regarding his general practices do not weigh in Respondents' favor either, as he stated that he normally stands "[u]p in the crow's nest" where "it's higher and we can see farther away." Tr. at 100. He is also easily reached there by others who would need to notify him of whale sightings: "They could tell the navigator, who could get on the PA and tell me. They could yell up to me in the crow's nest. There's all kinds of ways they can get my attention." Tr. at 103. Mr. Jennet also observed that either Master Parisi or Captain Wagner – depending on who was controlling the vessel – usually stood on the port bridge wing three to four feet away from him. Tr. at 87-89. There was nothing to block their view or prevent them from seeing the whales, he said. Tr. at 89. Moreover, Mr. Jennet testified that whales are distinguishable from tuna because they are larger and spray water when they are on the surface. Tr. at 85-86. Given this evidence, the Tribunal is not persuaded by Respondents' suggestion that they were wholly unaware of the whales before setting their nets in each of these counts. It is simply implausible that no one on the crew saw the nearby whale with the tuna before making the set. Finally, it has not escaped this Tribunal's notice that Master Parisi espoused an attitude toward fishing and his obligations under the MMPA that could almost be characterized as willful blindness: "I'm not looking for marine mammals. I'm looking for fish." Tr. at 97.

Consequently, the preponderance of the relevant, material, reliable, and probative evidence shows Respondents knowingly set purse seine fishing gear on live whales on the five occasions as alleged in the NOVA and Amended NOVA, and thus engaged in the "take" of marine mammals.

## **VII. WHETHER THE TAKING OF MARINE MAMMALS WAS "INCIDENTAL" TO RESPONDENTS' COMMERCIAL FISHING ACTIVITIES**

In their Post-Hearing Brief, Respondents assert NOAA "misapplies the term 'knowingly' to mean the 'intentional' acts prohibited under the MMPA," RB at 5, when in fact, their "authorization to incidentally take marine mammals in the course of their permitted commercial fishing operations, [ ] includes both negligent and even intentional acts," RB at 1. "Simply because Respondents may have 'known' there were whales associated with the tuna schools," does not mean Respondents "'intentionally' set on the whales because their intent was purely to capture the tuna." RB at 5-6. Respondents assert that they "did not target or otherwise chase the whales in order to make the sets." RB at 6. Respondents allege that "the term 'intentional' requires some kind of *mens rea* for which there is no evidence here." RB at 6. A "not unexpected" taking of whales is allowed by the regulations, they claim, citing the Agency's definition of "incidental taking" as an "unintentional, *but not unexpected*, taking." RB at 5-6. According to Respondents, the evidence shows that "at most" their intentional acts to secure tuna resulted in the unintentional, but not unexpected, taking of whales, which is a lawful "incidental taking" under NOAA's interpretation of the MMPA. RB at 6; *see also* RRB at 5 ("There is no question that Respondents intentionally set on tuna," but there is no evidence Respondents intentionally targeted whales.).

Further, Respondents argue that when read together as a "whole," the MMPA regulations "support[] the conclusion that [they] did not improperly target the whales." RB at 6; *see also*

RRB at 2. They assert that the regulations “are replete with various definitions of ‘incidental,’” RB at 7 (citing 50 C.F.R. §§ 216.11(a), 229.3(a), 229.4(a)), and further define the term “intentional,” RB at 7-8 (citing 50 C.F.R. § 216.3). Respondents argue that these definitions demonstrate that NOAA contemplated a difference between vessels that “intentionally” target and chase whales and those that do not. RB at 8 (citing 50 C.F.R. § 216.3) (“The term ‘intentional purse seine set’ means that a tuna purse seine vessel or associated vessels chase marine mammals and subsequently make a purse seine set.”). They suggest that in certain circumstances vessels intentionally chase and capture marine mammals to find and capture fish. RB at 4 (citing 65 Fed. Reg. 30, 44 (Jan. 3, 2000)). Respondents argue that in this case, however, NOAA presented no evidence that Respondents intentionally targeted or chased marine mammals to catch tuna. RB at 9. All that was shown, they assert, was that they intentionally encircled fish with their nets, which “must be permitted regardless of whether whales happen to be in the vicinity given the unpredictable nature of whales and the potential for a ‘not unexpected’ encirclement of the whales.” RRB at 5. “Any other interpretation of the law,” Respondents proclaim, would render their authorization “meaningless.” RRB at 5.

Respondents’ interpretation of the regulations and the result from the Agency’s position here is both incorrect and overdramatic. As an exception to the moratorium, the MMPA allows for only the “incidental taking of marine mammals in the course of commercial fishing.”<sup>26</sup> 16 U.S.C. § 1387(a)(1). As the United States District Court for the District of Columbia recently noted, “the statute itself supports a definition of ‘incidental’ that excludes intentional conduct.” *Black*, 2015 U.S. Dist. LEXIS 104694, at \*53. The Court further explained:

Indeed, while the statute expressly prohibits the “intentional lethal take of any marine mammal in the course of commercial fishing operations,” 16 U.S.C. § 1387(a)(5), the Secretary was permitted to allow “incidental taking,” *id.* at § 1387(c)(2)(C). However, the owner or operator of a commercial fishing vessel was required to report “all incidental mortality and injury of marine mammals in the course of commercial fishing operations.” *Id.* at § 1387(e). As such, it is clear that Congress, by banning all “intentional” instances of

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<sup>26</sup> As indicated in footnote 15 above, while Congress granted this exception to the moratorium, it indicated a clear intent for the exception to be narrowly defined so as *not* to undermine the overall purpose of the Act, in that it stated immediately thereafter:

*In any event* it shall be the immediate goal that the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations be reduced to insignificant levels *approaching a zero mortality and serious injury rate* within 7 years after the date of enactment of this section [enacted April 30, 1994].

16 U.S.C. § 1387(a)(1) (emphasis added). Respondents’ reading of the exception to allow for them to intentionally and perpetually set nets on whales in the course of fishing is not consistent with reaching a “zero mortality and serious injury rate.”

mortality but requiring the reporting of all “incidental” incidents of mortality understood the terms to cover different conduct.

*Id.* Based on this statutory language, the Agency by regulation defined “incidental” to mean, 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. This definition interpreting the statute to permit the “incidental, but not intentional, take of mammals [is] both reasonable and consistent with the language, structure, and purpose of the MMPA.” *Black*, 2015 U.S. Dist. LEXIS 104694, at \*54-55.

Substituting the term “take” for the generic term “act” in the text of the regulation provides a framework for analyzing the facts in this case: Incidental means, with respect to a [taking], a non-intentional or accidental [taking] 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]. See 50 C.F.R. § 229.2. 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. Taking of Marine Mammals Incidental to Commercial Fishing Operations, 60 Fed. Reg. 45,086 (Aug. 30, 1995). The Final Rule was 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.* at 45,086 (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.” *Id.* at 45,088 (emphasis added).

The Final Rule’s history features discussion about the definition of “incidental, but not intentional, take,” and “incidental mortality,” which were later removed from the Final 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 out 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.

Taking of Marine Mammals Incidental to Commercial Fishing Operations, 60 Fed. Reg. 31,666, 31,675 (June 16, 1995) (Proposed Rule) (emphasis added). Thus, while the exception provides commercial fishing vessels with a shield from culpability from the strict liability moratorium provision for accidentally taking a marine mammal in the course of fishing, in recognition that

such accidents occur in the normal course of fishing activities, it does not shield a vessel that knowingly sets its nets on tuna associated with whales, indifferent to their wellbeing, which is what occurred in the five instances at issue in this case.

Furthermore, despite Respondents' concern that their authorization would be "meaningless" if their incidental taking authorization were limited to truly accidental takes, the record clearly shows that is not the case. Master Parisi himself distinguished between circumstances where he sees whales associated with a school and knows he must "stop the boat and wait," and "times when we've set the net and they've come in out of nowhere. They just pop up, and there's not much I can do about it." Tr. at 97-98. Indeed, that is where Congress drew the line between its resolute effort to protect marine mammals from the activity of man and the latitude granted the commercial fishing industry. See *Fla. Marine Contrs. v. Williams*, 378 F. Supp. 2d 1353, 1362 (M.D. Fla. 2005) ("Congress clearly designed Section 1371 to end the taking of marine mammals without regard to the nature of the activity that caused the taking[.]...The exceptions to the moratorium in Section 1371 also demonstrate that the section is intended to operate to further the Act's objectives. These exceptions are either directly conditioned upon conformity with the Act's objectives, or . . . are limited by their very terms to avoid any conflict with these objectives.") (citations omitted). Granting broader latitude and protection to commercial fishing operations would be inapposite to the achievement of the objective and congressional intent. See *Comm. for Humane Legislation, Inc.*, 414 F. Supp at 309 ("The MMPA does not direct the defendants to afford porpoise only that amount of protection which is consistent with the maintenance of a healthy tuna industry. The interests of the marine mammals come first under the statutory scheme, and the interests of the industry, important as they are, must be served only after protection of the animals is assured.").

Moreover, granting such greater latitude is factually unwarranted. Mr. Jennet was present for some 47 sets made by the vessel between March 2, 2010 and June 13, 2010, and on only five occasions were whales actually associated with a school being investigated. See AE 1 at 17; Stip., ¶¶ 11-16, 25. Thus, there is no indication that prohibiting vessels from setting on schools associated with whales significantly impedes their ability to successfully acquire tuna.

In conclusion, the Agency has shown by a preponderance of the evidence that Respondents took marine mammals by knowingly setting purse seine fishing gear on whales on April 12, 2010, April 20, 2010, April 21, 2010, April 25, 2010, and April 27, 2010, resulting in their temporary capture (restraint/detention) and/or harassment as alleged in the NOVA and Amended NOVA. Further, such taking was inconsistent with Respondents' Section 118 authorization to *incidentally* take pursuant to their commercial fishing operations. Respondents, therefore, are liable for five counts 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).

## **VIII. DISCUSSION AS TO PENALTY**

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

Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, as amended, resulted in the maximum civil penalty increasing to \$11,000 per violation. 15 C.F.R. § 6.4(f)(10); *see also* Stip. ¶ 10.

As to the penalty assessment, the procedural rules governing this proceeding, found at 15 C.F.R. part 904, 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 violations, and ability to pay; and such other matters as justice may require.

15 C.F.R. § 904.108(a).<sup>27</sup>

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 ALJ 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." 15 C.F.R. § 904.204(m); *see also* *Frenier*, 2012 NOAA LEXIS 11, at \*11 (NOAA Sept. 27, 2012).

#### **A. The Parties' Arguments**

The Agency seeks to assess penalties totaling \$37,000 against Respondents, jointly and severally, for the five MMPA violations. NOVA at 3-4; Amended NOVA at 1. In determining the proposed penalties, NOAA states it considered the relevant statutory and regulatory provisions, specifically as incorporated within its "Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions," dated March 16, 2011 ("Penalty Policy").<sup>28</sup> AB at 5. NOAA asserts using the Penalty Policy "improves consistency at a national level, provides greater predictability for the regulated community and the public, and promotes transparency in enforcement." AB at 5.

The Penalty Policy utilizes a sanction matrix for each statute that NOAA enforces to determine an "initial base penalty." Penalty Policy at 4. The two factors mapped on the matrix

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<sup>27</sup> The procedural rules governing this proceeding 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.

<sup>28</sup> The relevant Penalty Policy is publically accessible at <http://www.gc.noaa.gov/enforce-office3.html>. As it was not admitted into the record, citation to the Penalty Policy will be to its numbered pages as reflected on the website. The subject Penalty Policy has since been revised, with the revised edition effective for enforcement actions charged on or after July 1, 2014. *See* [http://www.gc.noaa.gov/documents/Penalty%20Policy\\_FINAL\\_07012014\\_combo.pdf](http://www.gc.noaa.gov/documents/Penalty%20Policy_FINAL_07012014_combo.pdf).

are: (1) the “offense level” (I-IV), representing the gravity of the prohibited act that was committed as enumerated on tables included in the Penalty Policy; and (2) the “intent level” (A-D) representing an assessment of the violator’s mental culpability in committing the violation. *Id.* at 4, 22. These two factors constitute the seriousness of the violation. *Id.* at 4. Once the initial base penalty is determined, various adjustment factors are applied to account for compliance history, whether the violation occurred as part of commercial or recreation activity, and post-violation cooperation. *Id.* at 22. The third and final step in the process is to add to the adjusted penalty a sum to recoup from the violator the proceeds of the unlawful activity and/or any other economic benefit. *Id.* Among the purposes of recouping economic benefit is to “keep the alleged violator from gaining an unfair advantage over lawful actors.” *Id.* at 5.

The Agency’s Penalty Assessment Worksheets attached to the NOVA detailed its initial penalty calculation methodology for each count. Those worksheets reflect that the Agency identified the gravity offense level for each violation as “Level III,” representing a “Taking Violation” involving the “Harm, Hunt, or Capture of a Marine Mammal, or attempt to do so.” JE 1 at 8-12; Penalty Policy at 51. On the worksheets, the culpability level for each of the violations is identified as “D,” meaning the violations were “intentional,” rather than reckless, negligent or unintentional. JE 1 at 8-12. Charting those factors upon the applicable matrix reveals a base penalty range of \$4,000-\$6,000. JE 1 at 8-12; Penalty Policy at 29. The Agency proposes a mid-range base penalty of \$5,000 per violation, with no adjustments upward or downward at the second step for any count. JE 1 at 8-12. For Counts 1, 2, 3, and 5, the Agency initially calculated the proceeds of Respondents’ unlawful activity as \$102,075 for Count 1; \$57,825 for Count 2; \$71,400 for Count 3; and \$17,025 for Count 5, and increased the penalties for those counts to the \$11,000 statutory maximum. JE at 8-12. However, as indicated above, the Agency amended its NOVA to reduce the penalties sought in counts 3 and 5 from \$11,000 to \$5,000. Amended NOVA at 1. It is unclear what prompted the reduction, but it appears the Agency eliminated the economic benefit portion of those penalties. Consequently, the total penalty sought was lowered from \$49,000 to \$37,000.

The Agency argues that the “relatively low statutory maximum [penalty of \$11,000] pales in comparison to the potential economic gain that can be realized by setting purse seine nets in order to capture tuna, whether whales are present or not.” AB at 5. NOAA suggests that “[i]n a competitive and challenging fiscal environment, ... some fishermen may conclude that catching fish matters more than avoiding the take of marine mammals and that any potential penalties are merely the cost of doing business.” AB at 6.

On the other hand, Respondents declare the proposed penalties are “unjustified and excessive,” “out of line with the facts in this case[,] and disregard the circumstances.” RB at 10 (citing *United States v. Bajakajian*, 524 U.S. 321, 334-337 (1998)). “[T]he value of the fish landed is not relevant to the degree of culpability,” they assert. RRB at 6. In fact, this is a case of “overzealous prosecution,” they argue, because their activities were consistent with incidental takings allowed under the MMPA, they have no prior history of violations, they were engaged in lawful commercial fishing activities, and no whale was harmed or killed. RB at 11; RRB at 6. Respondents suggest the record shows they do “not target or chase the whales” and that their “goal was to catch fish.” RB at 11. Finally, they argue, if the “excessive penalties” proposed here are levied upon them, “there is nothing left to distinguish a case where someone

intentionally and maliciously seeks out and/or kills the whales while setting on tuna.” RB at 12; *see also* RRB at 6.

## **B. Penalty Analysis**

### *Nature, Circumstances, Extent, and Gravity of the Violation*

The record shows that during a single fishing voyage, Respondents knowingly set their nets on tuna in the presence of whales five separate times, each time resulting in the whales being restrained for some period of time by encirclement of the vessel’s purse seine net. Moreover, while the record generally indicates the whales were able to easily escape the net before it closed upon them, evidence suggests the whale caught in the net during Set No. 10, at issue in the first count, may have been less fortunate. Mr. Jennet indicated the net was torn during that set, which suggests the whale was to some extent physically restrained by the net, and likely felt annoyed, harassed, and/or threatened.<sup>29</sup> While there is no evidence the whale was injured by the interaction, any lack of injury was serendipitous and not a result of care taken by the Respondents, who clearly set their nets knowing that whales were in close proximity.

Therefore, I find a substantial penalty is appropriate for this violation, and the others, based on their serious nature, circumstances, extent, and gravity.

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

As to culpability, Mr. Jennet credibly testified that the Respondents were well positioned to be aware of the whales’ presence prior to setting the nets. It is also clear that the Respondents knew it was illegal to set upon them but set the nets anyway. *See, e.g.*, AE 1 at 382 (Captain Wagner indicating he knew there was a Marine Mammal Protection Act and that he had seen “that it was forbidden to intentionally set the net on a marine mammal”). Mr. Jennet’s testimony and contemporaneous accounts with regard to sighting whales associated with fish prior to setting the nets as alleged in each of the five counts establishes that those violations were intentional as well. Engaging in such intentional and repeated violative behavior by an experienced captain and experienced fishing master is reprehensible. Those in charge of a vessel should foster an environment encouraging compliance with and respect for the law. Consequently, Respondents’ acts warrant a significant penalty. That Respondents had no prior history of violations, and that the whales involved were not identified as threatened or endangered or killed does not offset this conclusion. Stip., ¶¶ 27, 28, 35, 41, 47, 53, 59.

Furthermore, I agree with the Agency that economic benefit and deterrence are important considerations in cases such as this one, where the fishery is high value and competitive, and all

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<sup>29</sup> The Tribunal hesitates to overly engage in anthropomorphic rationalizations regarding the reactions of mammals or their emotional states. On the other hand, the animals obviously cannot speak up for themselves or file suit on their own behalf for being detained and harassed under the MMPA. *See Citizens to End Animal Suffering & Exploitation v. New England Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993) (“The MMPA does not authorize suits brought by animals.”).

Respondents stood to benefit significantly from noncompliance. For example, in the set at issue in Count 1, Respondents landed at least \$182,000 worth of tuna, and for the set at issue in Count 2, they caught no less than \$150,000 worth of tuna. Stip., ¶¶ 32, 39. Even assessing the maximum permissible penalty of \$11,000 for each count, the facts before me show that Respondents will still realize an economic benefit of \$310,000 from these two violations. Thus, the maximum penalty is not excessive or disproportional in any way to the violation, but it is actually inadequate to compensate for its full magnitude. Moreover, while this Initial Decision takes no position on whether Respondents view potential MMPA penalties for setting on live whales as a “cost of doing business,” the penalties imposed in this matter must deter Respondents and others from adopting such an attitude. See *Churchman*, 2011 NOAA LEXIS 2, at \*60-61 (NOAA 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.”); see also 15 C.F.R. § 904.108(b) (civil penalty may be increased for commercial violators “to make a civil penalty more than a cost of doing business”); *Pesca Azteca, S.A. de C.V.*, 2009 NOAA LEXIS 10, at \*39 (NOAA Oct. 1, 2009), *aff’d* 2010 NOAA LEXIS 3 (NOAA App. 2010); *Silva*, 2005 NOAA LEXIS 1, at \*17-18 (NOAA Mar. 17, 2005).

### C. Conclusion

After weighing the relevant statutory and regulatory penalty factors, it is hereby found that, as a result of violating the MMPA and implementing regulation as alleged in the NOVA and Amended NOVA, Respondents are jointly and severally liable for civil penalties in the amount of \$11,000 for the violation in Count 1; \$11,000 for the violation in Count 2; \$5,000 for the violation in Count 3; \$5,000 for the violation in Count 4; and \$5,000 for the violation in Count 5.

### ORDER

Pursuant to 16 U.S.C. § 1375(a)(1), a total penalty of **\$37,000** is hereby **ASSESSED** against Respondents AACH Holding Co. No. 2, LLC, and Lawrence Wagner, jointly and severally, for five counts of violating the Marine Mammal Protection Act, 16 U.S.C. § 1372(a)(1), and 50 C.F.R. § 216.11.

Once this Initial Decision becomes final under 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 Agency<sup>30</sup>

Dated: September 21, 2015  
Washington, D.C.

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<sup>30</sup> 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.