

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:

PORTER WATSON

Respondent

Docket Number:

PI0900579

INITIAL DECISION AND ORDER

Issued:

July 21, 2010

Issued By:

Hon. Parlen L. McKenna
Presiding

APPEARANCES:

FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

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FOR THE RESPONDENT PORTER WATSON

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I. STATEMENT OF THE CASE

On July 21, 2009, the United States Department of Commerce, National Oceanic and Atmospheric Administration (NOAA or Agency) issued a Corrected Notice of Violation and Assessment of Administrative Penalty (NOVA) to Mr. Porter Watson (Respondent). The NOVA charged Respondent with a single count of violating 16 U.S.C. § 1538 et seq. (the Endangered Species Act (ESA)), 50 C.F.R. §§ 224.101 and 224.103(a)(2) in connection with Respondent approaching within one hundred (100) yards of at least one humpback whale. In the NOVA, the Agency sought a \$2,000 civil penalty against Respondent for this violation.

On August 20, 2009, Respondent timely requested a hearing. On September 15, 2009, a Notice of Transfer and Assignment of Administrative Law Judge and Order Requesting Preliminary Positions on Issues and Procedures (PIPP) was issued, which assigned this matter to the undersigned for disposition.

On October 14, 2009, the Agency filed its PIPP, and Respondent filed his PIPP on February 24, 2010. On March 11, 2010, the undersigned issued an Order and Notice of Hearing, which set the matter for hearing in Kailua-Kona, Hawaii for May 4, 2010.¹

On May 4, 2010, the hearing commenced as scheduled. At the hearing, the Agency offered six (6) witnesses and ten (10) exhibits in support of its case. Respondent appeared at the hearing and designated Mr. Richard Decker as his lay representative for the hearing. Both Respondent and Mr. Decker testified during the hearing, and Respondent offered a video DVD as an exhibit in support of his case. The parties' witnesses and exhibits entered into evidence are identified in Attachment A.

¹ On March 29, 2010, the undersigned issued an Order and Notice of Hearing Location, which set the location for the hearing.

During the hearing, Respondent admitted the facts of the violation alleged, and the sole matter for consideration was the appropriate amount of the sanction. See Tr. at 127.² Both parties elected to submit post-hearing briefs on the subject of the appropriate penalty for the admitted violation. On May 5, 2010, Respondent's representative at the hearing, Mr. Decker, filed a letter in support of Respondent's case.³ On June 29, 2010, Respondent filed his Post-Hearing Brief, and on July 1, 2010, the Agency filed its Post-Hearing Brief, which included Proposed Findings of Fact and Conclusions of Law. Rulings on the Agency's Proposed Findings of Fact and Conclusions of Law are contained in Attachment B.

The record of this proceeding, including the transcript, evidence, pleadings and other submissions, has now been reviewed by the undersigned and the case is ripe for decision. The findings of fact and conclusions of law that follow are prepared upon my analysis of the entire record, applicable regulations, statutes, and case law. Each exhibit entered, although perhaps not specifically mentioned in this decision, has been carefully reviewed and given thoughtful consideration.

II. FINDINGS OF FACT

1. On November 13, 2006, a group of sharks were following a distressed humpback whale offshore from Kailua-Kona, Hawaii. Tr. at 28.
2. A State of Hawaii Department of Aquatic Resources (DAR) boat approached the humpback whale to conduct observations. Tr. at 29-30.

² References to the transcript of the hearing are designated as "Tr. at [page #]".

³ Mr. Decker did not copy this letter to Agency counsel. The undersigned therefore transmitted a copy of Mr. Decker's letter to Agency counsel. Because Mr. Decker was designated as Respondent's representative at the hearing, the May 5, 2010 letter is not a prohibited filing and is made part of the record of this matter.

3. Observers aboard the DAR boat saw six (6) to ten (10) boats around the humpback whale, several of which were within 100 yards of the whale. Tr. at 30-31, 32, 72; Agency Exh. 5; Agency Exh. 6.
4. As the DAR boat approached the scene, the boats in the area generally backed away after being reminded of the 100-yard approach rule. Tr. at 31, 72, 100; Agency Exh. 2 at 1-2; Agency Exh. 6 at 1.
5. There were approximately twenty-four (24) to forty (40) sharks in the water near the humpback whale. Tr. at 32, 93; Agency Exh. 6 at 2.
6. More boats began coming out to the scene to observe the humpback whale, including Mr. Richard Decker's boat with Respondent on board. Tr. at 32, 72-73; Agency Exh 6 at 2.
7. Mr. Decker and Respondent had embarked on Mr. Decker's boat to photograph and take video of the sharks that were following the humpback whale. Tr. at 14-16.
8. Officials aboard the DAR boat attempted to inform these newly arriving boats about the 100 yard approach prohibition. Tr. at 33.
9. Most of the boats complied with the requests to move outside the 100 yard zone around the humpback whale. Tr. at 34.
10. Mr. Decker admitted that DAR personnel instructed the boats in the area (including his boat) more than once to observe the 100 yard rule because the boats were within 100 yards of the humpback whale. Tr. 143.
11. The humpback whale was generally visible at the surface and alive throughout the incident. Tr. at 41, 78, 92, 94, 102, 105.

12. Given the amount of sharks around the whale and the fact that many of the boats were on the ocean side of the whale, the DAR officials were concerned for human safety both at the moment (i.e., people getting into the water) and for possible grounding of the whale on the shore, which would bring many sharks into close proximity of the shore as well. Tr. at 34-35, 53-54, 103.
13. On at least one occasion, Mr. Decker's vessel came within one hundred (100) yards of the humpback whale while under power. Tr. at 36-38, 74, 87-88, 94; Agency Exh. 7 at 1.
14. Respondent and Mr. Decker entered the water to photograph and take video of the sharks following the humpback whale at least two times for approximately fifteen (15) minutes each time. Tr. at 24.
15. On at least one of these occasions, Mr. Decker and Respondent entered the water and the whale started moving in their direction. Tr. at 39, 74-76, 101; Agency Exh. 2 at 2-3; Agency Exh. 6 at 2.
16. On at least one of these occasions, when Mr. Decker and Respondent entered the water, they were within 100 yards of the whale. Tr. 89-90.
17. Respondent denied ever entering the water within 100 yards of the humpback whale, although he admitted that both he and Mr. Decker ended up quite close to the whale. Tr. at 23, 25, 56-60, 114, 125-126; Respondent's PPIP and Post-Hearing Brief. This denial is rejected as not credible.
18. During the times Mr. Decker and Respondent entered the water, no one was left to man Mr. Decker's boat. Tr. at 41, 90-91, 100; Agency Exh. 2 at 2; Agency Exh. 6 at 2.

19. The DAR boat approached Mr. Decker and Respondent and DAR personnel directed Mr. Decker and Respondent to get out of the water and move the boat outside the 100 yard zone around the humpback whale. Tr. at 39-40, 77, 91-92, 95-96; Agency Exh. 2 at 2-3; Agency Exh. 6 at 2; Agency Exh. 7 at 1.
20. Mr. Decker and Respondent claim that that they had difficulty hearing the directions from the DAR boat to get out of the water and did not willfully ignore such directions. Tr. at 58, 97-98, 126, 144-145, 146. This claim is accepted as credible.
21. Eventually, Mr. Decker got out of the water before Respondent. Tr. at 40, 91; Agency Exh. 2 at 2; Agency Exh. at 2.
22. Respondent remained in the water, and by the time he exited the water, the humpback whale was less than fifty (50) feet from Mr. Decker's boat. Tr. at 40, 43-44, 92; Agency Exh. 2 at 3; Agency Exh. 3 (3A); Agency Exh. 4; Agency Exh. 6 at 2.
23. Mr. Decker admitted that when he and Respondent were last in the water, Respondent and Mr. Decker were as close as fifty (50) feet or less of the humpback whale. Tr. at 16.
24. Mr. Decker was charged with one ESA violation for unlawful approach of the humpback whale. Tr. at 18.
25. The Agency sought a civil penalty in the amount of \$2,000 against Mr. Decker for this violation. Id.

26. Mr. Decker and the Agency entered an Agreed Disposition in June 2008 in which Mr. Decker admitted the facts of the violation and settled the matter for \$1,500. Tr. at 18-19; Agency Exh. 1.
27. Respondent sells his photographs and video of marine wildlife for profit. Tr. at 118-120, 128, 134. However, the undersigned finds that Respondent's "business" is more of an expensive hobby than a "commercial enterprise."
28. Respondent offered the video of the humpback whale and sharks he took during this incident for sale but as of the date of the hearing had not received any money from the video. Tr. at 119, 134-135.
29. When Respondent got in the water to videotape, he knew that the reason the sharks were in the area was because of the humpback whale. Tr. at 123, 128.
30. Respondent claims that he and Mr. Decker went out that day to take photographs of sharks following a distressed whale – not to take photographs or video of the whale. Tr. at 124-125, 126.
31. Respondent admitted the violation but denied intentionally approaching the humpback whale. Tr. at 127, 132-134.
32. Respondent was aware that humpback whales are endangered. Tr. at 128.
33. Respondent has been diving off Hawaii for forty-five (45) years. Tr. at 128.
34. Respondent admitted that humpback whales can alter their course for any/no discernable reason. Tr. at 129.
35. Respondent admitted that he did not think about the safety concerns of leaving the boat unmanned, as he and Mr. Decker were "only concerned with getting in the water and getting some footage." Tr. at 131.

36. Respondent stated that if he faced a similar situation in the future he would “try to make myself more aware of where the whale was . . . Maybe I wouldn’t get in with them, but I probably would. If there were sharks there, I would want to photograph” but that he would not do it again under the same or similar circumstances. Tr. at 148.

37. Respondent did not assert an inability to pay the proposed sanction. Tr. at 151.

38. The record reveals no prior violations of the 100 yard approach prohibition by Respondent.

III. PRINCIPLES OF LAW

A. Agency’s Burden of Proof

In order to prevail on the charges instituted against a respondent, the Agency must prove the violations alleged by a preponderance of the evidence. 5 U.S.C. § 556(d); In re Cuong Vo, 2001 WL 1085351 (NOAA 2001). Preponderance of the evidence means the Agency must show it is more likely than not a respondent committed the charged violation. Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983). The Agency may rely on either direct or circumstantial evidence to establish the violation and satisfy the burden of proof. See generally, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764-765 (1984). The burden of producing evidence to rebut or discredit the Agency’s evidence will only shift to the Respondent after the Agency proves the allegations contained in the NOVA by a preponderance of reliable, probative, substantial, and credible evidence. Steadman v. S.E.C., 450 U.S. 91, 101 (1981).

B. Analysis of the Charge

The Agency charged Respondent with a single count of approaching within one hundred (100) yards of at least one humpback whale in violation of the ESA and the regulations regarding restrictions on approaching humpback whales in Hawaii under 50 C.F.R. §§ 224.101 and 224.103(a)(2).

The ESA provides at 16 U.S.C. § 1538 (a)(1)(G) that it is unlawful for any person subject to the jurisdiction of the United States to “violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.” The ESA regulations promulgated at 50 C.F.R. § 224.101(b) list endangered marine mammals, which include the humpback whale. With respect to specific restrictions regarding approaching humpback whales in Hawaii, the regulations at 50 C.F.R. § 224.103(a)(2) proscribe in part that:

Except as provided in part 222, subpart C, of this chapter (General Permit Procedures), it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or to cause to be committed, within 200 nautical miles (370.4 km) of the Islands of Hawaii, any of the following acts with respect to humpback whales (*Megaptera novaeangliae*):

...

(2) Approach, by any means, within 100 yard (90 m) of any humpback whale; . . .

As the undersigned has discussed in a prior decision, the Agency’s interpretation of what it means to “approach” a humpback whale under this regulation contemplates some active movement toward the humpback whale under most circumstances. See In re Rundle, 2009 WL 2053601 (NOAA 2009)). The Agency clarified this aspect of its

regulations in responding to comments on the proposed rule prohibiting approaches by stating, “NMFS recognizes a difference between approach and proximity to humpback whales, and that whales may approach vessels.” 52 Fed. Reg. 44913 (November 23, 1987).

IV. ANALYSIS

Respondent admitted the fact of the violation during the hearing. See Tr. at 127. However, Respondent denied intentionally getting in the water within 100 yards of the humpback whale and claimed that when he entered the water he was outside the 100 yard no approach zone. See Tr. at 56-60, 114, 125-126. However, personnel on the DAR boat observed Mr. Decker’s boat come within 100 yards of the humpback whale on more than one occasion and also observed both Mr. Decker and Respondent in the water well within 100 yards of the humpback whale shortly after being informed by other DAR personnel on the boat that Mr. Decker and Respondent had entered the water. See Tr. at 36-38, 74, 87; Agency Exh. 7 at 1. Respondent’s claim that he never entered the water while within 100 yards of the humpback whale are rejected as not credible. The weight of the evidence simply does not comport with Respondent’s version of events.

This was not a situation where the humpback whale suddenly appeared next to Mr. Decker’s vessel or next to Respondent while he was in the water. Respondent and Mr. Decker intentionally followed the course of the humpback whale for some period, entered the water near the humpback whale on at least two occasions, resulting in being extremely close to the humpback whale while in the water (see Tr. at 24). The record evidence, taken as a whole, reveals by a preponderance of the evidence that on at least

one occasion Respondent made an unlawful approach of a humpback whale by getting into the water within 100 yards of the whale.

V. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Endangered Species Act makes it unlawful for any person to violate any regulation pertaining to an endangered species pursuant to the Act. See 16 U.S.C. § 1538(a)(1)(G).
2. The Endangered Species Act and its underlying regulations prohibit approaching endangered humpback whales within 100 yards in the Exclusive Economic Zone around the Islands of Hawaii. See 50 C.F.R. §§ 224.101 and 224.103(a)(2)
3. Respondent Porter Watson is a “person” within the meaning of the Endangered Species Act and is a person subject to the jurisdiction of the United States. See 16 U.S.C. § 1532(13).
4. All activities giving rise to this matter occurred along the coast of the Big Island of Hawaii and within the Exclusive Economic Zone of the United States. See Agency Exhs. 2-8.
5. On November 13, 2006, Respondent Porter Watson did approach an endangered humpback whale within 100 yards in the water.
6. The Agency has established by a preponderance of the evidence that on November 13, 2006 Respondent violated the Endangered Species Act and its underlying regulations codified at 50 C.F.R. § 224.103(a)(2).

VI. CONSIDERATION OF PENALTY ASSESSMENT

The ESA authorizes the imposition of a civil penalty of up to \$27,500 per offense at the time of Respondent's violation. See 16 U.S.C. § 1540.⁴ In assessing a penalty, the undersigned considered a number of factors. "Factors to be taken into account in assessing a penalty . . . may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior offenses, and ability to pay; and such other matters as justice may require." 15 C.F.R. § 904.108(a). The Agency recently modified 15 C.F.R. § 904.204(m) by removing any presumption in favor of the Agency's proposed sanction and providing that the undersigned may assess a civil penalty de novo, taking into account all the factors required by applicable law. See 75 Fed. Reg. 35631-32 (June 23, 2010). The Agency designated this change as merely "procedural" in nature, and the new rule will be applied to this case.

The Agency's Endangered Species Act Penalty Schedule (see Agency Exh. 10 at 3) calls for a sanction of between \$1,000 and \$3,500 for a first time offense by a commercial person of a 100 yard approach violation such as the one at issue here. For non-commercial persons, the suggested penalty is between \$500 and \$1,000. Id. Based upon all the evidence of the record, the undersigned finds that Respondent's activity's fall somewhere between a commercial entity and an expensive hobbyist.

⁴ Civil monetary penalties are subject to the Federal Civil Penalties Inflation Adjustment Act of 1990 and are adjusted regularly for inflation. The current adjustment establishes the statutory maximum at \$32,500. However, at the time of violation, the maximum was \$27,500, adjusted from the civil penalty of \$25,000 stated in the ESA. See 15 C.F.R. § 6.4.

A. Respondent's Status as a Commercial Operator

The Agency's NOVA proposed an assessment of a \$2,000 penalty against Respondent under the theory that Respondent should be treated as a commercial operator. Moreover, in support of its assessment, the Agency presented several aggravating factors, which it believed justified the penalty assessed in the NOVA.

First, the Agency argues that Respondent should be considered a commercial operator for purposes of determining the appropriate range of sanction in the penalty schedule. Respondent admitted that he went out on the day in question to obtain video that he could possibly sell and that he did in fact attempt to sell the video he took. Tr. at 119-120. But Respondent argues that the commercial designation should not be applied to him because "the truth of the matter is that [he] spend[s] more in camera gear repair and replacement than [he] take[s] in." Respondent's Post-Hearing Brief.

Respondent's argument thus seems not so much that he is not in the business of selling his videos, but rather that his activity is more akin to an expensive hobby. Respondent inability to sell the video (see Tr. at 119, 134-135) does not render him a non-commercial operator for purposes of determining the proper sanction.⁵ The undersigned will, therefore, use the range of penalties from \$500 up to \$3,500 suggested for a non-commercial operator up to the maximum for a commercial operator as guidance in determining the appropriate penalty in this case.

⁵ Had Respondent sold the video for profit, any economic gain from his unlawful activity (i.e., the approach of the humpback whale) would have been considered in terms of setting an appropriate amount. A respondent should not be allowed to make a "profit" through such activity and the sanction should ensure that such "profits" are accounted for in determining the appropriate civil penalty amount.

B. The Nature, Circumstances, Extent and Gravity of Respondent's Violation

Agency counsel argues that the nature and circumstances of the violation warrant a stiff sanction because Respondent not only violated the 100 yard approach prohibition but also did so to an "extreme level" by getting within a fluke's length from the whale. Agency Post-Hearing Brief at 3. Furthermore, Agency counsel argues that Respondent compounded his close approach in Mr. Decker's vessel by getting into the water and approaching the humpback whale. Id.

The record clearly establishes that Mr. Decker's boat unlawfully approached the humpback whale on at least one occasion. Tr. at 143. However, no testimony or other evidence establishes the person directly responsible for the boat's approach. As the boat belongs to Mr. Decker, it is assumed that Mr. Decker was the vessel operator and the Agency already settled Mr. Decker's violation for \$1,500.

Importantly, Respondent's entry into the water occurred after the DAR boat had warned Mr. Decker and Respondent to observe the 100 yard safety zone around the humpback whale. Tr. at 95, 143. Respondent must assume responsibility for his choices to violate the 100 yard approach prohibition by getting into the water.

Agency counsel also maintains that Respondent aggravated the situation by refusing to cooperate with DAR personnel's verbal directions to remain outside the 100 yard approach zone while in Mr. Decker's vessel and further ignored direct verbal commands from the DAR boat to remove himself from the water while he was well within 100 yards of the humpback whale. Agency Post-Hearing Brief at 3. The fact of the DAR personnel instructing Respondent to extricate himself from the water and

Respondent's failure to comply with that instruction is undisputed. See, e.g., Tr. at 39-40, 77, 91-92, 95-96; Agency Exh. 2 at 2-3; Agency Exh. 6 at 2 and Agency Exh. 7 at 1.

However, Respondent claims that he could not hear what the DAR boat was saying to him given the circumstances. See Tr. at 97-98; Respondent's Post-Hearing Brief. Importantly, Respondent does not contend that he failed to see the DAR personnel's attempts to speak to him. Indeed, a DAR employee testified that Respondent was looking directly at him while he was directing Respondent to exit the water. Tr. at 97. A reasonable and prudent person under the circumstances would have attempted to ascertain what clearly identified officials were saying to him if he could not hear.

Accordingly, Respondent should be held responsible for his failure to be aware of the circumstances and timely ascertain DAR personnel's instructions. See, e.g., Tr. at 131 (noting that Respondent and Mr. Decker were only concerned with getting in the water and obtaining footage – not concerned with leaving the boat unmanned). This failure will be considered a factor in aggravation but not so much as a complete disregard for the DAR personnel's instructions as Agency counsel argues.

C. Respondent's Culpability, Acceptance of Responsibility and Prior Violations

Agency counsel also argues that Respondent failed to adequately accept responsibility for his actions because Respondent attempted to minimize the fact of the humpback whale's presence and state that he was only going out to film the tiger sharks and not the whale. Agency Post-Hearing Brief at 4. As discussed above, Respondent admitted the fact of the violation, but denied he intentionally meant to come within 100 yards of the humpback whale. Respondent's Post-Hearing Brief.

Respondent might never have had the specific intent to violate the 100 yard prohibition outlined in the Agency's regulations, but clearly Respondent knew from the DAR boat's prior warnings that Mr. Decker's vessel was within 100 yards of the whale at some point before entering the water. The whale was generally visible on the surface (see Tr. at 41, 78, 92, 94, 102, 105), and it is simply not credible that Respondent failed to notice the whale's position relative to his own when he entered the water. Respondent might have been mistaken as to the distances (i.e., he might have believed he was outside the 100 yard zone), but the record establishes that Respondent entered the water within 100 yards of the humpback whale on at least one occasion.

Agency counsel also highlights Respondent's statement at the hearing that he would probably want to film the tiger sharks again in a similar situation. Id. However, Respondent's full statement indicated that he would likely not commit a violation again under similar circumstances. Tr. at 148. While Respondent's statement was not the most convincing admission of "lessons learned," it does appear that these proceedings (and the associated sanction) will serve an appropriate deterrent effect.

Overall, the undersigned finds that Respondent committed a serious violation of the 100 yard approach prohibition. Respondent's getting into the water within 100 yards of the humpback whale was done in a reckless manner by leaving Mr. Decker's boat unmanned, in close proximity to a distressed humpback whale with many sharks swimming around the area. DAR personnel were reasonably concerned for Respondent's (and other individuals') safety in such a situation. Respondent's actions caused the DAR boat to divert their attention from observing the humpback whale to instruct Respondent

to comply with the 100 yard non-approach zone around the whale after having earlier told Mr. Decker and Respondent to observe the 100 yard restriction.

Respondent is a long-time diver off Hawaii and was aware that the humpback whale is an endangered species. Tr. at 128. Respondent knew that humpback whales can alter their course (Tr. at 129) and should have known that by entering the water within 100 yards of the humpback, it was possible (even likely) that he could end up very close to the humpback whale. Respondent should have known better than to enter the water in violation of the Agency's regulations, especially when faced with a DAR boat on scene reminding everyone (including Respondent) to observe the 100 yard approach prohibition.

Conversely, a significant reduction in the Agency's proposed penalty amount of \$2,000 is warranted given the particular facts and circumstances of this incident: particularly, (1) Respondent is not really a commercial operator but more of a hobbyist; (2) the evidence does not establish that Respondent willfully ignored instructions to get out of the water; and (3) the evidence does not establish that Respondent was responsible for Mr. Decker's boat approaching the humpback whale within 100 yards. Accordingly, the undersigned finds a penalty of \$1,000 appropriate for this violation given all the circumstances and evidence on the record. This amount is within the Agency's suggested penalty range for a first time offender and reflects the seriousness and gravity of Respondent's violation

VI. ORDER

WHEREFORE:

IT IS HEREBY ORDERED that a civil penalty in the amount of **ONE THOUSAND DOLLARS** (\$1,000.00) is assessed against Respondent Porter Watson.

PLEASE BE ADVISED that a failure to pay the penalty within thirty (30) days from the date on which this decision becomes final Agency action will result in interest being charged at the rate specified by the United States Treasury regulations and an assessment of charges to cover the cost of processing and handling the delinquent penalty. Further, in the event the penalty or any portion thereof becomes more than ninety (90) days past due, an additional penalty charge not to exceed six (6) percent per annum may be assessed.

PLEASE BE FURTHER ADVISED that any party may petition for administrative review of this decision. The petition for review must be filed with the Administrator of the National Oceanic and Atmospheric Administration within thirty (30) days from the day of this initial decision and order as provided in 15 C.F.R. § 904.273. Copies of the petition should also be sent to the ALJ Docketing Center, NOAA counsel, and the presiding judge. A copy of 15 C.F.R. § 904.273 is attached as **Attachment C** to this order.

If neither party seeks administrative review within 30 days after issuance of this order, this initial decision will become the final decision of the agency.

IT IS SO ORDERED.

Done and dated this 21st day of July, 2010 at
Alameda, CA.

A handwritten signature in black ink, appearing to read "P. L. McKenna", written over a horizontal line.

HON. Parlen L. McKenna
Administrative Law Judge
United States Coast Guard

ATTACHMENT A: LIST OF WITNESS AND EXHIBITS

AGENCY WITNESSES

1. Asst. Special Agent in Charge John Barylsky (NMFS OLE)
2. Justin Viezbicke (DAR)
3. Linda Livnat (DAR)
4. Brent Carman (DAR)
5. Steve Cotton (DAR)
6. Special Agent Frank Giarretto (NMFS OLE)

RESPONDENT WITNESSES

1. Porter Watson
2. Richard Decker

AGENCY'S EXHIBITS (Agency Exh. 1 through Agency Exh. 10).

1. Agreed Disposition of Richard Decker
2. Statement of Justin Viezbicke
3. Viezbicke Photos (3 photos – 3A, 3B and 3C)
4. Viezbicke Photo Index
5. Mersburgh memo to Viezbicke
6. Statement of Laura Livnat
7. Statement of Brent Carman
8. SA Frank Giarretto's Offense Investigation Report
9. Endangered Species Act regulations, 50 C.F.R. § 224.103(a)(2)
10. Endangered Species Act civil penalty schedule

RESPONDENT'S EXHIBIT

1. DVD of video taken by Respondent

ATTACHMENT B: RULINGS ON THE AGENCY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Proposed Findings of Fact

1. On November 13, 2006, Respondent Porter Watson did approach an endangered Humpback whale within 100 yards while on board a vessel with Richard Decker. *See Agency Exs. 2-8 and testimony of Agency Witnesses Viezbicke, Livnat, Carman and Cotton generally.*

Accepted and Incorporated to the extent this Proposed Finding of Fact indicated that Porter Watson was on Mr. Decker's boat when it approached within 100 yards of the humpback whale, but rejected to the extent that it purports to demonstrate that Respondent was in charge of or otherwise directing the course of Mr. Decker's boat at the time.

2. On November 13, 2006, Respondent Porter Watson did approach an endangered Humpback whale within 100 yards in the water. *See Agency Exs. 2-8 and testimony of Agency Witnesses Viezbicke, Livnat, Carman and Cotton generally.*

Accepted and Incorporated.

3. The whale in question was an endangered Humpback whale. *See TR 36 at 4-6.*

Accepted and Incorporated.

4. Richard Decker admitted the violation. *See Agency Ex. 1.*

Accepted and Incorporated.

5. Porter Watson admitted the violation. *See TR at 127 at 11-13.*

Accepted and Incorporated.

6. Respondent was warned and instructed by Department of Aquatic Resources personnel to remain a lawful distance from the Humpback whale. *See Agency Exs. 2-8 and testimony of Agency Witnesses Viezbicke, Livnat, Carman and Cotton generally.*

Accepted and Incorporated.

7. Respondent ignored the warning and instructions from Department of Aquatic Resources personnel to remain a lawful distance from the Humpback whale. *See Agency Exs. 2-8 and testimony of Agency Witnesses Viezbicke, Livnat, Carman and Cotton generally.*

Rejected for the reasons provided in the Initial Decision and Order.

Proposed Conclusions of Law

1. The Endangered Species Act makes it unlawful for any person to violate any regulation pertaining to an endangered species issues pursuant to the Act. *See 16 U.S.C. § 1538(a)(1)(G).*

Accepted and Incorporated.

2. The Endangered Species Act and its underlying regulations prohibit approaching endangered Humpback whales within 100 yards of the Exclusive Economic Zone around the Islands of Hawaii. *See Agency Ex. 9.*

Accepted and Incorporated.

3. Respondent Porter Watson is a “person” as defined by the Endangered Species Act. *See 16 U.S.C. § 1532(13).*

Accepted and Incorporated.

4. All activities giving rise to this matter occurred along the coast of the Big Island of Hawaii and within the Exclusive Economic Zone of the United States. *See Agency Ex. 2-8.*

Accepted and Incorporated.

5. The Agency has established by a preponderance of the evidence that Respondent Porter Watson violated the Endangered Species Act and its underlying regulations codified at 50 C.F.R. § 224.103(a)(2).

Accepted and Incorporated.

ATTACHMENT C: PROCEDURES GOVERNING ADMINISTRATIVE REVIEW

904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision within 30 days after the date the decision is served. The petition must be served on the Administrator by registered or certified mail, return receipt requested at the following address:

Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Copies of the petition for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel for Enforcement and Litigation at the following address: Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

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

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

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

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

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

(3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statutes, regulations,

and principal authorities. Petitions may not refer to or incorporate by reference entire documents or transcripts;

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

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

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

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

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content requirements in paragraph (d) of this section without further review.

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

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

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

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

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

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

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

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

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

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

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