

UNITED STATES DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

**In the Matter of:**

**MATTHEW JAMES FREITAS, ET AL.<sup>1</sup>**

**Respondents.**

**Docket Number:**

**PI0904338  
(consolidated cases)**

**INITIAL DECISION AND ORDER**

**Issued:**

**August 23, 2013**

**Issued By:**

Hon. Parlen L. McKenna  
Presiding

**APPEARANCES:**

**FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

Alexa A. Cole, Esq.  
Charles Green, Esq.  
Enforcement Section, NOAA Office of General Counsel  
1313 East West Highway  
Silver Spring, MD 20910

**FOR THE RESPONDENTS**

James P. Walsh, Esq.  
Gwen Fanger, Esq.  
Davis Wright Tremaine LLP  
505 Montgomery Street, Suite 800  
San Francisco, CA 94111

---

<sup>1</sup> On December 13, 2010, Docket Numbers PI0904338, PI1000365, PI1000367, PI1000369, and PI1000371 were consolidated by Order of the Chief Administrative Law Judge. Respondents in this consolidated case include: Matthew James Freitas, Sea Quest LLC, Ching Wen Wu, Benjamin Brown Maughan, Jr., Ocean Conquest LLC, Wu Chin Pin, Russell Keith Bass, Jr., Ocean Encounter LLC, Ho-Ching Chang, Paul Magellan, Sea Honor LLC, Yen Hsing Tasai, John Zolezzi, Pacific Ranger LLC, and Su Tien Shih.

## TABLE OF CONTENTS

I.	Preliminary Statement.....	- 1 -
II.	Procedural History.....	- 3 -
III.	Principles of Law.....	- 5 -
A.	Burden of Proof/Standard of Proof.....	- 5 -
B.	The WCPFCIA and Agency Regulations.....	- 6 -
1.	The WCPFCIA’s Conservation Management Measure Related to FADs.....	- 6 -
2.	The Agency’s FAD Regulations.....	- 7 -
C.	The Marine Mammal Protection Act.....	- 9 -
IV.	Findings of Fact.....	- 12 -
	CMM 2008-01 and the FAD Closure Period.....	- 12 -
	NOAA Guidance to the South Pacific Tuna Corporation Regarding the MMPA.....	- 15 -
	The South Pacific Tuna Corporation and Key Personnel.....	- 16 -
	The F/V Sea Quest and Key Individuals Associated with the Vessel.....	- 19 -
	Charge 1 – August 14, 2009 – FAD Violation.....	- 20 -
	Charge 2 – September 17, 2009 – FAD Violation.....	- 22 -
	The F/V Pacific Ranger and Key Individuals Associated with the Vessel.....	- 23 -
	Charge 1 – September 30, 2009 – FAD Violation.....	- 24 -
	The F/V Ocean Conquest and Key Individuals Associated with the Vessel.....	- 25 -
	Charge 1 – September 18, 2009 – MMPA Violation.....	- 27 -
	Charge 2 – September 24, 2009 – FAD Violation.....	- 27 -
	Charge 3 – September 25, 2009 – FAD Violation.....	- 28 -
	The F/V Ocean Encounter and Key Individuals Associated with the Vessel.....	- 30 -
	Charge 1 – September 17, 2009 – MMPA Violation.....	- 31 -
	Charge 2 – September 24, 2009 – MMPA Violation.....	- 32 -
	Charge 3 – September 25, 2009 – MMPA Violation.....	- 33 -
	Charge 4 – September 25, 2009 – MMPA Violation.....	- 34 -
	Charge 5 – September 18, 2009 – FAD Violation.....	- 35 -
	Charge 6 – September 20, 2009 – FAD Violation.....	- 36 -
	Charge 7 – September 21, 2009 – FAD Violation.....	- 36 -
	Charge 8 – September 22, 2009 – FAD Violation.....	- 37 -
	Charge 9 – September 23, 2009 – FAD Violation.....	- 37 -
	The F/V Sea Honor and Key Individuals Associated with the Vessel.....	- 38 -
	Charge 1 – September 28, 2009 – FAD Violation.....	- 39 -
	Charge 2 – September 30, 2009 – FAD Violation.....	- 40 -
V.	Analysis.....	- 40 -
A.	Alleged MMPA Violations.....	- 41 -
1.	The F/V Ocean Conquest’s Alleged MMPA Violation – September 18, 2009.....	- 45 -
2.	The F/V Ocean Encounter’s Alleged MMPA Violations.....	- 46 -
	Alleged MMPA Violation #1 – September 17, 2009.....	- 47 -
	Alleged MMPA Violation #2 – September 24, 2009.....	- 48 -
	Alleged MMPA Violation #3 – September 25, 2009.....	- 49 -
	Alleged MMPA Violation #4 – September 25, 2009.....	- 49 -
B.	Alleged FAD Violations Related to Sets Made on Fish under the Boat.....	- 50 -
1.	The F/V Sea Quest Alleged FAD Violations.....	- 54 -
	Alleged FAD Violation #1 – August 14, 2009.....	- 54 -
	Alleged FAD Violation #2 – September 17, 2009.....	- 56 -
2.	The F/V Pacific Ranger Alleged FAD Violation – September 30, 2009.....	- 57 -
3.	The F/V Ocean Conquest’s Alleged FAD Violations.....	- 58 -
	Alleged FAD Violation #1 – September 24, 2009.....	- 58 -
	Alleged FAD Violation #2 – September 25, 2009.....	- 59 -
4.	The F/V Ocean Encounter’s Alleged FAD Violations.....	- 60 -
	Alleged FAD Violation #1 – September 18, 2009.....	- 61 -

Alleged FAD Violation #2 – September 20, 2009 .....	- 62 -
Alleged FAD Violation #3 – September 21, 2009 .....	- 63 -
Alleged FAD Violation #4 – September 22, 2009 .....	- 64 -
Alleged FAD Violation #5 – September 23, 2009 .....	- 65 -
C. Alleged FAD Violations Related to Servicing/Deploying a FAD .....	- 65 -
1. The F/V Sea Honor FAD Servicing/Deploying FAD Violations .....	- 65 -
Alleged Deploying/Servicing FAD Violation #1 – September 28, 2009 .....	- 66 -
Alleged Deploying/Servicing FAD Violation #2 – September 30, 2009 .....	- 67 -
VI. Ultimate Findings of Fact and Conclusions of Law .....	- 67 -
VII. Consideration of Penalty Assessment .....	- 71 -
A. Agency’s Penalty Arguments .....	- 78 -
1. The FAD Violations .....	- 79 -
2. The MMPA Violations .....	- 81 -
B. Respondents’ Response .....	- 82 -
1. The FAD Violations .....	- 82 -
2. The MMPA Violations .....	- 83 -
C. General Background Applicable to All Counts .....	- 83 -
1. The Harm to the Resource .....	- 83 -
2. The Value of the Fish Caught .....	- 84 -
D. Respondents’ General Degree of Culpability .....	- 88 -
E. Respondents’ Prior Offenses .....	- 89 -
F. Other Matters As Justice Requires .....	- 89 -
G. The Responsibility of the Fishing Masters .....	- 90 -
H. Analysis and Calculation of Civil Penalty for Each Respondent’s Violations .....	- 91 -
1. F/V Sea Quest Respondents .....	- 91 -
Charge 1 – FAD Violation .....	- 91 -
Charge 2 – FAD Violation .....	- 94 -
2. F/V Sea Honor Respondents .....	- 94 -
Charge 1 – FAD Violation .....	- 94 -
Charge 2 – FAD Violation .....	- 95 -
3. F/V Pacific Ranger Respondents .....	- 95 -
Charge 1 – FAD Violation .....	- 95 -
4. F/V Ocean Conquest Respondents .....	- 96 -
Charge 1 – MMPA Violation .....	- 96 -
Charge 2 – FAD Violation .....	- 96 -
Charge 3 – FAD Violation .....	- 97 -
5. F/V Ocean Encounter Respondents .....	- 98 -
Charge 1 – MMPA Violation .....	- 98 -
Charge 2 – MMPA Violation .....	- 99 -
Charge 3 – MMPA Violation .....	- 99 -
Charge 4 – MMPA Violation .....	- 99 -
Charge 5 – FAD Violation .....	- 100 -
Charge 6 – FAD Violation .....	- 101 -
Charge 7 – FAD Violation .....	- 102 -
Charge 8 – FAD Violation .....	- 103 -
Charge 9 – FAD Violation .....	- 104 -
I. Conclusion .....	- 105 -
VII. Order .....	- 106 -
ATTACHMENT A: LIST OF WITNESSES AND EXHIBITS .....	- 108 -
ATTACHMENT B: RULINGS ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW .....	- 113 -
ATTACHMENT C: PROCEDURES GOVERNING ADMINISTRATIVE REVIEW .....	- 215 -
Certificate of Service .....	<b>Error! Bookmark not defined.</b>

## **I. Preliminary Statement**

The National Oceanic and Atmospheric Administration's (NOAA or Agency) filed a series of administrative enforcement actions against Respondents alleging either (1) violations of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFCIA), 16 U.S.C. §§ 6906(a)(1) and (a)(10), and its implementing regulations found at 50 C.F.R. §§ 300.222(w) and 300.223(b) or (2) both the WCPFCIA and the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1362 et seq., and its implementing regulations found at 50 C.F.R. Part 216. The total amount sought by the Agency from Respondents for these alleged violations is \$1,456,750.00. The charges against each Respondent are summarized as follows.

### F/V Sea Quest Respondents

The Agency alleged in its Notice of Violation and Assessment (NOVA) that Respondents Matthew James Freitas, Sea Quest LLC, and Chang Wen Wu (collectively, the F/V Sea Quest Respondents) violated the WCPFCIA on two occasions by setting a purse seine on or within 1 nautical mile (nm) of a Fish Aggregating Device (FAD) during a period closed to such activity. The Agency sought a total civil penalty of \$253,750.00 for these violations.

### F/V Pacific Ranger Respondents

The Agency alleged that Respondents John Zolezzi, Pacific Ranger LLC, and Su Tien Shih (collectively, the F/V Pacific Ranger Respondents) committed one violation of the WCPFCIA by setting a purse seine on or within 1 nm of a FAD during the closure period. The Agency sought a civil penalty totaling \$117,500.00 for this violation.

### F/V Ocean Conquest Respondents

The Agency alleged that Respondents Benjamin Brown Maughan, Jr., Ocean Conquest LLC, and Wu Chia Pin (collectively, the F/V Ocean Conquest Respondents) violated the MMPA

by knowingly setting their purse seine fishing gear on a whale. The Agency also alleged that the F/V Ocean Conquest Respondents committed two WCPFCIA violations by setting a purse seine on or within 1 nm of a FAD during the closure period. The Agency sought a total civil penalty of \$267,750.00 for these violations.

F/V Ocean Encounter Respondents

The Agency alleged that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC, and Ho-Ching Chang (collectively, the F/V Ocean Encounter Respondents) violated the MMPA on four occasions by setting their purse seine fishing gear on a whale. The Agency also alleged that the F/V Ocean Encounter Respondents violated the WCPFCIA five times in connection with their setting a purse seine on or within 1 nm of a FAD during the closure period. The Agency sought a total civil penalty of \$657,750.00 for these violations.

F/V Sea Honor Respondents

The Agency alleged that Respondents Paul Magellan, Sea Honor LLC, and Yen Hsing Tasai (collectively, the F/V Sea Honor Respondents) violated the WCPFCIA on two occasions by servicing/deploying a FAD during the FAD closure period. The Agency sought a total civil penalty of \$160,000.00 for these violations.

After thoroughly reviewing the record evidence and arguments of the parties, I find all of the alleged violations are **PROVED** and the following sanctions against Respondents are appropriate as detailed in this Decision and Order:

F/V Sea Quest Respondents	\$147,959.68
F/V Pacific Ranger Respondents	\$41,699.50
F/V Ocean Conquest Respondents	\$215,776.77
F/V Ocean Encounter Respondents	\$497,617.98
F/V Sea Honor Respondents	<u>\$50,000.00</u>
<b>Total</b>	<b>\$953,053.93</b>

## II. Procedural History

On September 29, 2010, the Agency issued Notices of Violations and Assessments to each of the collectively named Respondents. Subsequently, Respondents filed a Request for Hearing and a Response to the NOVA. On February 11, 2011, the Agency filed its initial Preliminary Position on Issues and Procedures (PPIP);<sup>2</sup> and on February 4, 2011, Respondents filed their PPIP. The parties engaged in extensive discovery and took a number of witness depositions prior to hearing. See Record Index.

Of particular note concerning these prehearing activities, Respondents filed a request for interlocutory review concerning the effective date for the Agency's WCPFCIA regulations and the Agency's waiver of the normal thirty (30) day notice period prior to implementation. Respondents argued that some of the alleged WCPFCIA violations occurred within the regular 30-day notice period and should be dismissed because the Agency did not have good cause to make the regulations immediately effective. On December 9, 2011, I certified the issue for review to NOAA's Administrator under 15 C.F.R. § 904.254. On November 15, 2012, the NOAA Administrator issued an order that: (1) rejected Respondents' arguments concerning the Agency's waiver of the thirty (30) day delayed effective date and (2) determined that the Agency may prosecute alleged violations that occurred within 30 days of the date the final rule was published. See Order on Petitions for Interlocutory Review (November 15, 2012).<sup>3</sup>

---

<sup>2</sup> Agency counsel filed amendments to the PPIP on three occasions: March 4, 2011, April 10, 2012, and July 2, 2012. See 15 C.F.R. § 904.240(a)(3) (party under an affirmative obligation to supplement the PPIP as available information or documentation relevant to the stated charges or defenses becomes known to the party).

<sup>3</sup> This Interlocutory Order applied equally to similar issues in the companion consolidated case of In re Black, et al. (Docket No. PI0904340). Both this case and Black were adjudicated parallel to one another because of the similarity of the legal and factual issues and because all Respondents were represented by the same counsel. While there was a considerable degree of cross-over and incorporation of non-case specific testimony between the cases for the sake of efficiency, a formal separation between this case and Black was maintained.

Despite the Administrator's ruling, Respondents continued to make these arguments in their Post Hearing Memorandum presumably to preserve these issues for appeal if necessary. See Post-Hearing Memorandum at 23-24. Regardless, I am precluded from addressing these arguments because of the Agency's procedural rules (see 15 C.F.R. § 904.200(b)) and the Administrator's explicit determination on the subject through interlocutory review. Therefore, I will not address Respondents' continued arguments on the Agency's alleged violation of the Administrative Procedure Act's rulemaking requirements and the alleged unconstitutionally vague and ambiguous nature of the regulations. However, since Respondents' counsel raised these issues again, they are noted and reserved for appeal with an Article III court of competent jurisdiction.

The hearing took place on four separate occasions: February 1-2, 2012 and July 11-12, 2012; August 23-24, 2012; and October 29, 2012. In total, the Agency offered fourteen (14) witnesses and sixty-five (65) exhibits in support of its case.<sup>4</sup> Respondents offered eight (8) witnesses and thirty-seven (37) exhibits in rebuttal. The parties' witnesses and exhibits entered into evidence are identified in **Attachment A**.

On February 15, 2013, the parties filed their respective post-hearing briefs, including proposed findings of fact and conclusions of law, rulings for which are found in **Attachment B**. The parties filed replies, including objections to the other side's proposed findings of fact and conclusions of law on March 28, 2013.

In rendering this Decision, I reviewed the entire record of this proceeding, including the transcript, evidence, pleadings and other submissions, and the case is ripe for decision. The

---

<sup>4</sup> Pursuant to the parties' agreement and for the sake of judicial economy, the testimony of five Agency witnesses from *In re Black, et al.* (Docket No. PI0904340) were fully incorporated into this case as if the witnesses testified in these consolidated cases. See Tr. at 7:21-8:14 (July 11, 2012). The witnesses whose testimonies were completely incorporated included: Mr. Raymond Clarke, Dr. Charles Karnella, Mr. Siosifa Fukafuka, Mr. Keith Bigelow, and Dr. Chris Reid.

findings of fact and conclusions of law that follow are based 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 examined and given thoughtful consideration.

### **III. Principles of Law**

#### **A. Burden of Proof/Standard of Proof**

In order to prevail on 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 its 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 a respondent after the Agency makes a prima facie case sufficient to establish 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).

Of particular note for this Decision, the Agency Administrator has recognized that the judge is in the best position to make credibility determinations when faced with conflicting testimony. See, e.g., In the matter of F/V Twister, Inc., et al., 2009 WL 4829742 (NOAA 2009). The judge's responsibility is "to hear the testimony of the witnesses and determine credibility based on the facts and circumstances surrounding the proffered testimony as well as the

witnesses' demeanor.” In the matter of Francis S. Barker, Jr., 2004 WL 1282051 (NOAA 2004) (quoting In the Matter of Town Dock Fish, 6 O.R.W. 580 (NOAA App. 1991)). Inconsistent and unsubstantiated testimony from witnesses detracts from their credibility, and the judge determines the weight to be afforded such evidence. Id.

## **B. The WCPFCIA and Agency Regulations**

### **1. The WCPFCIA's Conservation Management Measure Related to FADs**

Under 16 U.S.C. §§ 6906(a)(1) and (a)(10), it is unlawful for any person: (1) to violate any provision of 16 U.S.C. Chapter 88 (Implementation of Western and Central Pacific Fisheries Convention) or any regulation or permit issued pursuant to that chapter and/or (2) to engage in fishing in violation of any regulation adopted pursuant to Section 6905(a).<sup>5</sup> Section 6905(a) authorizes the Secretary of Commerce to administer and enforce Chapter 88 and specifically directs the Secretary to “prevent any person from violating this chapter in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1857) were incorporated and made a part of this chapter.” 16 U.S.C. § 6905(c). Any person who violates Chapter 88 is subject to the same penalties as provided for in the Magnuson-Stevens Act. Id.<sup>6</sup>

In December 2008, the Western and Central Pacific Fisheries Commission (WCPFC or

---

<sup>5</sup> See also 16 U.S.C. § 6904(a) (authorizing the Secretary of Commerce to promulgate regulations to carry out the United States' obligations under the WCPFCIA, including recommendations and decisions adopted by the Commission).

<sup>6</sup> The Magnuson-Stevens Act provides for civil penalties of up to \$100,000 per violation. See 16 U.S.C. § 1858(a). However, under the Federal Civil Penalties Inflation Adjustment Act of 1990, the ceiling for such penalties has been increased to \$140,000. See 73 Fed. Reg. 75321 (Dec. 11, 2008).

Commission) adopted the Conservation and Management Measure 2008-01 (CMM 2008-01) to conserve bigeye and yellowfin Tuna. Agency Exh. 6. CMM 2008-01 covered a three (3) year period (2009 through 2011) and provided specific requirements for both purse seine and longline vessels fishing for tuna. *Id.* at 3-8. Of particular concern here, CMM 2008-01 established a closed period in each of the three (3) covered years during which purse seine vessels were prohibited from fishing on Fish Aggregating Devices (FADs). *Id.* at 4. CMM 2008-01 broadly defined a FAD as “any man-made device, or natural floating object, whether anchored or not, that is capable of aggregating fish.” Resp. Exh. 1 at 2, n. 1.<sup>7</sup>

In 2009, the FAD closure period lasted from August 1 through September 30. Agency Exh. 6 at 4.<sup>8</sup> Additionally, during the 2009 FAD closure period, all purse seine vessels were required to have 100% observer coverage. *Id.* The Commission later adopted CMM 2009-02 that sought to ensure consistent and robust application of FAD closures.

## **2. The Agency’s FAD Regulations**

On August 4, 2009, NOAA published a final rule (74 Fed Reg 38544) that implemented the purse seine measures required in CMM 2008-01.<sup>9</sup> The regulations went into effect August 3, 2009. *See* Order on Petitions for Interlocutory Review (Nov. 15, 2012) (discussing the Agency’s rulemaking and waiver of the 30-day implementation period). The regulations prohibited the following activities during the FAD closure period for owners, operators, and

---

<sup>7</sup> An Attachment to CMM 2008-01 defined FADS as “drifting or anchored floating or submerged objects deployed by vessels for the purpose of aggregating tuna species to purse seine or ring-net fishing operations.” Resp. Exh. I at 39 (Attachment E). The Commission later changed this definition in CMM 2009-02. *See* Resp. Exh. J at 2.

<sup>8</sup> *See* Resp. Exh. I at 3-4 (“The purse seine fishery on the high seas in the area bounded by 20°N and 20°S shall be closed to fishing on FADs between 0000 hours on 1 August 2009 and 2400 hours on 30 September. During this period all purse seine vessels without an observer from the Regional Observer Program on board will cease fishing and return directly to port. During this period, a vessel may only engage in fishing operations if the vessel carries on board an observer from the Regional Observer Program to monitor that at no time does the vessel deploy or service any FAD or associated electronic devices or fish on schools in association with FADs.”).

<sup>9</sup> The Agency’s regulations generally implementing the WCPFCIA are at 50 C.F.R. Part 300, Subpart O.

crew aboard fishing vessels of the United States within the Convention Area:<sup>10</sup>

- (1) Setting a purse seine around a FAD or within (1) one nautical mile of a FAD;
- (2) Setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD, such as by setting the purse seine in an area from which a FAD has been removed within the previous eight hours, or setting the purse seine in an area in which a FAD has been inspected or handled within the previous eight hours, or setting the purse seine in an area into which fish were drawn by a vessel from the vicinity of a FAD;
- (3) Deploying a FAD into the water; and
- (4) Repairing, cleaning, maintaining, or otherwise servicing a FAD, including any electronic equipment used in association with a FAD, in the water or on a vessel while at sea, except that: (i) a FAD may be inspected and handled as needed to identify the owner of the FAD, identify and release incidentally captured animals, un-foul fishing gear, or prevent damage to property or risk to human safety; and (ii) A FAD may be removed from the water and if removed, may be cleaned, provided that it is not returned to the water.

50 C.F.R. § 300.223(b). See also 50 C.F.R. § 300.222(w) (making it unlawful to set a purse seine around, near or in association with a FAD or deploy or service a FAD in contravention of Section 300.223(b)). The regulations defined a FAD as:

[A]ny artificial or natural floating object, whether anchored or not and whether situated at the water surface or not, that is capable of aggregating fish, as well as any objects used for that purpose that are situated on board a vessel or otherwise out of the water. The meaning of FAD does not include a fishing vessel, provided that the fishing vessel is not used for the purpose of aggregating fish.

50 C.F.R. § 300.211. Section 300.211 only includes the fishing vessel itself as a FAD when it is used for the purpose of aggregating fish and made it clear that any objects purposefully used to aggregate fish would be considered a FAD.

<sup>10</sup> The regulations define the "Convention Area" as:

[A]ll waters of the Pacific Ocean bounded to the south and to the east by the following line: From the south coast of Australia due south along the 141st meridian of east longitude to its intersection with the 55th parallel of south latitude; thence due east along the 55th parallel of south latitude to its intersection with the 150th meridian of east longitude; thence due south along the 150th meridian of east longitude to its intersection with the 60th parallel of south latitude; thence due east along the 60th parallel of south latitude to its intersection with the 130th meridian of west longitude; thence due north along the 130th meridian of west longitude to its intersection with the 4th parallel of south latitude; thence due west along the 4th parallel of south latitude to its intersection with the 150th meridian of west longitude; thence due north along the 150th meridian of west longitude.

50 C.F.R. § 300.211.

### C. The Marine Mammal Protection Act

The MMPA makes it unlawful for “any person subject to the jurisdiction of the United States or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas.” 16 U.S.C. § 1372(a)(1). The MMPA defines “take” as to “harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill.” 16 U.S.C. § 1362(13). See Center for Biological Diversity v. Salazar, 695 F.3d 893, 898-99 (9th Cir. 2012). The statute provides a definition of “harassment” as “(i) any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [i.e., Level A Harassment]; 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 [i.e., Level B Harassment].” 16 U.S.C. §§ 1362(18)(A), 1362(18)(C),(D). The MMPA provides for a penalty of up to \$10,000 for violations of the MMPA or any permit or regulations issued thereunder. 16 U.S.C. § 1375(a)(1).<sup>11</sup>

Of particular note for these cases is the exemption given to commercial fishing operators for “incidental takings” in connection with their fishing activities. See 16 U.S.C. § 1387. That section of the MMPA expresses the Congressional goal to reduce the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations “to insignificant levels approaching zero mortality and serious injury rate.” 16 U.S.C. § 1387(a)(1). Congress balanced this goal with the interests of the commercial fishing industry by authorizing incidental takes.

---

<sup>11</sup> The maximum penalty at the time of Respondents’ alleged violation is \$11,000 under the Federal Civil Penalties Inflation Adjustment Act of 1990. See 73 Fed. Reg. 75321 (Dec. 11, 2008).

That section provided additional protections for any mammals considered “depleted” on the basis of its listing as a threatened or endangered species under the Endangered Species Act (16 U.S.C. § 1531 *et seq.*) certain limitations at Section 1371(a)(5)(E) apply.<sup>12</sup> During this proceeding, Agency counsel did not assert that the MMPA alleged violations involved endangered, threatened or depleted species but rather the Agency’s position was that the takings were not “incidental” and therefore the exemption did not apply. See Tr. at 355:17-356:4 (July 12, 2012).<sup>13</sup>

Congress delegated authority to the Commerce Department to “prescribe such regulations as are necessary and appropriate to carry out the purposes” of the MMPA. 16 U.S.C. § 1382(a); see also id. at § 1373(a). Agency regulations at 50 C.F.R. Part 229 implemented Section 1387’s exemption for commercial fishing. Those regulations clearly indicated that Section 1387 – and not other sections of the MMPA – governs the incidental take of marine mammals in the course of commercial fishing operations. 50 C.F.R. § 229.1<sup>14</sup>

The Agency indicated that the purpose of the Part 229 regulations was: 1) to reduce the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations below the potential biological removal level of a particular stock, and 2) to reduce to the incidental mortality or serious injury of marine mammals occurring in the course of

---

<sup>12</sup> Section 1371(a)(5)(E) provides that the Secretary of Commerce can issue permits for such taking if after notice and opportunity for public comment, the Secretary determines that: “(I) the incidental mortality and serious injury from commercial fisheries will have a negligible impact on such species or stock; (II) a recovery plan has been developed or is being developed for such species or stock pursuant to the Endangered Species Act of 1973; and (III) where required under section 1387 of this title, a monitoring program is established under subsection (d) of such section, vessels engaged in such fisheries are registered in accordance with such section, and a take reduction plan has been developed or is being developed for such species or stock.”

<sup>13</sup> References to the transcript are abbreviated as “Tr. at [page number]:[line number] ([date]); references to Agency Exhibits as “Agency Exh. [numeric]”; and Respondents’ Exhibits as “Resp. Exh. [alphabetic]”.

<sup>14</sup> U.S. vessels fishing for yellowfin tuna in the eastern tropical Pacific Ocean purse seine fishery are subject to separate regulations not at issue. See 50 C.F.R. § 216.24.

commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate by the statutory deadline. *Id.* at 229.1(g).

The regulations prohibited the taking of any marine mammal incidental to commercial fishing operations except as otherwise provided in 50 C.F.R. Part 216 and Part 229. Under 50 C.F.R. § 229.2, “incidental” is defined as “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. § 229.3(a). The Agency specifically prohibited the intentional, lethal take of any marine mammal “unless imminently necessary in self-defense or to save the life of a person in immediate danger”. 50 C.F.R. § 229.3(f).<sup>15</sup>

The regulations also specified particular requirements for different fisheries designated as Categories I-III. *See* 50 C.F.R. §§ 229.4-229.5 A Category I fishery means a fishery determined by the Agency to have frequent incidental mortality and serious injury of marine mammals; whereas a Category II fishery means a commercial fishery determined by the Agency to have occasional incidental mortality and serious injury of marine mammals; and, finally, a Category III fishery means a commercial fishery determined by the Agency to have a remote likelihood of, or no known incidental mortality and serious injury of marine mammals. 50 C.F.R. § 229.2. The Agency publishes the list of fisheries each year in the Federal Register organized into these Categories. For the applicable period at issue, all Pacific purse seine fisheries on the high seas

---

<sup>15</sup> The only NOAA case found directly dealing with the commercial fishing exemption from the MMPA predated significant changes to the exemption in 1995. *See In re Anthony F. Favaloro, et al.*, 1994 WL 1246352 (1994). In that case, part of the analysis rested upon interpreting then-current 50 C.F.R. § 229.6(c)(5)-(6), which specifically provided that those engaged in commercial fishing could “intentionally take marine mammals to protect catch, gear or person during the course of the commercial fishing operation by a means and in a manner not expected to cause death or injury to a marine mammal.” *Id.* (quoting the regulation). In contrast, the applicable regulations for these cases significantly circumscribed such previously allowable “intentionally taking” to only those instances “imminently necessary in self-defense or to save the life of a person in immediate danger, and such taking is reported in accordance with the requirements of §229.6.” 50 C.F.R. § 229.3(f). *See also U.S. v. Hayashi*, 22 F.3d 859 (9th Cir. 1993) (criminal case dealing with older version of the regulations prior to the 1994 MMPA amendments).

were listed as Category II fisheries. See 73 Fed. Reg. 73032-01 (December 1, 2008) (effective January 1, 2009) (Table 3 – Commercial Fisheries on the High Seas).

For a Category II fishery, the vessel must have a valid Certificate of Authorization to engage in any authorized, incidental takes. See 50 C.F.R. § 229.4. Under these regulations, vessel owners and crew in a Category II fishery must comply with all deterrence provisions set forth in the MMPA and all guidelines and prohibitions published thereunder when necessary “to deter a marine mammal from damaging fishing gear, catch, or other private property, or from endangering personal safety”. 50 C.F.R. § 229.4(i).

The parties agreed on two fundamental aspects of this exemption: 1) Section 1387 of the MMPA allows for the take of marine mammals incidental to commercial fishing operations and 2) each vessel involved in this case was authorized for such incidental takes. The differences between the parties reside in their respective interpretation of the exemption and what commercial fishing activities are excluded from the MMPA’s prohibitions. These differences are fully examined and analyzed below.

#### **IV. Findings of Fact**

##### **CMM 2008-01 and the FAD Closure Period**

1. In December 2008, the Western and Central Pacific Fisheries Commission (WCPFC or Commission) adopted Conservation and Management Measure 2008-01 (CMM 2008-01) to conserve bigeye and yellowfin tuna. Agency Exh. 58.

2. Two of the purposes of Measure 2008-01 included: 1) to achieve over a three-year period commencing in 2009, a minimum of 30% reduction in bigeye tuna fishing mortality from the annual average during 2004 or the average of the years 2001-2004 and 2) to ensure that no increase in fishing mortality for yellowfin tuna beyond the annual average during 2004 or the average of the years 2001-2004. Resp. Exh. I at 2-3; Tr. at 108:16-109:10 (July 11, 2012).

3. Fundamentally, a goal of the WCPFC was to begin a three year program of reducing the catch of bigeye and yellowfin tuna from purse seine fishing. Resp. Exh. L (74 Fed. Reg. at 26161) (June 1, 2009).

4. Leading up to CMM 2008-01, the bigeye tuna stocks were subject to “overfishing.” Tr. at 163:9-164:7 (July 11, 2012).<sup>16</sup>

5. The status of yellowfin stock leading up to CMM 2008-01 was not overfished or subject to overfishing. However, since the yellowfin tuna population was fully exploited at that time, the regulators determined that the amount of fishing effort on yellowfin should be maintained at existing levels or reduced. Tr. at 164:8-16 (July 11, 2012).

6. For the purse seine fleet, CMM 2008-01 did two things to accomplish this goal: 1) reduced the number of fishing days and 2) instituted the above-noted FAD prohibition. Tr. at 109:11-15 (July 11, 2012).

7. The Commission considered the FAD prohibition necessary because many of the fish congregating under FADs were juveniles. As such, their removal from the population before they had a chance to mature/reproduce could significantly reduce their population. Tr. at 120:18-20; 170:12-13; 172:9-173:8; 195:25-196:11 (July 11, 2012).

8. The Commission’s objective was to maintain the then-current mortality rate for yellowfin tuna and to reduce the catch of juvenile bigeye and yellowfin tuna. Tr. at 110:13-18; 120:5-7; 120:21-25 (July 11, 2012).

9. The main target of the entire fishery tends to be skipjack tuna, accounting for 80-85% of the total catch over the two years prior to the hearing. Tr. at 78:15-22 (July 11, 2012).

10. The Commission was not concerned about the health of the skipjack stock at the time CMM 2008-01 was passed and implemented. Tr. at 122:5-8 (July 11, 2012).

11. Of the total catch of tuna for the region in 2009 (2,467,903 metric tons), skipjack harvests represented 73%, or 1,789,979 metric tons. Resp. Exh. A, at p. 2.

12. Of the total catch, 77% (1,894,500 metric tons) was harvested by purse seine vessels and the remainder by other types of fishing, such as longline. *Id.*

13. Relatively small amounts of bigeye, usually small fish, and some yellowfin are caught in the purse seine fishery. *Id.* at p. 3.

14. Currently, there are thirty nine (39) U.S. flagged purse seine vessels licensed under the Convention to conduct tuna fishing operations. Tr. at 69:20-21 (July 11, 2012).

15. As of 2010, approximately 2.4 million metric tons of tuna were caught in the Western Pacific area (of a global total of 4 million metric tons), of which purse seiners from all countries accounted for 1.8 million metric tons. Tr. at 76:10-13 (July 11, 2012).

---

<sup>16</sup> “Overfishing” occurs where the harvest rate is too high and the individuals are being removed too fast so that the population cannot sustain itself. “Overfished” is different than “overfishing” in that the level of harvest is so great that it is inhibiting the reproduction of the population. Thus, “overfished” constitutes a much more serious situation than “overfishing” and can threaten the species’ continued viability. Tr. at 163:9-17 (July 11, 2012).

16. Of the 1.8 million metric tons, the U.S. purse seiner fleet landed approximately 240,000 metric tons of tuna. Tr. at 76:14-19 (July 11, 2012).

17. The value of the U.S. tuna fishery in the Convention area varies. For the two years prior to the hearing, that value was approximately \$350-\$400 million/year on an x-vessel price (i.e., what the vessel is paid for the catch). Tr. at 84:13-85:3 (July 11, 2012).

18. At its December 2007 meeting, the Commission created an observer program to, “among other things, collect verified catch data, and to monitor the implementation of the conservation and management measures adopted by the Commission.” Resp. Ex. H at 1.

19. The Secretariat of the Pacific Community and the Forum Fisheries Agency (FFA) coordinate the training of the international observers. Tr. at 138:15-139:20 (July 11, 2012).

20. The training course for observers generally consisted of two parts: 1) a two week generic training, which consisted of firefighting, sea safety, first aid and communications and 2) fishery observer specific training ranging from three to five weeks long. Tr. at 143:5-147:22 (July 11, 2012).

21. The WCPFC Conservation and Management Measure 2007-01 states: “[t]he functions of observers operating under the Commission ROP shall include collecting catch data and other scientific data, monitoring the implementation of the conservation and management measures adopted by the Commission and any additional information related to the fishery that may be approved by the Commission.” Respondents’ Ex. H at 2

22. The United States is a party to the Western and Central Pacific Fisheries Convention and has agreed to be bound by the measures adopted by the Commission and to implement the requirements domestically. See <http://www.wcpfc.int/key-documents/convention-text> (WCPFC website providing links to the Convention Document and Status of the Convention Document).

23. CMM 2008-01 covers a three-year period – 2009 through 2011 – and provides specific measures for both purse seine and longline fishing vessels. Agency Exh. 58.

24. CMM 2008-01 established a closed period in each of the three years when purse seine vessels are prohibited from fishing on FADs. Id.

25. In 2009, the FAD closure period under CMM 2008-01 was from August 1 through September 30. Id.

26. Additionally, during the 2009 FAD closure, purse seine vessels were required to have 100% observer coverage. Id.; see also Resp. Exh. H at 1; Resp. Exh. R; 50 C.F.R. § 300.223(e)(1).

27. The American Tunaboat Association (ATA), an organization representing the interests of the U.S. flag purse seiner fleet operating in the tropical Pacific Ocean, wrote a letter during the rulemaking process that raised some concerns about the use of FADs and the regulation of the same. See Resp. Exh. M.

28. On August 4, 2009, NOAA published a final rule implementing the purse seine measures. Agency Exh. 8, “*Final Rule - Fishing Restrictions and Observer Requirements in Purse Seine Fisheries for 2009-2011 and Turtle Mitigation Requirements in Purse Seine Fisheries*,” 74 Fed. Reg. 38544 (August 4, 2009), codified at 50 C.F.R. § 300.223.

29. The applicable purse seine prohibitions became effective as of August 3, 2009. Id.

30. In December 2009, the Commission adopted Conservation Management Measure 2009-02 (CMM 2009-02) to ensure clear rules for the application of the provisions relating to FAD closure and catch retention due to reports from the WCPFC Secretariat and Members about cases of inconsistent application of CMM 2008-01 during the two month FAD closure period in 2009. Resp. Exh. J. at 1.

31. CMM 2009-02 provided the following interpretation of CMM 2008-01’s definition of a FAD: “any object or group of objects, of any size, that has or has not been deployed, that is living or non-living, including but not limited to buoys, floats, netting, webbing, plastics, bamboo, logs and whale sharks floating on or near the surface of the water that fish may associate with”. Id. at 2.

32. CMM 2009-02 specified that during the FAD closure period, no purse seine vessel is allowed to conduct any part of a set within 1 nm of a FAD – i.e., the vessel, any fishing gear or the vessel’s tenders may not be located within 1 nm of a FAD while the set is being conducted. Id.

33. Measure 2009-2 also contained the following: “5. The operator of a vessel shall not allow the vessel to be used to aggregate fish, or to move aggregated fish including using underwater lights and chumming.” Id.

34. Under CMM 2008-01, the observer provider is to timely notify the vessel operators and captains at the completion of the trip of any comments concerning the vessel operations reported by the observer. Resp. Exh. H, Annex B, at ¶ 1.c.

35. Under CMM 2008-01, the captain is supposed to be given the opportunity to comment on the observer’s report, with the right to add additional information that may be relevant. Id.

36. The captain is obligated to ensure that the observer is not, among other things, intimidated, interfered with, or bribed. Id. at Annex B, at ¶ 2.m.

#### **NOAA Guidance to the South Pacific Tuna Corporation Regarding the MMPA**

37. Dr. Charles Karnella is employed by the National Marine Fisheries Service as head of International Fisheries Division in the Pacific Islands Region in Honolulu, Hawaii. Tr. at 100:25-101:17 (July 11, 2012).

38. Dr. Karnella understood the MMPA and the Agency’s regulations implementing the MMPA to make unlawful intentional sets on marine mammals and that the exemption applies to

the incidental or unintended or accidental take of marine mammals. Tr. at 379:11-16 (July 12, 2012).

39. Dr. Karnella attended the American Tunaboat Association (ATA) meetings in San Diego in years prior to the FAD closure period that led to the charged violations. In that meeting, Dr. Karnella told industry representatives that they could not intentionally set the net around marine mammals but that if they accidentally or unintentionally or unknowingly set around a marine mammal, the boat owners would have to supply a report if the mammal was killed or injured. Tr. at 379:23-381:21 (July 12, 2012).

40. Dr. Karnella explained that if they saw a marine mammal with fish around it, the vessel could not make a set around the mammal to get the fish. Tr. at 383:4-11 (July 12, 2012).

41. Members of the South Pacific Tuna Corporation were at these meetings. Tr. at 382:4-23 (July 12, 2012).

42. Dr. Karnella also travelled to Chinese Taipei in July of 2009 for a meeting coordinated by Mr. Chou of the South Pacific Tuna Corporation and explained relevant provisions of the MMPA to SPTC personnel among other topics. Tr. at 386:8-388:4 (July 12, 2012).

43. Dr. Karnella acknowledged that Section 118 of the MMPA gives any commercial vessel that qualifies for the exemption authorization to incidentally take marine mammals during the course of fishing operations but opined that the exemption centers on a question of the vessel's intent. Tr. at 392:4-10 (July 12, 2012).

#### **The South Pacific Tuna Corporation and Key Personnel**

44. Mr. Robert Virissimo serves as Vice President of Vessel Operations for the South Pacific Tuna Corporation (SPTC). Tr. at 62:20-63:4 (August 24, 2012).

45. SPTC manages a total of 14 purse seiners that are all part of the Western Central Pacific Purse Seine fleet and each vessel involved in these cases is managed by SPTC. Tr. at 8:7-14; 38-39 (August 24, 2012).

46. Mr. Virissimo's duties include hiring all the vessel captains and making sure the vessels comply with applicable regulations. Tr. at 63:14:-17; 81:11-82:5 (August 24, 2012).

47. Mr. Virissimo keeps up with fisheries regulations, attends meetings, and provides guidance to SPTC captains. Tr. at 64:15-65:1 (August 24, 2012).

48. Mr. Virissimo was a vessel captain in both the Eastern and Western Pacific for approximately 30 years before assuming his current position with SPTC. Tr. at 65:7-20 (August 24, 2012).

49. Mr. Virissimo had a conversation with Mr. Raymond Clark from NOAA prior to the Agency's implementation of the FAD closure regulations about the issue of fish under the boat sets. Tr. at 65:21-66:9 (August 24, 2012).

50. After this meeting, Mr. Virissimo recalled that Mr. Clark said during a follow up telephone conversation that he would talk to the rule writer about the issue. Tr. at 67:8-21 (August 24, 2012).

51. Mr. Virissimo could not recall any discussion with Mr. Clark or any other Agency personnel concerning the use of aggregating lights. Tr. at 68:2-5; 73:14-74:13 (August 24, 2012).

52. Mr. Virissimo communicated with SPTC vessel captains about the 2009 FAD closure and the Agency's regulations by sending the captains a copy of the rule; telling them the date of the closure; directing them not to set on FADs during the closure period; but telling them it was allowed to set on fish that had gathered under the boat during the night. Tr. 69:23-70:15 (August 24, 2012).

53. Mr. Virissimo did not consider the fishing vessel itself a FAD, even if it used lights to hold the fish in place and was not concerned about his vessels using lights. Tr. at 70:16-17; 83:21-85:7; 87:12-15 (August 24, 2012).

54. Mr. Virissimo claimed that if the Agency had told him not to set on fish under the boat, he would have directed his captains not to do so. Tr. at 73:1-6 (August 24, 2012).

55. Mr. Virissimo explained that in his practice of setting on fish gathered under the boat, he would use the work boat with flood lights deployed to hold the fish in place while the main vessel made a set on the fish and acknowledged that this was a common practice for the boats he managed. Tr. at 75:4-76:14 (August 24, 2012).

56. Mr. Virissimo stated that normally the main vessel would "darken everything" while making these sets in part to have the workboat's lights holding the fish as the main vessel circles the workboat and hopefully the fish with the purse seine net. Tr. at 78:1-81:10 (August 24, 2012).

57. Mr. Virissimo admitted that he received an electronic mail during the 2009 FAD closure period from Mr. Bill Sardina, a manager of other, non-SPTC purse seine vessels, advising him that he would not let his boats use underwater lights because it would violate the Agency's regulations. However, Mr. Virissimo discounted Mr. Sardina's message as simply an opinion on what the regulations prohibited. Tr. at 89:18-93:14 (August 24, 2012); see also Agency Exh. 69 (e-mail from Mr. Sardina to Mr. Virissimo dated August 12, 2009).

58. Mr. Virissimo nevertheless communicated with the SPTC captains via electronic mail on September 1, 2009 that there might be a problem with the vessels using lights to attract or hold fish in place under the Agency's regulations but reiterated that he did not believe the SPTC vessels were doing anything wrong because a prohibition on the use of lights was "nowhere to be found in the Federal Register, rules and regulations we received." Tr. at 94:7-95:6 (August 24, 2012); Agency Exh. 68 (e-mail from Mr. Virissimo to SPTC captains and SPTC personnel).

59. In response to that September 1, 2009 e-mail, Mr. Virissimo had a follow-up e-mail exchange with the captain of the SPTC vessel Sea Fox. Agency Exh. 67; Tr. at 95:8-97:15 (August 24, 2012).

60. Mr. Virissimo also had an e-mail exchange with Captain Maughan of the F/V Ocean Conquest concerning the use of lights following that September 1, 2009 e-mail. Agency Exh. 66 (indicating that the vessel could set on fish found under the boat in the morning but advising that “if you pull up to a FAD and put your lights on to pull the fish off of it, that’s not considered fish under the boat. The main argument is that you use your work boat to keep the fish from leaving while you set, and there is nothing in our rules that says you can’t do that. Like you know, that’s the way we catch fish under the boat.”).

61. Mr. Virissimo received an electronic mail on July 27, 2009 from Mr. Gordon Yamasaki, NOAA employee, concerning the use of a light boat to draw fish away from the boat (which Mr. Virissimo claimed was a “FISH UNDER THE BOAT, no FAD involved”) explaining that such use would be considered a FAD set “as you are aggregating the fish away from the vessel, to the light boat, and using it as a FAD.” Agency Exh. 70.

62. Mr. Virissimo did not view Mr. Yamasaki’s e-mail as an instruction not to use lights on workboats, but rather an opinion on what the regulations would prohibit, and so Mr. Virissimo did not provide instructions to SPTC captains not to engage in such practices. Tr. at 102:22-103:19; 104:4-15 (August 24, 2012).

63. Mr. Virissimo also provided instructions to SPTC captains regarding the MMPA, which was the company’s guidance not to set on whales intentionally. Tr. at 107:1-10 (August 24, 2012).

64. Ms. Annette Schlife is the Chief Financial Officer (CFO) for the South Pacific Tuna Corporation (SPTC). Tr. at 112:21-113:8 (August 23, 2012).

65. As CFO, Ms. Schlife performs all the financial duties for SPTC, including preparing and reviewing financial statements, dealing with auditors and booking the final settlements paid for the fish the SPTC vessels catch. Tr. at 113:9-20 (August 23, 2012).

66. As CFO, Ms. Schlife reports to Mr. Max Cho, President of SPTC. Tr. at 7:22-8:6 (August 24, 2013).

67. Ms. Schlife created a spreadsheet that she claimed identified the tons of tuna caught by species and prices paid to SPTC for each of the counts the agency alleged in terms of booked revenue. Tr. at 114:22-116:2 (August 23, 2012); Resp. Exh. T.

68. Ms. Schlife indicated that SPTC got paid by the amount of total tonnage for the trip – not by discrete sets and it was not possible to relate any particular fish sold for the trip to a particular, individual set. Tr. at 118:3-123:3; 127:10-129:4 (August 23, 2012).

69. The individual purse seine vessels sell the fish for its trip when it is taken off the vessel and loaded onto a carrier and the fish is priced on that day. Tr. at 130:6-12 (August 23, 2012).

70. SPTC has an [REDACTED] for the sale of its fish to a [REDACTED] which then transports the fish and sells it to a [REDACTED] Tr. at 130:13-131:17 (August 23, 2012).

71. FCF pays SPTC 95% of the estimated value of the fish based on volume and prices for that day, which is then subject to a final settlement that accounts for the actual volume/composition of the catch and rejected fish. Tr. at 131:23-133:10 (August 23, 2012).

72. Ms. Schlife prepared a detailed breakdown for each vessel where tuna were caught for the alleged violation that showed the total, final settlement amounts for the fish sold on the relevant trips with prices given for each species of tuna based on the size of the tuna and attached the actual receipts for such sales. See Resp. Exh. BB (F/V Sea Quest Trip #22); Resp. Exh. GG (F/V Sea Quest Trip #23); Resp. Exh. XX (F/V Pacific Ranger Trip #9); Resp. Exh. LLL (F/V Ocean Conquest Trip #20); Resp. Exh. BBBB (F/V Ocean Encounter Trip #20).

73. Respondents prepared a summary of the charged violations showing what the observer for each count estimated on the Form PS-3 for a particular set versus what the vessels Purse Seine Logsheet estimated for that same set. Resp. Exh. BBBBBB; Tr. at 173:7-174:22 (August 23, 2012).

74. Ms. Schlife prepared a spreadsheet from SPTC company records that shows the price all the SPTC vessels (not just Respondent vessels) received for the fish it unloaded during the period charges were alleged against Respondents. Resp. Exh. CCCCCC; Tr. at 183:2-184:9 (August 23, 2012).

#### **The F/V Sea Quest and Key Individuals Associated with the Vessel**

75. At the time of the charged violations, the F/V Sea Quest was a U.S.-flagged purse seine vessel owned by Sea Quest LLC. Agency Exh. 33.

76. At the time of the charged violations, the captain of the F/V Sea Quest was Respondent Captain Matthew Freitas. Agency Exh. 2; Agency Exh. 36; Tr. at 43:4-6 (August 24, 2012).

77. Captain Freitas has been a fishing vessel captain for approximately 26 years and has been involved in the fishing industry for almost 40 years. Tr. at 42:23-43:3 (August 24, 2012).

78. Captain Freitas is paid a per diem salary, which is not connected to the amount of fish the vessel catches. Tr. at 44:5-18 (August 24, 2012).

79. Captain Freitas considered his duties as ensuring the safety of the crew, overseeing fishing operations generally, filling out the required vessel logs, and ensuring that the vessel complied with applicable regulations. Tr. at 43:7-20 (August 24, 2012).

80. However, Captain Freitas acknowledged that the vessel's fishing master determined when, where and how to set the purse seine net. Agency Exh. 36 at 2; see also Agency Exh. 37 at 4 (Mr. Iohp's observation that the fishing master directed the use of the aggregating lights).

81. At the time of the charged violations, the fishing master of the F/V Sea Quest was Respondent Chang Wen Wu. Agency Exh. 2; Agency Exh. 36 at 2.

82. Respondent Chang Wen Wu did not testify in this case and provided no rebuttal against the evidence presented by the Agency.

83. At the time of the charged violations, the F/V Sea Quest carried an observer, Mr. Kun Iohp, on board the vessel. Agency Exh. 2; Agency Exh. 37; Tr. at 26:2-4 (Feb. 1, 2012).

84. Mr. Iohp is a citizen of the Federated States of Micronesia (FSM) who resides in Pohnpei. Tr. at 23:7-19 (Feb. 1, 2012).

85. This was Mr. Iohp's first trip as a fisheries observer and first trip on a purse seine tuna boat. Tr. at 49:14-19 (Feb. 1, 2012); see also Agency Exh. 37.

86. Mr. Iohp was employed by the National Oceanic Resources Marine Association (NORMA) as a fisheries observer in 2009. Tr. at 23:20-24:2 (Feb. 1, 2012).

87. Mr. Iohp received training as an observer in Pohnpei that lasted about one week and three days. Tr. at 24:8-14 (Feb. 1, 2012).

88. Topics covered in Mr. Iohp's training included "finding out what kind of fish" the vessels catch and where those vessels do most of their fishing and how to complete the observer forms. Tr. at 24:15-19; 25:1-3 (Feb. 1, 2012).

89. Mr. Iohp considered his duties as an observer to include observing the fishing activities and recording those activities in his observer forms and logs (including the results of the catch). Tr. at 25:4-24 (Feb. 1, 2012).

90. While Mr. Iohp was aboard the F/V Sea Quest, he maintained observer reports - including his Trip Diary, Purse Seine Trip Report and Purse Seine Observer Workbook - that documented the events that he observed while on board the F/V Sea Quest. Tr. at 37:5-9; 38:19-46:16 (Feb. 1, 2012); see also Agency Exh. 1 (Trip Diary); Agency Exh. 2 (Purse Seine Observer Workbook); Agency Exh. 3 (Trip Diary); Agency Exh. 4 (Purse Seine Observer Workbook).

91. NOAA Special Agent (SA) Take Tomson conducted an investigation of the alleged violations committed by the F/V Sea Quest and prepared an Offense Investigation Report. Agency Exh. 32; Tr. at 276:6-17 (July 11, 2012).

92. SA Tomson conducted an interview with Mr. Iohp and recorded the results of that interview. Agency Exh. 37.

93. SA Tomson also conducted an interview with Captain Freitas and recorded the results of that interview. Agency Exh. 36.

#### **Charge 1 – August 14, 2009 – FAD Violation**

94. Mr. Iohp got up while it was still dark at approximately 04:00 on the morning of August 14, 2009 and discovered that the F/V Sea Quest was using lights to attract fish. Tr. at 26:11-20; 26:23-27:2 (Feb. 1, 2012); Agency Exh. 1 at 31; Agency Exh. 2 at Form PS-2 page 31 of 35.

95. Mr. Iohp described the F/V Sea Quest's aggregating lights as one green and two bright white lights hanging three to four feet from the side of the vessel and suspended approximately eight to nine feet above the water, with the lights directed downward toward the ocean. Tr. at 27:6-28:15 (Feb. 1, 2012); Agency Exh. 37 at 2.

96. The vessel deployed its auxiliary work boats, which then dropped lights into the water. Tr. at 26:11-20; 30:15-24 (Feb. 1, 2012).

97. Mr. Iohp was on the second of three decks at the time he observed the auxiliary boats deployed, approximately 10 meters above the boats. Tr. at 30:3-14 (Feb. 1, 2012).

98. Mr. Iohp speculated that these lights were submerged to hold the fish in place. Tr. at 31:3-18 (Feb. 1, 2012).

99. The F/V Sea Quest's auxiliary work boats were approximately 15 feet long and had circular green and red lights that were about six inches wide and two feet long. Tr. at 28:16-29:25 (Feb. 1, 2012).

100. Once the F/V Sea Quest deployed the auxiliary boats, the F/V Sea Quest turned off the lights it had hung over the side, which had been on all night. Tr. at 31:25-32:18; 32:12-33:24 (Feb. 1, 2012).

101. The F/V Sea Quest then proceeded about half a mile and returned a few minutes later and made a set, while the auxiliary boats drifted with the submerged lights engaged. Tr. at 31:19-24; 26:20-22; 34:1-21 (Feb. 1, 2012); see also Agency Exh. 2, Form PS-2 at page 31 of 35 (indicating that this was set #34 of the trip).

102. Captain Freitas described the alleged FAD violations as involving "fish under the boat" sets, which involved setting on fish that had gathered under the vessel at night. Tr. at 46:2-12 (August 24, 2012).

103. Captain Freitas admitted that such sets involved dropping a work boat, which has a "sounder" to let the main vessel know when the fish are under it before the main vessel pulls away. Captain Freitas asserted that the use of lights is for safety purposes and not for aggregating fish. Tr. at 46:13-24 (August 24, 2012).

104. Captain Freitas stated that the main vessel used its boom lights to illuminate the vessel's decks and had its running lights on as well for these sets. Tr. at 47:11-48:4 (August 24, 2012); see also Agency Exh. 36 at 3.

105. Captain Freitas admitted that the auxiliary boats used what he termed "drop lights", which are lights submerged approximately two feet below the water but claimed that the work boats used these light to illuminate the boat so the main vessel can see where those auxiliary boats are located while performing the set. Tr. at 48:5-12; 57:8-58:8; 59:12-15 (August 24, 2012).

106. Captain Freitas was familiar with fish aggregating lights, which he described as larger, more powerful lights that are dropped about 20 feet into the water; but he claimed that the

workboats did not use any such lights during the two sets in question. Tr. at 48:13-49:1 (August 24, 2012); see also Agency Exh. 36 at 3-4.

107. However, Captain Freitas acknowledged that those “drop lights” were used at least partly in the hopes of keeping the fish in place while the main vessel performed a set around the work boats. Tr. at 59:12-61:10 (August 24, 2012).

108. The F/V Sea Quest estimated the amount of fish caught in any particular set by counting the brails of fish taken from the pursed net and brought onboard the main vessel, with each brail holding approximately 4 metric tons of fish. Tr. at 49:2-50:6 (August 24, 2012).

109. With respect to the species composition of each set, the F/V Sea Quest crew would estimate the percentage of each species caught by examining specimens from the brail. Tr. at 50:7-51:23 (August 24, 2012).

110. Mr. Iohp estimated that for the August 14, 2009 set, the vessel caught 50 mt of tuna of which 60% were skipjack, 30% were yellowfin, and 10% were bigeye tuna. Agency Exh. 2 at 70 (Form PS-3, page 34 of 34).

111. The F/V Sea Quest’s South Pacific Regional Purse Seine Logsheet recorded the set as resulting in the catch of 50 mt of skipjack tuna and indicated the school association code as “8 OTHER – UNDER BOAT”. Agency Exh. 34 at page 3, line 11.<sup>17</sup>

112. Captain Freitas believed that setting on fish that had accumulated under the boat overnight was allowed. Tr. at 53:18-20 (August 24, 2012); Agency Exh. 36 at 5.

113. At all times during the events of August 14, 2009 described above, the F/V Sea Quest was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 281:16 - 20 (July 11, 2012); see also Agency Exh. 34 at page 3, line 11.

### **Charge 2 – September 17, 2009 – FAD Violation**

114. On September 17, 2009, Mr. Iohp woke up around 04:00 (when it was still completely dark) and the F/V Sea Quest’s auxiliary boats were already in the water with submerged lights engaged. Tr. at 35:17-36:15 (Feb. 1, 2012); Agency Exh. 3 at 13 (noting that when he went outside he noticed the auxiliary boats were “attracting the fish with submarine lights”).

115. When Mr. Iohp got up that morning, the F/V Sea Quest’s lights were turned off. Tr. at 36:16-23 (Feb. 1, 2012).

116. The F/V Sea Quest completed a set in the same manner as described on August 14, 2009. Tr. at 36:24-37:4 (Feb. 1, 2012).

---

<sup>17</sup> The ship’s purse seine logsheet records times and dates as UTC/GMT – not ship’s time/date.

117. Mr. Iohp obtained the catch results for the set from the F/V Sea Quest's log. Tr. at 46:6-13; 48:9-12 (Feb. 1, 2012).

118. Mr. Iohp recorded these events in his Purse Seine Observer Workbook, which shows that: 1) at 04:00, activity code 14, drifting - with fish aggregating lights, and the comment "attracting the fish" and 2) at 04:49, a set was made. Agency Exhibit 4 at Form PS-2, page 27 of 51.

119. Mr. Iohp estimated that for this set the vessel caught 75 mt of tuna of which 25% were skipjack, 50% were yellowfin, and 25% were bigeye tuna. Agency Exh. 4 at 79 (Form PS-3, page 27 of 61).

120. The F/V Sea Quest's South Pacific Regional Purse Seine Logsheet recorded the set as resulting in the catch of 65 mt of skipjack tuna and 10 mt of yellowfin and indicated the school association code as "8 OTHER - UNDER BOAT". Agency Exh. 35 at page 3, line 3.

121. At all times during the events of August 14, 2009 described above, the F/V Sea Quest was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 281:16 - 20 (July 11, 2012); see also Agency Exh. 35 at page 3, line 3.

#### **The F/V Pacific Ranger and Key Individuals Associated with the Vessel**

122. At the time of the charged violations, the F/V Pacific Ranger was a U.S.-flagged purse seine vessel owned by Pacific Ranger LLC. Agency Exh. 39.

123. At the time of the charged violations, the captain of the F/V Pacific Ranger was respondent Captain John Zolezzi. Tr. at 6:7-9 (October 29, 2012); Agency Exh. 40.

124. Captain Zolezzi has worked in the tuna industry for approximately 35 years and has served as a master of a vessel for over 30 years. Tr. at 5:22-6:6 (October 29, 2012).

125. At the time of the charged violations, the fishing master of the F/V Pacific Ranger was Respondent Su Tien Shih. Agency Exhibit 38.

126. Respondent Su Tien Shih did not testify in this case and provided no rebuttal against the evidence presented by the Agency.

127. At the time of the charged violations, the F/V Pacific Ranger carried an observer, Mr. Auto'o Siliomea, on board the vessel. Tr. at 53:13-23 (Feb. 1, 2012); Agency Exhs. 5-7, 38.

128. Mr. Siliomea has been employed as a fisheries observer since 2009. Tr. at 52:4-7 (Feb. 1, 2012).

129. Mr. Siliomea is from the Solomon Islands and was trained as an observer in Honiara, Solomon Islands. Tr. at 52:8-14 (Feb. 1, 2012).

130. Mr. Siliomea was trained by the FAA with the training consisting of working on a fishing vessel and recording observation data. Tr. at 52:19-24 (Feb. 1, 2012).

131. The training lasted almost four weeks, including instruction on filling out the observer forms and training on the 2009 FAD closure. Tr. at 52:25-53:7 (Feb. 1, 2012).

132. Specifically, Mr. Siliomea was told that a FAD is anything that floats and aggregates fish, including logs, debris, or a whale. Tr. at 53:9-12 (Feb. 1, 2012).

133. While Mr. Siliomea was aboard the F/V Pacific Ranger, he maintained observer reports, including his Trip Diary, Purse Seine Trip Report and Purse Seine Observer Workbook that documented the events that he observed while on board the F/V Pacific Ranger. Tr. at 54-59 (Feb. 1, 2012).

134. During this trip, Mr. Siliomea estimated the catch amounts and compositions based on the brails of fish brought aboard and by attempting to sample five fish from each brail. Agency Exh. 6 at 18, 24.

135. Mr. Siliomea admitted in his Trip Report that “some parts of the forms I do not understand properly due to I was no[t] well trained for it.” Agency Exh. 36 at 37.

136. NOAA SA Brandon Jim On conducted an investigation of the alleged violation committed by the F/V Pacific Ranger and prepared an Offense Investigation Report. Agency Exh. 38; Tr. at 298:3-304:15 (July 11, 2012).

137. SA On exchanged an electronic mail with Captain Zolezzi concerning the F/V Pacific Ranger’s fishing activities and Captain Zolezzi replied by denying the vessel set on a FAD during the FAD closure period. Agency Exh. 40.

#### **Charge 1 – September 30, 2009 – FAD Violation**

138. Mr. Siliomea’s Trip Diary and Purse Seine Observer Workbook detail this activity in his records for September 30, 2009. Agency Exh. 5 at 7 and Agency Exh. 7 at PS-2, page 7 of 30.

139. In his trip diary, Mr. Siliomea states that at 05:50 the vessel made set number 3, during which the vessel used fish aggregating lights. Agency Exh. 5 at 7.

140. Specifically, Mr. Siliomea observed that the F/V Pacific Ranger’s auxiliary boat # 6 was drifting with “fish aggregating lights” and the main vessel made set around it. Agency Exh. 5 at 7; Tr. at 55:3-22 (Feb. 1, 2012).

141. Mr. Siliomea noted the set activity in his Purse Seine Observer Workbook, which shows that: 1) at 05:45, activity code 9 – investigated floating object; and 2) at 05:50 set #3 was made. Agency Exh. 7 at PS-2, page 7 of 30.

142. Mr. Siliomea described the light the auxiliary boat deployed in the water as being green. Tr. at 55:23-56:6 (Feb. 1, 2012).

143. Mr. Siliomea also stated that at the time the set was made, a log was floating near the vessel but he could not specifically recall the size of the log. Tr. at 55:3-22; 62:15-25 (Feb. 1, 2012).

144. Mr. Siliomea claimed that the F/V Pacific Ranger's translator approached him before the set was made and asked him not to go outside because the vessel was going to make a set on a log. Agency Exh. 36 at 33.

145. Captain Zolezzi admitted that the F/V Pacific Ranger's workboat was used in connection with this set and that the workboat's underwater light was turned on but stated that he directed the fishing master to extinguish the light, which was what happened shortly thereafter. Tr. at 7:11-8:5; 10:2-6 (October 29, 2012).

146. Captain Zolezzi estimated that the underwater light was on for only a minute or two before it was extinguished at his direction. Tr. at 10:7-10 (October 29, 2012).

147. No one reported to Captain Zolezzi that there was a log or other floating object in the net and he did not see any such object during the set. Tr. at 11:5-10 (October 29, 2012).

148. Mr. Siliomea recorded the set as resulting in the catch of 50 mt of skipjack tuna. Agency Exh. 7 at PS-2 Form page 10 (7 of 30); Agency Exh. 7 at Form PS-3 page 36 (3 of 27).

149. The F/V Pacific Ranger's South Pacific Regional Purse Seine Logsheet recorded the set as resulting in the catch of 50 mt of skipjack tuna and indicated the school association code as "2 FEEDING ON BAITFISH". Agency Exh. 41 at page 1, line 5.<sup>18</sup>

#### **The F/V Ocean Conquest and Key Individuals Associated with the Vessel**

150. At the time of the charged violations, the F/V Ocean Conquest was a U.S.-flagged purse seine vessel owned by Ocean Conquest LLC. Agency Exh. 56.

151. At the time of the charged violations, the captain of the F/V Ocean Conquest was Respondent Benjamin Maughan, Jr. Agency Exh. 52.

152. Captain Maughan has extensive fishing experience and made his first trip on a tuna fishing boat in 1938 and had been a licensed captain for over 50 years. Tr. at 56:1-57:5; 58:1-5 (August 23, 2012).

153. Captain Maughan receives a salary for his position on the F/V Ocean Conquest and is not paid based on the amount of fish the vessel catches. Tr. at 58:12-22 (August 23, 2012).

154. At the time of the charged violations, the fishing master of the F/V Ocean Conquest was Respondent Wu Chia Pin. Agency Exh. 49; Tr. at 57:8-10 (August 23, 2012).

155. Captain Maughan considered his duties as captain to ensure the safety of the vessel and the crew and make sure all the regulations were obeyed. Tr. at 57:11-17 (August 23, 2012).

<sup>18</sup> The ship's purse seine logsheet records times and dates as UTC/GMT – not ship's time/date.

156. Captain Maughan had “nothing to do with setting the nets or saying about fish” – which was the fishing master’s responsibility. Tr. at 57:18-22 (August 23, 2012).

157. Captain Maughan acknowledged that the vessel was not supposed to set on whales but stated that experienced captains know how to control the whales and make them do what the vessel captain wants them to do and claimed that if a whale gets into a net it is because the vessel did not see the whale or the whale dove and came back into the net. Tr. at 60:7-61:13 (August 23, 2012).

158. Captain Maughan claimed that lights in the water do not attract fish under the boat. Tr. at 62:13-64:16 (August 23, 2012).

159. However, Captain Maughan acknowledged that the Taiwanese fishing masters believe that if they put the light in the water the fish will stay by the workboats. Tr. at 65:15-18 (August 23, 2012).

160. Indeed, Captain Maughan stated that the fishing master in these instances used lights in the water because of that belief. Tr. at 67:2-12 (August 23, 2012).

161. Based on his experience, Captain Maughan estimates the amount and composition of catch as it comes onboard and consults with the chief engineer who is observing the fish as they are loaded into the holding wells. Tr. at 69:8-70:20; 71:5-72:1 (August 23, 2012).

162. Captain Maughan denied that the F/V Ocean Conquest violated the MMPA or the FAD prohibition. Tr. at 72:10-20 (August 23, 2012).

163. Respondent Wu Chia Pin did not testify in this case and provided no rebuttal against the evidence presented by the Agency.

164. At the time of the charged violations, the F/V Ocean Conquest carried an observer, Mr. Anthony Lioliomola, on board the vessel. Agency Exh. 50; Tr. at 66:13-17 (Feb. 1, 2012).

165. Mr. Lioliomola is a citizen of the Solomon Islands and resides in Honiara and was employed as a fishery observer in the fall of 2009 by the FFA and the national fisheries program. Tr. at 65:1-10 (Feb. 1, 2012).

166. Mr. Lioliomola was a trained Pacific Islands Forum Fisheries Agency (FFA) observer. Tr. at 65:11-19 (Feb. 1, 2012).

167. Mr. Lioliomola’s training included information on the FAD closure and how to conduct observations aboard the fishing boats, including species identification and filling out the required observation forms. Tr. at 65:20-66:9 (Feb. 1, 2012).

168. While Mr. Lioliomola was aboard the F/V Ocean Conquest, he maintained observer reports including his Trip Diary, Purse Seine Trip Report and Purse Seine Observer Workbook that documented the events that he observed while on board the F/V Ocean Conquest. Tr. at 90-104 (Feb. 1, 2012).

169. Mr. Lioliomola prepared his observer workbook daily, his diary at the end of the day and the trip report at the end of the trip. Tr. at 97:16-98:7 (Feb. 1, 2012).

#### **Charge 1 – September 18, 2009 – MMPA Violation**

170. Mr. Lioliomola was positioned on the top deck, below the helicopter deck, of the F/V Ocean Conquest and observed what happened. Tr. at 68:18-21; 69:15-70:5 (Feb. 1, 2012).

171. Mr. Lioliomola observed a whale and the tuna associated with it without the aid of any binoculars at a range of approximately 100 – 200 meters. Tr. at 70:6-18 (Feb. 1, 2012).

172. Mr. Lioliomola could not determine what kind of whale it was. Tr. at 70:19-71:2 (Feb. 1, 2012).

173. Mr. Lioliomola's Trip Diary and Purse Seine Observer Workbook detail the F/V Ocean Conquest's set activity for September 18, 2009. Agency Exh. 12 at 59; Agency Exh. 11 at Form PS-2, page 32 of 43; Tr. at 98:8-99:19 (Feb. 1, 2012).

174. The set began at 12:46 and shortly after the winch came on, Mr. Lioliomola saw a whale in the net and the fishing master told two towboats to chase the whale out of the net before hauling the net closed. Agency Exh. 12 at 59; see also Tr. at 67-75 (Feb. 1, 2012).

175. The F/V Ocean Conquest's workboats attempted to drive the whale out of the net and the whale reacted to these efforts and escaped the net before it was fully pursed. Tr. at 73:-75:20 (Feb. 1, 2012).

176. The crew made a lot of noise during the set to drive the tuna together so they do not escape the net – the whale got out of the net and escaped as a result and swam away. Tr. at 74:21-75:14 (Feb. 1, 2012).

177. Mr. Lioliomola recorded this encounter with a whale in his Purse Seine Observer Workbook, which indicates that at 12:46, the vessel made set #6 in association with a live whale (school association code 6). Agency Exh. 11 at Form PS-2, page 32 of 43.

178. At all times during the events of September 18, 2009 described above, the F/V Ocean Conquest was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 347:2 - 7 (July 12, 2012).

#### **Charge 2 – September 24, 2009 – FAD Violation**

179. Mr. Lioliomola's Trip Diary and Purse Seine Observer Workbook detail a set the F/V Ocean Conquest made on September 24, 2009. Agency Exh. 12 at 2; Agency Exh. 13 at 1; Agency Exh. 14 at Form PS-2 at 38 of 43.

180. Mr. Lioliomola described how, on the evening of September 23, 2009, the F/V Ocean Conquest put lights in the water and they turned on all the boat's lights and then drifted at night. Tr. at 76:6-16; 80:4-7 (Feb. 1, 2012).

181. Mr. Lioliomola described these lights as being on the port side of the vessel with some on top of the second deck and one placed in the water. Tr. at 77:1-14 (Feb. 1, 2012).

182. The lights were light green and white fluorescent colored lights. Tr. at 77:15-21 (Feb. 1, 2012).

183. The non-submerged lights were pointed downwards towards the water. Tr. at 78:3-13 (Feb. 1, 2012).

184. The submerged lights were approximately the size of a 1.5 liter bottle of water and were white and submerged approximately 10-20 meters beneath the surface of the water. Tr. at 78:18-79:23 (Feb. 1, 2012).

185. On the morning of the 24th, Mr. Lioliomola woke up around 04:20 to the sound of the alarm and when he went outside he heard the crew say that there were fish under the boat. Tr. at 80:12-18 (Feb. 1, 2012); Agency Exh. 12 at 2.

186. At the time, it was still completely dark. Tr. at 80:19-20 (Feb. 1, 2012).

187. The F/V Ocean Conquest used two workboats to keep the school in place while the main vessel moved away to make a set around the workboats. Agency Exh. 12 at 2; Agency Exh. 13 at 13; Tr. at 81:7-22; 84:2-20 (Feb. 1, 2012).

188. After the work boats had been deployed and had their submerged lights on, the F/V Ocean Conquest turned its lights off. Tr. at 81:24-82:4 (Feb. 1, 2012).

189. Mr. Lioliomola used activity code 9 ("Investigate floating object") and noted "FISH UNDER THE BOAT" on Form PS-2 and noted that the set was made at 05:18. Agency Exh. 14 at PS-2, page 38 of 43; Tr. at 81:4-6 (Feb. 1, 2012).

190. Mr. Lioliomola estimated that the vessel caught 49 mt of fish; whereas the vessel estimated the catch to be 50 mt. Tr. at 100:15-101:20 (Feb. 1, 2012); Agency Exh. 14, Form PS-3 at page 27 of 31.

191. Mr. Lioliomola estimated the catch consisted of 46 mt of skipjack and 3 mt of yellowfin tuna. Tr. at 102:15-23 (Feb. 1, 2012).

192. At all times during the events of September 24, 2009 described above, the F/V Ocean Conquest was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 347:2-7 (July 12, 2012).

### **Charge 3 – September 25, 2009 – FAD Violation**

193. On the evening of September 24, 2009, the F/V Ocean Conquest was adrift with five or six other vessels. Tr. at 85:1-7 (Feb. 1, 2012).

194. Mr. Lioliomola woke up the next day around 04:50 at the sound of the alarm and he noticed the F/V Ocean Conquest was running toward the other vessel. Tr. at 85:7-11 (Feb. 1, 2012).

195. One of the crewmembers told Mr. Lioliomola that fish were under a Taiwanese vessel owned by the Fong Kuo Company. Tr. at 85:13-86:7 (Feb. 1, 2012).

196. When Mr. Lioliomola went to the bridge to record the time and position, the fishing master told him that the F/V Ocean Conquest was going to make a set on the fish under the Taiwanese vessel. Tr. at 86:11-87:6 (Feb. 1, 2012).

197. Mr. Lioliomola's Trip Diary and Purse Seine Observer Workbook detail a set the F/V Ocean Conquest made on September 25, 2009. Agency Exh. 12 at 3; Agency Exh. 13 at 14; Agency Exh. 14 at Form PS-2, page 39 of 43.

198. At approximately 04:30, the F/V Ocean Conquest prepared to make a set on fish that had aggregated under the Taiwanese vessel Fong Kuo 736. Agency Exh. 12 at 3.

199. The F/V Ocean Conquest's fishing master said Taiwanese vessels are not allowed to set on fish under the boat but it is okay for U.S. boats to do so. Agency Exh. 12 at 3; Tr. at 87:12-15 (Feb. 1, 2012).

200. The fishing master spoke broken English but Mr. Lioliomola felt that he could understand him. Tr. at 87:16-25 (Feb. 1, 2012).

201. At 05:00, the F/V Ocean Conquest moved alongside the Fong Kuo 736 and deployed two boats into the water. Fong Kuo 736 moved slowly away from the light boats and we made set #31 at 05:30 hours. Agency Exh. 12 at 3; Agency Exh. 13 at 14; Tr. at 88:4-9 (Feb. 1, 2012).

202. The work boats then moved close to the Fong Kuo vessel and put submerged lights into the water and the Taiwanese vessel turned off its lights. Tr. at 88:8-18 (Feb. 1, 2012).

203. The Fong Kuo vessel then moved away from the F/V Ocean Conquest's work boats and the F/V Ocean Conquest then made a set around those work boats to catch the tuna. Tr. at 89:1-90:4 (Feb. 1, 2012).

204. In his Purse Seine Observer Workbook, Mr. Lioliomola noted that: 1) at 05:00 the vessel was investigating a free school while using its light boats; and 2) at 05:30, set # 31 was made. Agency Exh. 14 at PS-2, page 39 of 43.

205. Mr. Lioliomola estimated that the second set resulted in the catch of 166 mt of tuna; whereas the vessel estimated the catch at 160 mt. Tr. at 104:6-8 (Feb. 1, 2012).

206. Mr. Lioliomola estimated the composition of the catch to be 70% skipjack; 20% yellowfin and 10% big eye tuna. Tr. at 104:9-13 (Feb. 1, 2012).

207. At all times during the events of September 25, 2009 described above, the F/V Ocean Conquest was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 347:2-7 (July 12, 2012).

**The F/V Ocean Encounter and Key Individuals Associated with the Vessel**

208. At the time of the charged violations, the F/V Ocean Encounter was a U.S.-flagged purse seine vessel owned by Ocean Encounter LLC. Agency Exh. 46.

209. At the time of the charged violations, the captain of the F/V Ocean Encounter was Respondent Russell Keith Bass. Agency Exh. 44.

210. Captain Bass did not testify in this case and provided no testimony against the evidence presented by the Agency.

211. Captain Bass has been a licensed captain for approximately 26 years and had been a captain of purse seine tuna vessels for approximately two and a half years. Agency Exh. 45 at 1.

212. During the period in question, Captain Bass was serving as relief captain for the F/V Ocean Encounters regular captain who was on vacation. Agency Exh. 45 at 1.

213. At the time of the charged violations, the fishing master of the F/V Ocean Encounter was Respondent Ho-Ching Chang. Agency Exh. 43.

214. Respondent Ho-Ching Chang did not testify in this case and provided no rebuttal against the evidence presented by the Agency.

215. At the time of the charged violations, the F/V Ocean Encounter carried an observer, Mr. Chris Nare, on board the vessel. Agency Exh. 42; Tr. at 115:13-16 (Feb. 2, 2012).

216. Mr. Nare is a citizen of the Solomon Islands who resides in Honiara. Tr. at 113:5-12 (Feb. 2, 2012).

217. Mr. Nare began working as a fisheries observer in the fall of 2009 by the Solomon Islands Ministry of Fisheries and Marine Resources. Tr. at 113:20-114:10 (Feb. 2, 2012).

218. Mr. Nare received training lasting two weeks in Honiara prior to becoming an observer. Tr. at 114:11-20 (Feb. 2, 2012).

219. Mr. Nare termed this “cadet observer training”, which included basic observer training on marine species identification and how to complete the observer forms. Tr. at 114:21-115:12 (Feb. 2, 2012).

220. While Mr. Nare was aboard the F/V Ocean Encounter, he maintained observer reports, including his Trip Diary, Purse Seine Trip Report and Purse Seine Observer Workbook, that documented the events that he observed while on board the F/V Ocean Encounter. Agency Exhs. 17-22.

221. NOAA SA Charles Raterman conducted an investigation into the F/V Ocean Encounter's activities during the 2009 FAD closure and completed an Offense Investigation Report. Agency Exh. 43.

222. As part of the investigation, SA Raterman interviewed Captain Bass via telephone and made a memorandum of that interview. Agency Exh. 44.

223. SA Raterman also asked Captain Bass follow up questions via electronic mail to which Captain Bass provided responses. Agency Exh. 45.

224. During the interview with SA Raterman and follow up e-mail questions, Captain Bass denied the vessel set on any FADs or used any underwater lights during the period of the alleged violations. Agency Exh. 44 at 3; Agency Exh. 45.

225. As for the alleged MMPA violations, Captain Bass stated that he did not intentionally set on any whales but acknowledged one instance during this period when a whale was discovered at the far end of the purse seine net and the F/V Ocean Encounter's workboats escorted the whale outside the net without apparent injury. Agency Exh. 44 at 3-4; Agency Exh. 45 at 8.

226. Mr. Nare admitted that all of the whales the F/V Ocean Encounter interacted with during this trip were able to get out of the purse seine net without any injury but believed the whale on September 17, 2009 was stressed. Tr. at 184:1-16; 190:25-191:4 (Feb. 2, 2012).

#### **Charge 1 – September 17, 2009 – MMPA Violation**

227. Mr. Nare's Trip Diary and Purse Seine Observer Workbook detail the F/V Ocean Encounter's encounter with a whale during a set made on September 17, 2009. Agency Exh. 17 at 53; Agency Exh. 22 at Form PS-2, page 6.

228. On September 17, 2009, while the F/V Ocean Encounter was searching for fish, a school of tuna was sighted. Tr. at 116:11-19 (Feb. 2, 2012).

229. Mr. Nare was positioned on the vessel's helideck and could see a whale in the school. Tr. 116:20-25 (Feb. 2, 2012).

230. From his position on the helideck, Mr. Nare estimated the whale was at a distance between 100 and 200 meters. Tr. at 117:11-15 (Feb. 2, 2012).

231. The set in question began at 08:42 when the F/V Ocean Conquest set on a school associated with a live whale. Agency Exh. 17 at 53.

232. Although the fishing master claimed to have unintentionally set on the whale, Mr. Nare and other crew members saw the whale in the school of fish. Agency Exh. 17 at 53.

233. Mr. Nare believed other members of the crew saw the whale – particularly a crewmember from Papua New Guinea, with whom he was sitting at the time on the helideck. Tr. at 118:6-119:6 (Feb. 2, 2012).

234. The F/V Ocean Encounter made the set around the school and the whale was caught in the center. Tr. at 117:2-4 (Feb. 2, 2012).

235. Mr. Nare believed the whale he saw in the net was a pilot whale. Tr. at 117:25-2 (Feb. 2, 2012).

236. The crew then tried to chase the whale out of the net with two workboats but they were unsuccessful in trying to get the whale to swim over the net. Tr. at 117:5-8; 120:2-7 (Feb. 2, 2012).

237. Mr. Nare believed the whale was spouting more frequently than normal when the boats were trying to chase it from the net. Tr. at 120:8-12 (Feb. 2, 2012).

238. Finally, the crew opened an end of the net to release the whale. Tr. at 117:8-10; 120:13-20 (Feb. 2, 2012).

239. By the time the purse seine net was closed, the whale was no longer in the net and no fish were caught. Tr. at 120:21-121:3 (Feb. 2, 2012).

240. Mr. Nare characterized this encounter with the whale in his Purse Seine Observer Workbook, which shows that at 08:47, set #4 was made in association with a live whale (school association code 6). Agency Exh. 22 at Form PS-2, page 6.

241. At all times during the events of September 17, 2009 described above, the F/V Ocean Encounter was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 347:9-13 (July 12, 2012).

#### **Charge 2 – September 24, 2009 – MMPA Violation**

242. Mr. Nare's Trip Diary and Purse Seine Observer Workbook detail the F/V Ocean Encounter's encounter with a whale during a set made on September 24, 2009. Agency Exh. 20 at 67; Agency Exh. 22 at PS-2, page 13.

243. The set began at 16:31 when the F/V Ocean Encounter set on a school of tuna associated with a live whale. Agency Exhibit 20 at 67; Tr. at 134:2-135:16 (Feb. 2, 2012); Agency Exh. 21 at 23.

244. Mr. Nare could see the whale, which was bigger than the tuna and it was spouting. Tr. at 129:1-7 (Feb. 2, 2012).

245. Mr. Nare identified the whale as a pilot whale, which escaped the net before it was pursed. Agency Exh. 20 at 67; Tr. at 130:19-131:11 (Feb. 2, 2012).

246. The F/V Ocean Encounter did not use its auxiliary boats to chase the whale from the net; rather, it appears the whale simply swam out of the net before it was pursed. Tr. at 1-4 (Feb. 2, 2012).

247. The F/V Ocean Encounter failed to catch any fish in this set. Tr. at 130:5-10 (Feb. 2, 2012).

248. Mr. Nare characterized this encounter with the whale in his Purse Seine Observer Workbook, which shows that at 16:20, the F/V Ocean Encounter was investigating a free school of tuna associated with a live whale and at 16:31, the vessel made set #16 in association with a live whale (school association code 6). Agency Exh. 22 at Form PS-2, page 13; Tr. at 131:125; 132:21-133:2 (Feb. 2, 2012).

249. At all times during the events of September 24, 2009 described above, the F/V Ocean Encounter was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 347:9-13 (July 12, 2012).

### **Charge 3 – September 25, 2009 – MMPA Violation**

250. On September 25, 2009, Mr. Nare was positioned on the helideck and could observe the whale from that position, which was approximately 100-300 meters from the vessel. Tr. at 136:12-18 (Feb. 2, 2012).

251. Mr. Nare indicated that the vessel was trying to set on the tuna without getting the whale caught in the net but the whale and the fish escaped the net. Tr. at 137:14-138:4 (Feb. 2, 2012).

252. Mr. Nare first saw the whale at 06:10 and the set began at 06:17. Tr. at 140:8-13 (Feb. 2, 2012).

253. Mr. Nare identified the whale involved in this set as a false killer whale. Tr. at 140:1-7 (Feb. 2, 2012); Agency Exh. 20 at 68.

254. Mr. Nare characterized this encounter with the whale in his Purse Seine Observer Workbook, which shows that at 06:17, the vessel made set #17 in association with a live whale (school association code 6). Agency Exhibit 22 at Form PS-2, page 14.

255. Mr. Nare observed that 35 mt of tuna were caught in connection with this set; whereas the vessel recorded 40 mt caught. Tr. at 143:2-4 (Feb. 2, 2012).

256. Mr. Nare estimated the catch composition to consist of 18 mt of skipjack tuna; 17 mt of yellow fin and .15 mt of bigeye tuna. Tr. at 143:12-21 (Feb. 2, 2012).

257. The F/V Ocean Encounter's Regional Purse Seine Logsheet indicates that the vessel caught 35 mt of skipjack tuna and 5 mt of yellowfin. Agency Exh. 48 at 2, line 16 (using code 1 – "FISHING SET" – for school association).<sup>19</sup>

---

<sup>19</sup> The ship's purse seine logsheet records times and dates as UTC/GMT – not ship's time/date.

258. At all times during the events of September 25, 2009 described above, the F/V Ocean Encounter was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 347:9-13 (July 12, 2012).

#### **Charge 4 – September 25, 2009 – MMPA Violation**

259. On September 25, 2009, Mr. Nare observed the F/V Ocean Encounter interacting with a whale during another of its purse seine sets for tuna on that date. Agency Exh. 20 at 68; Agency Exh. 22 at Form PS-2 page 14.

260. Mr. Nare characterized this encounter with the whale in his Purse Seine Observer Workbook, which shows that at 16:01, the vessel made set #18 in association with a live whale (school association code 6). Agency Exh. 22 at Form PS-2, page 14.

261. Mr. Nare noted in his trip diary that he heard the watchman in the crow's nest tell the fishing master that there was a whale in the school, but the fishing master set on this school anyway. Agency Exh. 20 at 68-69.

262. Mr. Nare claimed that the crew knew there was a whale associated with this set and that a crewmember from Papua New Guinea interpreted what the Chinese crew said over the ship's loudspeaker and they said that there was a live whale with the tuna. Tr. at 147:2-18 (Feb. 2, 2012).

263. Mr. Nare recalled the fourth incident with the whale as being essentially the same as the others. Tr. at 144:21-145:10 (Feb. 2, 2012).

264. The F/V Ocean Encounter was searching for tuna, found a school of tuna with a whale associated with the school and attempted to make a set on that school of tuna. Tr. at 145:1-3 (Feb. 2, 2012).

265. The F/V Ocean Encounter did not use its auxiliary boats to chase the whale out of net and the whale escaped as the vessel made the set on the school of tuna. Tr. at 145:11-16 (Feb. 2, 2012).

266. Mr. Nare estimated that the vessel caught 5 mt of tuna on this set and the vessel estimated 6 mt. Tr. at 148:8-18 (Feb. 2, 2012); Agency Exh. 22 – Form PS-3 – at page 18 of 25.

267. Mr. Nare estimated about 1 mt of yellowfin and 4 mt of skipjack were caught. Tr. at 150:11-18 (Feb. 2, 2012); Agency Exh. 22 – Form PS-3 – at page 18 of 25.

268. The F/V Ocean Encounter's Regional Purse Seine Logsheet indicates that the vessel caught 5 mt of skipjack tuna and 1 mt of yellowfin. Agency Exh. 48 at 2, line 18 (using code 1 – "FISHING SET" – for school association).<sup>20</sup>

---

<sup>20</sup> The ship's purse seine logsheet records times and dates as UTC/GMT – not ship's time/date.

269. At all times during the events of September 25, 2009 described above, the F/V Ocean Encounter was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 347:9-13 (July 12, 2012).

#### **Charge 5 – September 18, 2009 – FAD Violation**

270. On September 18, 2009, Mr. Nare was sleeping and a crewmember from Papua New Guinea woke him up and told him the vessel was going to make a set. Tr. at 151:2-12 (Feb. 2, 2012).

271. At approximately 05:10 when he went on deck he “saw two of our auxiliary boats were out there with the fish aggregating lights.” Agency Exhibit 17 at 57.

272. Mr. Nare described the work boats’ lights as bright green and submerged in the water. Tr. at 153:10-20 (Feb. 2, 2012).

273. These lights were approximately 20 meters under the surface of the water. Tr. at 153:24-25 (Feb. 2, 2012).

274. When Mr. Nare got to the bridge, he observed that the fishing master had already gotten into his usual position and called for the skiff to be released. Tr. at 151:19-152:4 (Feb. 2, 2012).

275. At that time, all the exterior lights of the main vessel (those on the boom and work lights on the side of the vessel) were off and the vessel was drifting away from the light boats which were deploying lights under the water. Tr. at 152:14-153:9 (Feb. 2, 2012).

276. The two work boats were tied together and had deployed submerged lights as the F/V Ocean Encounter made a set around those two work boats. Tr. at 154:19-155:14 (Feb. 2, 2012).

277. Mr. Nare related a conversation he had with Captain Bass in which Captain Bass said that “we are not doing a FAD set”. Captain Bass further stated that the fish had collected under the vessel at night while it was drifting. Finally, he stated that the vessel was deploying two of its work boats with fish aggregating lights to make the set. Tr. at 152:5-13 (Feb. 2, 2012).

278. Mr. Nare recorded in his Purse Seine Observer Workbook that: 1) at 05:19, the vessel investigated a free school that was associated with a drifting log; and 2) at 05:32, set #3 was made on that school. Agency Exh. 22 at Form PS-2, page 7.

279. Mr. Nare estimated that the vessel caught 90 mt of tuna consisting of 45 mt of skipjack; 23 mt of yellow fin and 22 mt of bigeye tuna. Tr. at 165:16-166:19 (Feb. 2, 2012).

280. The F/V Ocean Encounter's Regional Purse Seine Logsheet indicates that the vessel caught 75 mt of skipjack tuna. Agency Exh. 48 at 1, line 11 (using code 1 – "FISHING SET" – for school association).<sup>21</sup>

281. At all times during the events of September 18, 2009 described above, the F/V Ocean Encounter was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 347:9-13 (July 12, 2012).

#### **Charge 6 – September 20, 2009 – FAD Violation**

282. Mr. Nare described the F/V Ocean Encounter's set on this date as "pretty much the same scenario" in the use of the two auxiliary boats with lights submerged in the water. Tr. at 156:21-25; 162:19-163:1 (Feb. 2, 2012).

283. Mr. Nare recorded in his Purse Seine Observer Workbook that on September 20, 2009, the vessel was drifting at 04:23 with fish aggregating lights; and 2) at 05:51, set #10 was made. Agency Exh. 22 at Form PS-2, page 9.

284. In his trip diary, Mr. Nare described the set made on at 05:51 as follows: "Drift last night, all the tuna came under the vessel; deploy boats with fish aggregating lights, we gently pull[.] away and then do the set." Agency Exh. 17 at 60.

285. Mr. Nare estimated that the vessel caught 255 mt of tuna consisting of 179 mt of skipjack; 25 mt of yellow fin and 51 mt of bigeye tuna. Tr. at 168:6-13 (Feb. 2, 2012); Agency Exh. 22, Form PS-3 at page 10 of 25.

286. The F/V Ocean Encounter's Regional Purse Seine Logsheet indicates that the vessel caught 225 mt of skipjack tuna and 1 mt of yellowfin tuna. Agency Exh. 48 at 1, line 15 (using code 1 – "FISHING SET" – for school association).<sup>22</sup>

287. At all times during the events of September 20, 2009 described above, the F/V Ocean Encounter was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 347:9-13 (July 12, 2012).

#### **Charge 7 – September 21, 2009 – FAD Violation**

288. Mr. Nare recorded in his Purse Seine Observer Workbook that on September 21, 2009, the vessel was drifting at 04:56 with fish aggregating lights; and 2) at 05:44, set #11 was made. Agency Exh. 22 at Form PS-2, page 10.

289. In his trip diary, Mr. Nare noted that on the morning of September 21, 2009, the F/V Ocean Conquest set on fish that aggregated under the vessel. Agency Exh. 17 at 62.

---

<sup>21</sup> The ship's purse seine logsheet records times and dates as UTC/GMT – not ship's time/date.

<sup>22</sup> The ship's purse seine logsheet records times and dates as UTC/GMT – not ship's time/date.

290. Mr. Nare estimated that the vessel caught 200 mt of tuna consisting of 160 mt of skipjack; 20 mt of yellow fin and 40 mt of bigeye tuna. Tr. at 170:4-17 (Feb. 2, 2012); Agency Exh. 22, Form PS-3 at page 11 of 25.

291. The F/V Ocean Encounter's Regional Purse Seine Logsheet indicates that the vessel caught 180 mt of skipjack tuna. Agency Exh. 48 at 2, line 2 (using code 1 – "FISHING SET" – for school association).<sup>23</sup>

292. At all times during the events of September 21, 2009 described above, the F/V Ocean Encounter was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 347:9-13 (July 12, 2012).

#### **Charge 8 – September 22, 2009 – FAD Violation**

293. On September 22, 2009, Mr. Nare observed the F/V Ocean Conquest make an early morning set on tuna and his Trip Diary and Purse Seine Observer Workbook detail this activity. Agency Exh. 20 at 64; Agency Exh. 22 at Form PS-2, page 11.

294. In his trip diary, Mr. Nare notes that "this set is the fourth early hour set we made." Agency Exh. 20 at 64. He also stated that "without these early hour sets", we would have had less than half the vessel capacity filled. He also stated that this fishing master specializes in FAD fishing and not fishing on free schools. Id.

295. Mr. Nare recorded in his Purse Seine Observer Workbook that on September 22, 2009, the F/V Ocean Conquest was drifting at 05:06 with fish aggregating lights; and 2) at 05:49, set #12 was made. Agency Exhibit 22 at PS-2, page 11.

296. Mr. Nare estimated that the vessel caught 30 mt of tuna consisting of 14 mt of skipjack; 6 mt of yellowfin and 10 mt of bigeye tuna. Tr. at 173:5-17 (Feb. 2, 2012); Agency Exh. 22, Form PS-3 at page 12 of 25.

297. The F/V Ocean Encounter's Regional Purse Seine Logsheet indicates that the vessel caught 30 mt of skipjack tuna for this set. Agency Exh. 48 at 2, line 4 (using code 1 – "FISHING SET" – for school association).<sup>24</sup>

298. At all times during the events of September 22, 2009 described above, the F/V Ocean Encounter was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 347:9-13 (July 12, 2012).

#### **Charge 9 – September 23, 2009 – FAD Violation**

299. On September 23, 2009, Mr. Nare observed the F/V Ocean Conquest make an early morning set on tuna and his Trip Diary and Purse Seine Observer Workbook detail this activity. Agency Exh. 20 at 66; Agency Exh. 22 at Form PS-2, page 12.

---

<sup>23</sup> The ship's purse seine logsheet records times and dates as UTC/GMT – not ship's time/date.

<sup>24</sup> The ship's purse seine logsheet records times and dates as UTC/GMT – not ship's time/date.

300. In his trip diary, Mr. Nare describes the set on the morning of September 23, 2009, as the vessel's fifth early morning set using aggregating lights. Agency Exh. 20 at 66.

301. Mr. Nare recorded in his Purse Seine Observer Workbook that on September 23, 2009, the F/V Ocean Conquest 1) was drifting at 05:06 with fish aggregating lights; and 2) at 0535, set #14 was made. Agency Exh. 22 at PS-2, page 12.

302. Mr. Nare estimated that the vessel caught 20 mt of tuna consisting of 15 mt of skipjack; 5 mt of yellowfin tuna. Tr. at 175:21-176:13 (Feb. 2, 2012); Agency Exh. 22, Form PS-3 at page 14 of 25.

303. The F/V Ocean Encounter's Regional Purse Seine Logsheet indicates that the vessel caught 20 mt of skipjack tuna for this set. Agency Exh. 48 at 2, line 11 (using code 1 – "FISHING SET" – for school association).<sup>25</sup>

304. At all times during the events of September 23, 2009 described above, the F/V Ocean Encounter was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 347:9-13 (July 12, 2012).

#### **The F/V Sea Honor and Key Individuals Associated with the Vessel**

305. At the time of the charged violations, the F/V Sea Honor was a U.S.-flagged purse seine vessel owned by Sea Honor LLC. Agency Exh. 28.

306. At the time of the charged violations, the captain of the F/V Sea Honor was Respondent Paul Magellan. Agency Exh. 30.

307. Captain Magellan has been involved in the tuna industry for approximately 43 years but retired after a helicopter accident. Tr. at 32:5-25 (Oct. 29, 2012).

308. Captain Magellan returned to the tuna industry as a purse seine captain in 2008. Tr. at 33:1-19 (Oct. 29, 2012).

309. Captain Magellan denied that the F/V Sea Honor deployed a FAD as alleged. Tr. at 35:2-10; 40:9-14 (Oct. 29, 2012).

310. Captain Magellan acknowledged that the fishing master is in charge of fishing operations but that if he was aware of any actions against the regulations he would intervene. Tr. at 41:10-42:9 (Oct. 29, 2012).

311. At the time of the charged violations, the fishing master of the F/V Sea Honor was Respondent Yen Hsing Tasai. Agency Exhibit 27.

312. Respondent Yen Hsing Tasai did not testify in this case and provided no rebuttal against the evidence presented by the Agency.

---

<sup>25</sup> The ship's purse seine logsheet records times and dates as UTC/GMT – not ship's time/date.

313. At the time of the charged violations, the F/V Sea Honor carried an observer, Mr. John Charles Belei, on board the vessel. Agency Exh. 31; Tr. at 226:14-23 (Feb. 2, 2012).

314. Mr. Belei is from the Solomon Islands and at the time of the hearings had been employed as a fishery observer for the Solomon Islands government for approximately five years. Tr. at 225:10-21 (Feb. 2, 2012).

315. Mr. Belei was a trained Pacific Islands Forum Fisheries Agency (FFA) observer. In 2008, Mr. Belei received his training which lasted one month. Tr. at 225:22-226:10 (February 2, 2012).

316. While Mr. Belei was aboard the F/V Sea Honor, he maintained observer reports - including his Trip Diary, Purse Seine Trip Report and Purse Seine Observer Workbook - that documented the events that he observed while on board the F/V Sea Honor. Tr. at 228:8-17 (February 2, 2012).

### **Charge 1 – September 28, 2009 – FAD Violation**

317. On September 28, 2009, Mr. Belei observed the F/V Sea Honor deployed/serviced a FAD. Tr. at 229:2-21 (Feb. 2, 2012); Agency Exh. 26.

318. Mr. Belei believed that the F/V Sea Honor deployed a satellite beacon on the FAD the vessel came across because the FAD did not have any such beacon and there were fish underneath the existing FAD. Tr. at 230:1-11 (Feb. 2, 2012).

319. Mr. Belei's Trip Diary and Purse Seine Observer Workbook detail how the F/V Sea Honor deployed/serviced a FAD on September 28, 2009. Agency Exh. 24 at 8; Agency Exh. 26 at Form PS-2, page 7 of 25.

320. Specifically, Mr. Belei described the events on September 28, 2009, as follows: "we investigate[d] a drifting FAD ... The drifting FAD that was found and investigated was not attached with any GPS buoy or radio buoy however, during the investigation time [the] fishing master command[ed] the crew[,] to deploy[,] another FAD alongside [the] FAD ... attached with S-H GPS buoy #01 at 1730 hrs." Agency Exh. 24 at 8.

321. Mr. Belei described the FAD the F/V Sea Honor found as consisting of ten yellow floats tied together supported by bamboo and attached with a netting hanging underneath. Agency Exh. 24 at 8.

322. The deployed FAD consisted of a long netting about 35 meters in length hanging underneath a FAD, with different colored canvas material and empty salt bags tied over the hanging net supported with bamboo. Agency Exh. 24 at 8.

323. Mr. Belei recorded this event in his Purse Seine Observer Workbook as at 17:30, activity code 10D (deploy - raft, FAD or payao) with the comments "deploy FAD alongside with a seen FAD and attached GPS B #01". Agency Exh. 26 at Form PS-2, page 7 of 25.

324. The F/V Sea Honor did not make a set on the FAD the vessel deployed during Mr. Belei's trip. Tr. at 237:9-11 (Feb. 2, 2012).

325. At all times during the events of September 28, 2009 described above, the F/V Sea Honor was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. 275:20-25 (July 11, 2012).

#### **Charge 2 – September 30, 2009 – FAD Violation**

326. On September 30, 2009, the F/V Sea Honor deployed a FAD in the same manner as on September 28, 2009. Tr. at 231:8-232:6 (Feb. 2, 2012); Agency Exh. 26.

327. Mr. Belei's Trip Diary and Purse Seine Observer Workbook detail this activity in his records for September 30, 2009. Agency Exh. 24 at 11; Agency Exh. 26 at Form PS-2, page 9 of 25.

328. In his trip diary, Mr. Belei again notes that the F/V Sea Honor deployed a FAD, stating "08:38 hrs a vessel deployed a FAD and attached with GPS buoy #02." Agency Exh. 24 at 11.

329. Mr. Belei recorded this event in his Purse Seine Observer Workbook as at 08:38, activity code 10D (deploy - raft, FAD or payao) with the following comments: "deployed FAD attached with GPS Buoy #02". Agency Exh. 26 at Form PS-2, page 9 of 25.

330. The F/V Sea Honor did not make a set on the FAD the vessel deployed during Mr. Belei's trip. Tr. at 237:12-14 (Feb. 2, 2012).

331. At all times during the events of September 30, 2009 described above, the F/V Sea Honor was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 275:20-25 (July 11, 2012 Hearing).

#### **V. Analysis**

The Agency's charges against Respondents can be characterized into three broad categories: 1) violations of the MMPA related to Respondents' alleged setting purse seine nets around whales; 2) FAD closure period violations related to Respondents' making early morning sets on fish that had accumulated under the main vessel after Respondents allegedly used "fish aggregating lights" on the main vessel and/or on their auxiliary work boats to hold the fish in place while the main vessel made the set; and 3) FAD closure period violations related to servicing/deploying a FAD. These alleged violations will be examined in turn by category, relative to the particular facts and circumstances of each Respondent's conduct.

## A. Alleged MMPA Violations

The key question to be resolved in determining Respondents' liability for the alleged unlawful marine mammal takes is the scope of the MMPA's commercial fishing exemption under 16 U.S.C. § 1387 and the Agency's implementing regulations of that exemption at 50 C.F.R. Part 229. Agency counsel acknowledged that Section 1387 allows for the take of marine mammals incidental to commercial fishing operations and that Respondents' vessels involved in these charges were authorized for such takes. Agency Reply at 2.

Nevertheless, Agency counsel took the position that Respondents' sets on marine mammals were not exempt from the MMPA as "incidental takes" because Respondents intentionally set their nets on the whales. Agency Reply at 1-6. In support of this position, Agency counsel relied on the definition of an "incidental" act in 50 C.F.R. § 229 for the proposition that an intentional act does not qualify for the exemption. Indeed, Agency counsel asserted that the Agency does not charge the take of marine mammals when such takes are incidental to commercial fishing operations but only prosecutes intentional takes. Agency Reply at 2.

In contrast, Respondents assert that the exemption provides that "only a lethal taking of a marine mammal may be charged if it occurs during a permitted incidental taking of a non-listed species of marine mammal." Respondents' Post-Hearing Memorandum at 5 (citing 16 U.S.C. § 1387(a)(5)).<sup>26</sup> Agency counsel argued that Respondents' reading of the exemption would permit all forms of intentional takes except ones that are lethal. Thus, they argue that such a reading would undermine the purpose of the MMPA expressed in 16 U.S.C. § 1361(6) ("it is the sense of Congress that [marine mammals] should be protected and encouraged to develop to the greatest

---

<sup>26</sup> Respondents filed a prehearing memorandum on the MMPA that detailed their arguments on the scope of the incidental take exemption.

extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem.”).

Respondents claimed that NOAA has misinterpreted the MMPA’s incidental take exemption of commercial fishing to authorize only incidental, non-intentional takes; and that the MMPA’s plain meaning runs contrary to NOAA’s interpretation. Id. at 24-25; see also Respondents’ MMPA Hearing Memorandum.

Respondents correctly argued that the Agency failed to present any evidence that the marine mammals in question were: 1) killed; 2) a species listed as threatened or endangered under the ESA (16 U.S.C. § 1531 et seq.); or listed as depleted under the MMPA; or otherwise not subject to the provisions of the incidental take provisions. Id. at 2. Respondents contend that the evidence indicated that any take was in fact incidental within the “ordinary and statutory meaning of that term”; that the vessels took extraordinary steps to keep the whales from being caught in the net; and they prevented any injury/mortality that might have been considered intentional. Id.

Respondents pointed out that the MMPA does not define the term “incidental take”. Respondents’ MMPA Hearing Memorandum at 10. Nevertheless, Respondents referenced several instances of the term’s use in the MMPA and argued that “incidental take” clearly contemplates that “where the sole purpose of commercial fishing is to harvest fish and not marine mammals, the agency may authorize the incidental taking of marine mammals even where the taking is a virtual certainty, and even intentional.” Id. (citing 16 U.S.C. §§ 1371(a)(2), 1374(a), 1383(a)(1), and 1387(a)(2)(B)). Respondents argued that Congress knew how to use the term “incidental but not intentional” with reference to the MMPA when it deemed it

necessary. However, it elected not to do so for the applicable commercial fishing exemption here. *Id.* at 10-12. Therefore, Respondent's counsel argues that Agency counsel's definition at 50 C.F.R. § 229.2 runs contrary to the express intent of the statute. *Id.* at 13-16.<sup>27</sup>

The background regarding the Agency's Part 229 regulations helps illuminate the appropriate scope of the commercial fishing exemption. On August 30, 1995, the Agency published a final rule (Incidental Taking Final Rule) for 50 C.F.R. Parts 216 and 229 addressing the commercial fishing incidental take exemption. 60 Fed. Reg. 45086, 1995 WL 509041 (August 30, 1995). The Incidental Taking Final Rule stated that the Agency was issuing the rule "to implement the new management regime for the unintentional taking of marine mammals incidental to commercial fishing operations" under the MMPA as amended in 1994. *Id.* at 45086 (emphasis added).

In the proposed rulemaking prior to the Incidental Taking Final Rule, the Agency discussed the definition of incidental taking as follows:

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 phrase "incidental, but not intentional" is intended to mean accidental taking. The words 'not intentional' should not be read to mean that persons who 'know' that there is some possibility of taking marine mammals incidental to commercial fishing operations or other specified activities are precluded from doing so.

60 Fed. Reg. 31666, 31675, 1995 WL 357934 (June 16, 1995) (emphasis added).<sup>28</sup>

In addressing comments made to the proposed rule, the Incidental Taking Final Rule stated that a "primary purpose" of section 118 of the MMPA is to provide an exemption for

---

<sup>27</sup> To the extent Respondents disagree with the Agency's implementation of the MMPA's exemption or the Agency's interpretation of the MMPA, I am prohibited by regulation from addressing such questions. See 15 C.F.R. § 904.200(b) (judge has no authority to rule on constitutional issues or challenges to the validity of regulations promulgated by the Agency or statutes administered by NOAA).

<sup>28</sup> The Agency's website provides a similar definition for "incidental taking" as: "An unintentional, but not unexpected, taking." See <http://www.nmfs.noaa.gov/pr/glossary.htm> (last visited on Aug. 8, 2013).

commercial fisheries “so they may accidentally seriously injure or kill marine mammals incidental to their commercial fishing operations so long as the level of serious injury and mortality does not severely impact marine mammal populations.” 60 Fed. Reg. at 45088 (emphasis added).<sup>29</sup>

Importantly, these explanations in the rulemaking comport with Agency counsel’s interpretation Respondents received prior to the alleged violations. Dr. Charles Karnella, an Agency employee, met with the industry body representing U.S. purse seiners (a meeting attended by SPTC representatives). In addition, Dr. Karnella met with SPTC personnel in Taipei, Taiwan. Tr. at 379:23-381:21; 383:4-11; 382:4-23; 386:8-388:4 (July 12, 2012). Following these meetings, it could not have been a surprise that the Agency would seek to bring charges against intentional encirclement of marine mammals during fishing operations.

Furthermore, the two Respondent captains facing MMPA violations and the SPTC fleet manager acknowledged that the purse seiners were not to intentionally make purse seine sets around marine mammals. See Tr. at 94:4-14 (August 23, 2012) (Captain Maughan stating that the MMPA prohibits setting on whales); Agency Exh. 44 at 4 (Captain Bass stating in an interview with SA Raterman that the vessel’s fishing master knew not to set on whales); Tr. at 107:1-111:24 (August 24, 2012) (Mr. Virissimo stated that it was SPTC policy not to intentionally set on whales due to MMPA restrictions. However, he was not sure of the SPTC captains’ understanding of the legal requirements). Therefore, based upon these facts, Respondents’ conduct clearly falls outside the scope of the exemption for incidental takes.

---

<sup>29</sup> The Agency later modified the Section 229 regulations by removing specific definitions of “incidental take” and “incidental mortality” and instead adopting the current definition of “incidental” in 1999 to apply broadly to acts under that Section. See 64 Fed. Reg. 9067, 1999 WL 88366 (February 24, 1999).

## 1. The F/V Ocean Conquest's Alleged MMPA Violation – September 18, 2009

Agency counsel alleged that on September 18, 2009, the F/V Ocean Conquest intentionally set on a live whale in order to capture the tuna associated with that whale. Credible record evidence indicates that Mr. Lioliomola observed a whale with tuna around it on the afternoon of September 18, 2009 at a range of 100-200 meters from the vessel. Agency Exh. 12 at 59; Agency Exh. 11 at Form PS-2, page 32 of 43; Tr. at 70:6-18; 98:8-99:19 (Feb. 1, 2012). Mr. Lioliomola stated that he could see the whale and the tuna without the aid of binoculars. Tr. at 70:6-18 (Feb. 1, 2012). Once the vessel attempted to make a set on the whale, Mr. Lioliomola saw the whale in the net, at which time, the fishing master directed the F/V Ocean Conquest's auxiliary boats to chase the whale out of the net. Agency Exh. 12 at 59; see also Tr. at 67-75 (Feb. 1, 2012). The whale escaped the net and the vessel did not catch any fish as a result of this set. Tr. at 74:21-75:14 (Feb. 1, 2012). Mr. Lioliomola noted in his Trip Diary that the fishing master said he never saw the whale before the set commenced. Tr. at 92:12-13 (Feb. 1, 2012); Agency Exh. 12 at 50.

The central question in evaluating this charge against Respondents is whether the alleged activities constituted an intentional, non-incidental set on the whale. Mr. Lioliomola did not assert that anyone else on the vessel saw the whale before the set was made. Indeed, Mr. Lioliomola indicated that the fishing master told him he had not seen the whale prior to the set and specifically noted that a "few minutes after the deployment of the winch, we saw the whale in the net." Tr. at 92:13-14 (Feb. 1, 2012) (emphasis added). This statement indicates that some unspecified people on the boat saw the whale in the net as the winch was engaged.

Mr. Lioliomola admitted that he did not know what the fishing master was thinking at the time of the set because Mr. Lioliomola was with the crew and not with the fishing master. Tr. at

71:8-17 (Feb. 1 2012). Finally, Captain Maughan denied that the vessel ever intentionally set on whales. Tr. at 72:10-14 (August 23, 2012).

It is simply implausible given the credible eyewitness testimony of Mr. Lioliomola that the crew did not see the whale before the set was made given the distance of the whale from the vessel. The F/V Ocean Conquest Respondents' actions cannot be construed as incidental and non-intentional. It is more likely than not that the F/V Ocean Conquest Respondents intentionally set on the whale. This conclusion is especially valid given the fact that Respondents' counsel argued throughout that he does not believe that intentional sets on whales were prohibited by the regulations.

A set like this around a live whale unquestionably constitutes a "taking" for MMPA purposes. Given the intentional, purposeful nature of the set on the whale, such a taking is not exempt under the incidental take provisions of the MMPA. The MMPA violation against the F/V Ocean Conquest Respondents is therefore found **PROVED**

## **2. The F/V Ocean Encounter's Alleged MMPA Violations**

Agency counsel charged the F/V Ocean Encounter Respondents with four separate violations of the MMPA. Each charge involved the alleged setting of the purse seine net on a live whale in connection with the F/V Ocean Encounter's efforts to capture tuna associated with the whale. Neither Captain Bass nor the fishing master testified at the hearing. Nevertheless, in an interview with SA Raterman, Captain Bass stated that he did not intentionally set on any whales, but acknowledged one instance during this period when a whale was discovered at the far end of the purse seine net. Thereafter, the F/V Ocean Encounter's workboats escorted the whale outside the net without apparent injury. Agency Exh. 44 at 3-4; Agency Exh. 45 at 8. The F/V Ocean Encounter Respondents did not specifically deny that the sets on whales happened as

alleged. However, they admitted that such sets would constitute “harassment” for MMPA purposes. See Respondents’ Reply at 12-13. In specifically addressing these four MMPA violations, Respondents reasserted that such harassment was fully permitted under the MMPA. Id. at 13.

The F/V Ocean Encounter observer admitted that all of the whales the F/V Ocean Encounter interacted with during this trip escaped the purse seine net without injury but believed the whale on September 17, 2009 was stressed. Tr. at 184:1-16; 190:25-191:4 (Feb. 2, 2012).

#### **Alleged MMPA Violation #1 – September 17, 2009**

On September 17, 2009, the F/V Ocean Encounter sighted a school of tuna. Tr. at 116:11-19 (Feb. 2, 2012). Mr. Nare, the vessel’s observer, spotted a whale with the tuna and estimated the whale was between 100 and 200 meters away. Tr. at 117:11-15 (Feb. 2, 2012). Mr. Nare believed other members of the crew saw the whale – particularly a crewmember from Papua New Guinea, with whom he was sitting at the time on the helideck. Tr. at 118:6-119:6 (Feb. 2, 2012); Agency Exh. 17 at 53. Given this distance from the whale/tuna, it simply stretches credulity to conclude that the fishing master did not see the whale with the tuna prior to the set. Indeed, since at least one crewmember saw the whale, one must question whether the fishing master was told of the whale’s presence in the net. Throughout all of these encounters with whales, two common threads arise from Respondents’ arguments – (1) in no instance did the fishing master see a whale prior to the set; and (2) apparently none of the crewmembers who saw the whale notified the fishing master of the whale’s presence. However, it is more likely than not that all of the crew intuitively understood that they were not to notify the fishing master of such circumstances since that notification would likely reduce the overall tuna catch and adversely affect their share of the proceeds.

At approximately 08:42, the F/V Ocean Encounter made a set on the school of tuna. Agency Exh. 17 at 53; Agency Exh. 22 at Form PS-2, page 6. The whale was trapped in the center of the net, although the fishing master claimed to have unintentionally set on the whale. Tr. at 117:2-4 (Feb. 2, 2012). The crew then tried to chase the whale out of the net with two workboats, but they were unsuccessful in getting the whale to swim over the net. Tr. at 117:5-8; 120:2-7 (Feb. 2, 2012). Finally, the crew opened one end of the net to release the whale. Tr. at 117:8-10; 120:13-20 (Feb. 2, 2012). By the time the purse seine net was closed, the whale was no longer in the net and all the fish escaped. Tr. at 120:21-121:3 (Feb. 2, 2012).

Given the credible record evidence, Respondents' actions were not incidental to their fishing operations, must be considered intentional, and thus constitute an intentional "taking" for MMPA purposes. As such, it is not exempt under the incidental take provisions of the MMPA. The alleged MMPA violation on September 17, 2009 against the F/V Ocean Encounter is therefore found **PROVED**.

#### **Alleged MMPA Violation #2 – September 24, 2009**

On September 24, 2009, Mr. Nare observed the F/V Ocean Encounter make a set on a whale associated with a school of tuna. Agency Exhibit 20 at 67; Tr. at 134:2-135:16 (Feb. 2, 2012); Agency Exh. 21 at 23. Before the set was made, Mr. Nare could clearly see the whale with the tuna, which was bigger than the tuna and it was spouting. Tr. at 129:1-7 (Feb. 2, 2012). The F/V Ocean Encounter did not use its auxiliary boats to chase the whale from the net; rather, it appears the whale simply swam out of the net before it was pursed. Tr. at 1-4 (Feb. 2, 2012). The F/V Ocean Encounter failed to catch any fish in this set. Tr. at 130:5-10 (Feb. 2, 2012).

Given the credible record evidence, Respondents' actions on September 24, 2009 cannot be construed as incidental and non-intentional. It is more likely than not Respondents

intentionally set on a clearly visible whale that was near the surface and spouting within the school of tuna. This set unquestionably constitutes a “taking” for MMPA purposes.<sup>30</sup> Therefore, given the intentional, purposeful nature of the set on the whale, such a taking is not exempt under the incidental take provisions of the MMPA. The MMPA violation on September 24, 2009 against the F/V Ocean Encounter is found **PROVED**.

#### **Alleged MMPA Violation #3 – September 25, 2009**

At approximately 06:10 on September 25, 2009, Mr. Nare saw a whale approximately 100-300 meters from the F/V Ocean Encounter Tr. at 136:12-18; 140:8-13 (Feb. 2, 2012). The vessel then made a set on the whale and the tuna associated thereto at 06:17. Agency Exh. 22 at Form PS-2, page 14. The vessel tried to set on the tuna without getting the whale caught in the net but the whale and the fish escaped the net. Tr. at 137:14-138:4 (Feb. 2, 2012).

Given the credible record evidence, the F/V Ocean Encounter Respondents’ actions on September 25, 2009 cannot be construed as incidental and non-intentional. It is more likely than not that the F/V Ocean Encounter Respondents intentionally set on a clearly visible whale within the school of tuna.<sup>31</sup> A set around a live whale unquestionably constitutes a “taking” for MMPA purposes. Given the intentional, purposeful nature of the set on the whale, such a taking is not exempt under the incidental take provisions of the MMPA. The MMPA violation on September 25, 2009 against the F/V Ocean Encounter is therefore found **PROVED**.

#### **Alleged MMPA Violation #4 – September 25, 2009**

Later in the day on September 25, 2009, Mr. Nare observed the F/V Ocean Encounter make a set on a whale that was associated with a school of tuna. Tr. at 145:1-3 (Feb. 2, 2012);

---

<sup>30</sup> Importantly, the discussion concerning whether Respondents intentionally set on a whale from V. A. 2 above, is hereby incorporated.

<sup>31</sup> Importantly, the discussion concerning whether Respondents intentionally set on a whale from V. A. 2 above, is hereby incorporated.

Agency Exh. 20 at 68; Agency Exh. 22 at Form PS-2 page 14. Mr. Nare heard the watchman in the crow's nest tell the fishing master that there was a whale in the school, but the fishing master set on this school anyway. Agency Exh. 20 at 68-69. Indeed, the crew knew there was a whale associated with this set. A crewmember from Papua New Guinea interpreted what the Chinese crew said over the ship's loudspeaker to the effect that there was a live whale with the tuna. Tr. at 147:2-18 (Feb. 2, 2012). The F/V Ocean Encounter did not use its auxiliary boats to chase the whale out of net and the whale escaped as the vessel made the set on the school of tuna. Tr. at 145:11-16 (Feb. 2, 2012).

Given the credible record evidence, Respondents' actions concerning this September 25, 2009 set cannot be construed as incidental and non-intentional. It is more likely than not Respondents intentionally set on a clearly visible whale within the school of tuna. The crew knew there was a whale associated with the set but nevertheless continued with the set. This set around a whale unquestionably constitutes a "taking" for MMPA purposes. Given the intentional, purposeful nature of the set on the whale, such a taking is not exempt under the incidental take provisions of the MMPA. The second MMPA violation on September 25, 2009 against the F/V Ocean Encounter is therefore found **PROVED**.

#### **B. Alleged FAD Violations Related to Sets Made on Fish under the Boat**

Several of the alleged FAD violations involve: (1) the use of the main fishing vessel to aggregate tuna overnight through the use of lights directed toward or submerged into the water; and/or (2) the use of the main vessel's auxiliary boats lights to hold the fish in place while the set was made. Respondents generally did not dispute that they made the alleged sets, but insisted that these sets were allowable as "fish under the boat" sets. Importantly, Agency regulations implementing the CMM 2008-01's requirements provide: "[t]he meaning of a FAD does not

include a fishing vessel, provided that the fishing vessel is not used for the purpose of aggregating fish.” 50 C.F.R. § 300.211.

Respondents correctly noted that the applicable regulations do not specifically mention a prohibition on the use of lights to aggregate the fish and/or hold them in place while the vessel makes a set. However, under the definition of a FAD, the regulations included “any objects” used for the purpose of aggregating fish that are situated on board a vessel or otherwise out of the water. 50 C.F.R. § 300.211. Objects like lights used by the main vessel to aggregate fish overnight and/or lights used by the vessel’s auxiliary workboats to hold the fish in place fall under this broad definition.

The regulations also did not explicitly state that setting on fish that aggregated under the boat was prohibited per se. Indeed, in the Final Rule announcing the regulations implementing CMM 2008-01’s requirements, the Agency addressed a comment to the proposed rule. That comment proposed that “in situations in which there are no FADs in the area of the fishing vessel, capturing a school of tuna that has aggregated under the fishing vessel” should not be prohibited. 74 Fed. Reg. 38544-01, 38546, 2009 WL 2365173 (August 4, 2009). The Agency responded by stating:

[T]he commenter’s view is consistent with the intent of the proposed rule; however, NMFS will revise the final rule to clarify that the meaning of a FAD does not include the purse seine vessel itself. Having said that, it is important to note that under the proposed rule it would be prohibited during a FAD prohibition period to set a purse seine in an area into which fish were drawn by a vessel from the vicinity of a FAD.

Id.

Importantly, the Agency clearly stated in later amendments to the regulations that the regulations (both the newly instituted and the 2009 regulations) “explicitly prohibit[.] setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD

or a vessel.” 78 Fed. Reg. 30773-01, 30776, 2013 WL 2245016 (May 23, 2013). In response to a comment about the alleged uncertainty of the 2009 FAD regulations on this subject, the Agency stated:

The rule explicitly prohibits setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD or a vessel. In other words, a vessel may not set on fish that have aggregated under that vessel or any other vessel overnight, regardless of whether any effort was made to aggregate those fish. This is a change relative to the 2009 rule, which allowed vessels to set on fish that naturally aggregated under a vessel overnight, so long as the vessel was not used for the purpose of aggregating fish. In addition to this new prohibition, the proposed rule would—and this final rule does—amplify the prohibitions established in the 2009 rule by explicitly prohibiting the use of lights in specific manners that are known to be used to aggregate fish.

Id. In this rulemaking, the Agency thus conceded that making a set on fish that had naturally aggregated under the vessel overnight – without the use of any objects to facilitate such aggregation – was allowable in 2009. Using objects, like lights, to aggregate the fish or hold them in place while a set was made transforms the vessel into a FAD under the 2009 regulations. See 50 C.F.R. § 300.211 (2009) (noting that a vessel is not a FAD unless used “for the purpose of aggregating fish”).

In fact, Respondents were on notice prior to the alleged violations that the Agency would likely consider setting on fish under boat in connection with using lights to aggregate or hold the fish in place would be considered a violation. Mr. Virissimo raised the issue of fish under the boat sets with NOAA employee Mr. Clark prior to the Agency’s implementation of the FAD closure. Tr. at 65:21-66:9 (August 24, 2012).<sup>32</sup> When the Final Rule came out, Mr. Virissimo communicated with SPTC vessel captains about the 2009 FAD closure and the Agency’s regulations by sending the captains a copy of the Final Rule; telling them the date of the closure;

<sup>32</sup> The specific substance of this conversation is not in the record beyond noting that Mr. Virissimo was concerned about how fish under the boat sets would be treated under the regulations and Mr. Clark allegedly said that he would discuss the issue with the rule’s writer. Nothing in the record indicates that Mr. Clark affirmed Mr. Virissimo’s understanding of what was to be allowed or prohibited on this point.

directing them not to set on FADs during the closure period; but telling them it was allowed to set on fish that had gathered under the boat during the night. Tr. 69:23-70:15 (August 24, 2012).

Later, Mr. Virissimo received an electronic mail on July 27, 2009 from Mr. Gordon Yamasaki, NOAA employee, concerning the use of a light boat to draw fish away from the boat on an SPTC vessel (which Mr. Virissimo claimed was a "FISH UNDER THE BOAT, no FAD involved"). Mr. Yamasaki explained that such use would be considered a FAD set "as you are aggregating the fish away from the vessel, to the light boat, and using it as a FAD." Agency Exh. 70. However, Mr. Virissimo did not view Mr. Yamasaki's e-mail as an instruction not to use lights on workboats, but rather an opinion on what the regulations would prohibit. Thus, Mr. Virissimo did not provide instructions to SPTC captains that such practices were prohibited. Tr. at 102:22-103:19; 104:4-15 (August 24, 2012).

Mr. Virissimo also admitted that he received an electronic mail during the 2009 FAD closure period from Mr. Bill Sardina, a manager of other, non-SPTC purse seine vessels, advising him that he would not let his boats use underwater lights because it would violate the Agency's regulations. However, Mr. Virissimo discounted Mr. Sardina's message as simply an opinion on what the regulations prohibited. Tr. at 89:18-93:14 (August 24, 2012); see also Agency Exh. 69 (e-mail from Mr. Sardina to Mr. Virissimo dated August 12, 2009). Despite his discounting of the opinion of both a NOAA employee and Mr. Sardina, Mr. Virissimo nevertheless communicated with the SPTC captains via electronic mail on September 1, 2009 that there might be a problem with the vessels using lights to attract or hold fish in place under the Agency's regulations. But Mr. Virissimo reiterated that he did not believe the SPTC vessels were doing anything wrong because a prohibition on the use of lights was "nowhere to be found in the Federal Register, rules and regulations we received." Tr. at 94:7-95:6 (August 24, 2012);

Agency Exh. 68 (e-mail from Mr. Virissimo to SPTC captains and SPTC personnel); see also Agency Exh. 66 (e-mail exchange between Mr. Virissimo and Captain Maughan concerning the use of lights in which Mr. Virissimo stated that “if you pull up to a FAD and put your lights on to pull the fish off of it, that’s not considered fish under the boat. The main argument is that you use your work boat to keep the fish from leaving while you set, and there is nothing in our rules that says you can’t do that. Like you know, that’s the way we catch fish under the boat.”).

### **1. The F/V Sea Quest Alleged FAD Violations**

Agency counsel charged Respondents with two separate FAD closure violations. Each involved the alleged setting of the purse seine net on tuna that had aggregated under the main vessel overnight. Agency counsel alleged that the F/V Sea Quest’s use of lights during the night and the use of lights on its auxiliary boats during the set to hold the fish in place while the set was made effectively turned the vessel itself into a FAD. Therefore, according to Agency counsel, the sets made on the tuna violated the FAD closure.

#### **Alleged FAD Violation #1 – August 14, 2009**

Mr. Iohp, the F/V Sea Quest’s observer, got up while it was still dark at approximately 04:00 on the morning of August 14, 2009 and discovered that the F/V Sea Quest was using lights to attract fish. Tr. at 26:11-20; 26:23-27:2 (Feb. 1, 2012); Agency Exh. 1 at 31; Agency Exh. 2 at Form PS-2 page 31 of 35. The vessel deployed its auxiliary work boats, which then dropped lights into the water. Tr. at 26:11-20; 30:15-24 (Feb. 1, 2012). The F/V Sea Quest’s auxiliary work boats were approximately 15 feet long and had circular green and red lights that were about six inches wide and two feet long. Tr. at 28:16-29:25 (Feb. 1, 2012). Once the F/V Sea Quest deployed the auxiliary boats, the F/V Sea Quest turned off the lights it had hung over the side, which had been on all night. Tr. at 31:25-32:18; 32:12-33:24 (Feb. 1, 2012). The F/V Sea Quest

then proceeded about half a mile and returned a few minutes later and made a set, while the auxiliary boats drifted with the submerged lights engaged. Tr. at 31:19-24; 26:20-22; 34:1-21 (Feb. 1, 2012); see also Agency Exh. 2, Form PS-2 at page 31 of 35 (indicating that this was set #34 of the trip).

Captain Freitas admitted that the F/V Sea Quest made a set on the morning of August 14, 2009 but described it as an allowable “fish under the boat” set and denied that the vessel or its auxiliary work boats used any lights to aggregate or hold the fish in place while the F/V Sea Quest made the set. Tr. at 46:2-24 (August 24, 2012). Captain Freitas maintained that any lights used were for safety purposes and not for aggregating fish. Id. However, Captain Freitas admitted that the auxiliary boats used what he termed “drop lights”, which are lights submerged approximately two feet below the water but claimed that the work boats used these light to illuminate the boat so the main vessel can see where those auxiliary boats are located while performing the set. Tr. at 48:5-12; 57:8-58:8; 59:12-15 (August 24, 2012). But Captain Freitas acknowledged that those “drop lights” were used at least partly in the hopes of keeping the fish in place while the main vessel performed a set around the work boats. Tr. at 59:12-61:10 (August 24, 2012). I find Captain Freitas’ general denial that the vessel did not use lights to aggregate the fish not credible. Captain Freitas admitted, at least in part, that the auxiliary work boats used submerged lights, which he claimed were for safety purposes. However, Mr. Iohp’s credible testimony and contemporaneous records counter these assertions.

Credible record evidence indicates the vessel used lights overnight in an effort to aggregate fish while it drifted and then deployed auxiliary boats the next morning with submerged lights to capture the aggregated fish. Both the observer and the vessel’s Regional Purse Seine Logsheet estimated that the set resulted in the capture of [REDACTED] mt of [REDACTED] Agency

Exh. 34; Agency Exh. 2.<sup>33</sup> These actions were prohibited by the applicable regulations.

Therefore, the FAD violation on August 14, 2009 against the F/V Sea Quest Respondents is found **PROVED**.

#### **Alleged FAD Violation #2 – September 17, 2009**

On September 17, 2009, Mr. Iohp woke up around 04:00 (when it was still completely dark) and the F/V Sea Quest's auxiliary boats were already in the water with submerged lights engaged. Tr. at 35:17-36:15 (Feb. 1, 2012); Agency Exh. 3 at 13 (noting that when he went outside he noticed the auxiliary boats were "attracting the fish with submarine lights"). The F/V Sea Quest then completed a set in the same manner as described for the activities on September 14, 2009. Tr. at 36:24-37:4 (Feb. 1, 2012); see also Agency Exhibit 4 at Form PS-2, page 27 of 51.

Credible record evidence thus indicates the F/V Sea Quest used lights in an effort to hold the fish which had aggregated overnight under the vessel on its auxiliary boats to capture those fish in a set. The observer estimated that the set resulted in the capture of 75 mt of tuna, consisting of 65 mt of skipjack and 10 mt of yellowfin; whereas the vessel's Purse Seine Regional Logsheet estimated the set resulted in the capture of 65 mt of tuna, consisting of 55 mt of skipjack and 10 mt of yellowfin. Agency Exh. 35 at page 3, line 3; Agency Exh. 4.<sup>34</sup> These actions were prohibited by the applicable regulations. Therefore, the alleged FAD violation on September 17, 2009 against the F/V Sea Quest Respondents is therefore found **PROVED**.

---

<sup>33</sup> The composition of the catch relative to species caught was differently estimated and will be analyzed in the Penalty Section below.

<sup>34</sup> The discrepancy between the amount and the composition of the catch will be analyzed in the Penalty Section below.

## **2. The F/V Pacific Ranger Alleged FAD Violation – September 30, 2009**

Agency counsel charged Respondents with a FAD closure violation. This charge involved the alleged setting of the purse seine net on tuna that had aggregated under the F/V Pacific Ranger overnight. Agency counsel alleged that the F/V Pacific Ranger's use of lights during the night and the use of lights on its auxiliary boats during the set to hold the fish in place during the set effectively converted the vessel into a FAD. Such an act violated the FAD closure regulations.

On September 30, 2009, the F/V Pacific Ranger's observer noted that at 05:50 the vessel made set number 3, during which the vessel used fish aggregating lights. Agency Exh. 5 at 7. Specifically, Mr. Siliomea observed that the F/V Pacific Ranger's auxiliary boat # 6 was drifting with "fish aggregating lights" and the main vessel made a set around it. Agency Exh. 5 at 7; Tr. at 55:3-22 (Feb. 1, 2012); see also Agency Exh. 7 at PS-2, page 7 of 30.

Captain Zolezzi admitted that the F/V Pacific Ranger's workboat was used in connection with this set and that the workboat's underwater lights were turned on. However, he stated that he told the fishing master to extinguish the lights, which was what happened shortly thereafter. Tr. at 7:11-8:5; 10:2-6 (October 29, 2012). Captain Zolezzi estimated that the underwater lights were on for only a minute or two before they were extinguished. Tr. at 10:7-10 (October 29, 2012). Captain Zolezzi's attempt to minimize the amount of time the underwater light was on is not credible. Mr. Siliomea's credible testimony and contemporaneous records counter the assertion that the underwater lights were on for only a short period.

Credible record evidence thus indicates the F/V Pacific Ranger used lights in an effort to hold the fish which had aggregated overnight under the vessel. Moreover, the F/V Pacific Ranger used its auxiliary boat lights to hold those fish so a set could be made. Both the observer

and the vessel's Regional Purse Seine Log estimated the set resulted in the capture of 50 mt of skipjack tuna. Agency Exh. 7 at PS-2 Form page 10 (7 of 30); Agency Exh. 7 at Form PS-3 page 36 (3 of 27); Agency Exh. 41 at page 1, line 5; Resp. Exh. BBBB BBB at 3. These actions were prohibited by the applicable regulations. Therefore, the alleged FAD violation on September 30, 2009 against the F/V Pacific Ranger is found **PROVED**.

### **3. The F/V Ocean Conquest's Alleged FAD Violations**

Agency counsel charged Respondents with two separate FAD closure violations. Each involved the alleged setting of the purse seine net on tuna that had aggregated under the main vessel overnight. Agency counsel alleged that the F/V Ocean Conquest's (1) use of lights during the night, and (2) use of lights on its auxiliary boats during the set to hold the fish in place while the set was made, effectively converted the vessel into a FAD. Therefore, the sets violated the FAD closure regulations.

In response, Captain Maughan claimed that lights in the water do not attract fish under the boat. Tr. at 62:13-64:16 (August 23, 2012). However, Captain Maughan acknowledged that the Taiwanese fishing masters believe that if they put the light in the water the fish will stay by the workboats. Tr. at 65:15-18 (August 23, 2012). Indeed, Captain Maughan stated that the fishing master in these instances used lights in the water because of that belief. Tr. at 67:2-12 (August 23, 2012). There is thus no question that Respondents used lights in an effort to keep the aggregated fish under the workboats while the main vessel made a set.

#### **Alleged FAD Violation #1 – September 24, 2009**

On the evening of September 23, 2009, the F/V Ocean Conquest put lights in the water and turned on all the boat's lights and then drifted at night. Tr. at 76:6-16; 80:4-7 (Feb. 1, 2012). These lights were on the port side of the vessel with some on top of the second deck and one

placed in the water. Tr. at 77:1-14 (Feb. 1, 2012). The non-submerged lights were pointed downwards towards the water. Tr. at 78:3-13 (Feb. 1, 2012).

The next morning, the vessel's observer, Mr. Lioliomola, woke up around 04:20 to the sound of the alarm and when he went outside he heard the crew say that there were fish under the boat. Tr. at 80:12-18 (Feb. 1, 2012); Agency Exh. 12 at 2. The F/V Ocean Conquest used two workboats with submerged lights to keep the school in place while the main vessel moved away to make a set around the workboats. Agency Exh. 12 at 2; Agency Exh. 13 at 13; Tr. at 81:7-22; 84:2-20 (Feb. 1, 2012). The observer estimated the set resulted in the catch of 46 mt of skipjack and 3 mt of yellowfin tuna; whereas the vessel's Regional Purse Seine Logsheet estimated the catch for this set to be 47 mt of skipjack and 3 mt of yellowfin. Tr. at 102:15-23 (Feb. 1, 2012); Resp. Exh. BBBB at 3.<sup>35</sup>

Credible record evidence thus establishes that the F/V Ocean Conquest used lights overnight in an effort to aggregate fish while it drifted and then deployed auxiliary boats the next morning with submerged lights to hold the fish while the F/V Ocean Conquest made a set. These actions were prohibited by the applicable regulations. Therefore, the FAD violation on September 24, 2009 against the F/V Ocean Conquest Respondents is found **PROVED**.

#### **Alleged FAD Violation #2 – September 25, 2009**

On the evening of September 24, 2009, the F/V Ocean Conquest was adrift with five or six other vessels. Tr. at 85:1-7 (Feb. 1, 2012). Mr. Lioliomola woke up the next day around 04:50 at the sound of the alarm and he noticed the F/V Ocean Conquest was running toward another vessel. Tr. at 85:7-11 (Feb. 1, 2012). One of the crewmembers told Mr. Lioliomola that fish were under a Taiwanese vessel owned by the Fong Kuo Company. Tr. at 85:13-86:7 (Feb.

---

<sup>35</sup> The discrepancy between the amount and the composition of the catch will be analyzed in the Penalty Section below.

1, 2012). When Mr. Lioliomola went to the bridge to record the time and position, the fishing master told him that the F/V Ocean Conquest was going to make a set on the fish under the Taiwanese vessel. Tr. at 86:11-87:6 (Feb. 1, 2012).

The F/V Ocean Conquest made a set on the fish that had been under the Taiwanese vessel. Agency Exh.12 at 3; Agency Exh. 13 at 14; Agency Exh. 14 at Form PS-2, page 39 of 43. Specifically, at 05:00, the F/V Ocean Conquest moved alongside the Fong Kuo 736 and deployed two boats into the water. Those two auxiliary boats put submerged lights into the water and the Taiwanese vessel turned off its lights. Tr. at 88:8-18 (Feb. 1, 2012). The Fong Kuo 736 moved slowly away from the light boats and set #31 was made at 05:30 hours. Agency Exh. 12 at 3; Agency Exh. 13 at 14; Tr. at 88:4-9 (Feb. 1, 2012). The observer estimated that the set resulted in the catch of 166 mt of tuna, consisting of 70% skipjack; 20% yellowfin and 10% big eye tuna; whereas the vessel's Regional Purse Seine Logsheet estimated the catch to be 160 mt, consisting of 130 mt of skipjack and 30 mt of yellowfin. Tr. at 104:6-13 (Feb. 1, 2012): Resp. Exh. BBBB<sup>36</sup>.

Credible record evidence establishes that the F/V Ocean Conquest's auxiliary boats used submerged lights to hold fish in place while the Fong Kuo moved away so that a set around those fish could be made. These actions were prohibited by the applicable regulations. Therefore, the FAD violation on September 25, 2009 against the F/V Ocean Conquest Respondents is found **PROVED.**

#### **4. The F/V Ocean Encounter's Alleged FAD Violations**

Agency counsel charged Respondents with five separate FAD closure violations. Each involved the alleged setting of the purse seine net on tuna that had aggregated under the main

---

<sup>36</sup> The discrepancy between the amount and the composition of the catch will be analyzed in the Penalty Section below.

vessel overnight. Agency counsel alleged that the F/V Ocean Encounter's use of lights during the night and/or the use of lights on its auxiliary boats during the set to hold the fish in place effectively turned the vessel into a FAD. Therefore, these sets allegedly violated the FAD closure prohibition.

Captain Bass did not testify at the hearing. However, during an interview with SA Raterman and follow up e-mail questions, Captain Bass denied the vessel set on any FADs or used any underwater lights during the period of the alleged violations. Agency Exh. 44 at 3; Agency Exh. 45.

#### **Alleged FAD Violation #1 – September 18, 2009**

On September 18, 2009, Mr. Nare, the F/V Ocean Encounter's observer, was sleeping and a crewmember from Papua New Guinea woke him up and told him the vessel was going to make a set. Tr. at 151:2-12 (Feb. 2, 2012). At approximately 05:10 when he went on deck, Mr. Nare saw that two of the F/V Ocean Encounter's auxiliary boats were in the water and had lights deployed in the water, approximately 20 meters under the surface. Agency Exhibit 17 at 57; Tr. at 153:10-25 (Feb. 2, 2012). The two work boats were tied together as the F/V Ocean Encounter made a set around them. Tr. at 154:19-155:14 (Feb. 2, 2012); Agency Exh. 22 at Form PS-2, page 7. At that time, all the exterior lights of the main vessel (those on the boom and work lights on the side of the vessel) were off and the vessel was drifting away from the work boats. Tr. at 152:14-153:9 (Feb. 2, 2012).

Mr. Nare related a conversation he had with Captain Bass in which Captain Bass said that "we are not doing a FAD set". Captain Bass further stated that the fish had collected under the vessel at night while it was drifting. Finally, he stated that the vessel was deploying two of its work boats with fish aggregating lights to make the set. Tr. at 152:5-13 (Feb. 2, 2012).

Mr. Nare estimated that the vessel caught 90 mt of tuna consisting of 45 mt of skipjack; 23 mt of yellow fin and 22 mt of bigeye tuna. Tr. at 165:16-166:19 (Feb. 2, 2012). The F/V Ocean Encounter's Regional Purse Seine Logsheet indicates that the vessel caught 75 mt of skipjack tuna. Agency Exh. 48 at 1, line 11 (using code 1 – "FISHING SET" – for school association).<sup>37</sup>

Credible record evidence establishes that the F/V Ocean Encounter's auxiliary boats used submerged lights to hold fish in place while the F/V Ocean Encounter made a set around those fish. These actions were prohibited by the applicable regulations. Therefore, the alleged FAD violation on September 18, 2009 against the F/V Ocean Encounter Respondents is found **PROVED.**

#### **Alleged FAD Violation #2 – September 20, 2009**

On the morning of September 20, 2009, the F/V Ocean Conquest set on fish that aggregated under the vessel. Agency Exh. 17 at 62. Prior to making the set, Mr. Nare observed that the vessel was adrift at 04:23 with lights on and that at 05:51 a set was made after the main vessel had deployed its auxiliary boats with fish aggregating lights engaged. Agency Exh. 22 at Form PS-2, page 9. Mr. Nare described the F/V Ocean Encounter's set on this date as "pretty much the same scenario" as the activities of September 18, 2009 in the use of the two auxiliary boats with lights submerged in the water. Tr. at 156:21-25; 162:19-163:1 (Feb. 2, 2012); see also Agency Exh. 21 at Section 5.1.1; Tr. at 173:18-174:14 (Feb. 2, 2012).

Mr. Nare estimated that the vessel caught 255 mt of tuna consisting of 179 mt of skipjack; 25 mt of yellowfin and 51 mt of bigeye tuna. Tr. at 168:6-13 (Feb. 2, 2012); Agency Exh. 22, Form PS-3 at page 10 of 25. The F/V Ocean Encounter's Regional Purse Seine

---

<sup>37</sup> The discrepancy between the amount and the composition of the catch will be analyzed in the Penalty Section below.

Logsheet indicates that the vessel caught 225 mt of skipjack tuna and 1 mt of yellowfin tuna. Agency Exh. 48 at 1, line 15 (using code 1 – “FISHING SET” – for school association).<sup>38</sup>

Credible record evidence thus establishes that the F/V Ocean Encounter’s auxiliary boats used submerged lights to hold fish in place while the F/V Ocean Encounter made a set around those fish. These actions were prohibited by the applicable regulations. Therefore, the alleged FAD violation on September 20, 2009 against the F/V Ocean Encounter Respondents is found **PROVED**.

**Alleged FAD Violation #3 – September 21, 2009**

On the morning of September 21, 2009, the F/V Ocean Conquest set on fish that aggregated under the vessel and used lights to hold the fish in place while the set was made. Agency Exh. 17 at 62; Agency Exh. 22 at Form PS-2, page 10; see also Tr. at 169:10-15 (Feb. 2, 2012). Mr. Nare described the F/V Ocean Encounter’s set on this date as done in the same manner as the activities of September 18, 2009 in the use of the two auxiliary boats with lights submerged in the water. Tr. at 163:2-4 (Feb. 2, 2012); see also Agency Exh. 21 at Section 5.1.1; Tr. at 173:18-174:14 (Feb. 2, 2012).

Mr. Nare estimated that the vessel caught 200 mt of tuna consisting of 160 mt of skipjack; 20 mt of yellow fin and 40 mt of bigeye tuna. Tr. at 170:4-17 (Feb. 2, 2012); Agency Exh. 22, Form PS-3 at page 11 of 25. The F/V Ocean Encounter’s Regional Purse Seine Logsheet indicates that the vessel caught 180 mt of skipjack tuna. Agency Exh. 48 at 2, line 2 (using code 1 – “FISHING SET” – for school association). Mr. Nare noted in his Trip Diary that

---

<sup>38</sup> The discrepancy between the amount and the composition of the catch will be analyzed in the Penalty Section below.

even though he observed bigeye tuna caught in this set through his sampling, “the vessel recorded no bigeye tuna retained.” Agency Exh. 17 at 62.<sup>39</sup>

Credible record evidence thus establishes that the F/V Ocean Encounter’s auxiliary boats used submerged lights to hold fish in place while the F/V Ocean Encounter made a set around those fish. These actions were prohibited by the applicable regulations. Therefore, the alleged FAD violation on September 21, 2009 against the F/V Ocean Encounter Respondents is found **PROVED**.

**Alleged FAD Violation #4 – September 22, 2009**

Mr. Nare described the F/V Ocean Encounter’s set on this date as done in the same manner as the activities of September 18, 2009 in the use of the two auxiliary boats with lights submerged in the water. Tr. at 163:5-6 (Feb. 2, 2012); Agency Exhibit 22 at PS-2, page 11; see also Agency Exh. 21 at Section 5.1.1; Tr. at 173:18-174:14; 215:21-216:3 (Feb. 2, 2012).

Mr. Nare estimated that the vessel caught 30 mt of tuna consisting of 14 mt of skipjack; 6 mt of yellowfin and 10 mt of bigeye tuna. Tr. at 173:5-17 (Feb. 2, 2012); Agency Exh. 22, Form PS-3 at page 12 of 25. The F/V Ocean Encounter’s Regional Purse Seine Logsheet indicates that the vessel caught 30 mt of skipjack tuna for this set. Agency Exh. 48 at 2, line 4 (using code 1 – “FISHING SET” – for school association).<sup>40</sup>

Credible record evidence thus establishes that the F/V Ocean Encounter’s auxiliary boats used submerged lights to hold fish in place while the F/V Ocean Encounter made a set around those fish. These actions were prohibited by the applicable regulations. Therefore, the alleged

---

<sup>39</sup> The discrepancy between the amount and the composition of the catch will be analyzed in the Penalty Section below.

<sup>40</sup> The discrepancy between the asserted compositions of the catch will be analyzed in the Penalty Section below.

FAD violation on September 22, 2009 against the F/V Ocean Encounter Respondents is found **PROVED.**

**Alleged FAD Violation #5 – September 23, 2009**

Mr. Nare described the F/V Ocean Encounter's set on this date as done in the same manner as the activities of September 18, 2009 in the use of the two auxiliary boats with lights submerged in the water. Tr. at 163:7-8; 219:7-14 (Feb. 2, 2012); Agency Exh. 20 at 66; Agency Exh. 22 at Form PS-2, page 12.

Mr. Nare estimated that the vessel caught 20 mt of tuna consisting of 15 mt of skipjack; 5 mt of yellowfin tuna. Tr. at 175:21-176:13 (Feb. 2, 2012); Agency Exh. 22, Form PS-3 at page 14 of 25. The F/V Ocean Encounter's Regional Purse Seine Logsheet indicates that the vessel caught 20 mt of skipjack tuna for this set. Agency Exh. 48 at 2, line 11 (using code 1 – "FISHING SET" – for school association).<sup>41</sup>

Credible record evidence thus establishes that the F/V Ocean Encounter's auxiliary boats used submerged lights to hold fish in place while the F/V Ocean Encounter made a set around those fish. These actions were prohibited by the applicable regulations. Therefore, the alleged FAD violation on September 23, 2009 against the F/V Ocean Encounter Respondents is found **PROVED.**

**C. Alleged FAD Violations Related to Servicing/Deploying a FAD**

**1. The F/V Sea Honor FAD Servicing/Deploying FAD Violations**

Agency counsel charged the F/V Sea Honor Respondents with two counts of servicing/deploying a FAD during the FAD closure period. Agency counsel alleged that the F/V

---

<sup>41</sup> The discrepancy between the asserted compositions of the catch will be analyzed in the Penalty Section below.

Sea Honor's actions in placing a GPS buoy on/deploying a FAD violated the regulations concerning what vessels could do with FADs during the FAD closure period.

In response, Captain Magellan denied that the F/V Sea Honor deployed a FAD as alleged. Tr. at 35:2-10; 40:9-14 (Oct. 29, 2012).

#### **Alleged Deploying/Serviceing FAD Violation #1 – September 28, 2009**

On September 28, 2009, the F/V Sea Honor's observer, Mr. Belei saw the F/V Sea Honor pull alongside a floating object; place a satellite buoy on that object; and redeploy it into the water. Tr. at 229:2-21 (Feb. 2, 2012); Agency Exh. 26 at Form PS-2, page 7 of 25; Agency Exh. 24 at 8. The object consisted of ten yellow floats tied together supported by bamboo and attached with netting hanging underneath. Agency Exh. 24 at 8. The F/V Sea Honor deployed a satellite beacon on that object under which fish had aggregated. Tr. at 230:1-11 (Feb. 2, 2012); Agency Exh. 24 at 8. The F/V Sea Honor did not make a set on this object during Mr. Belei's trip on the vessel Tr. at 237:9-11 (Feb. 2, 2012).

Credible record evidence thus establishes that on September 28, 2009, the F/V Sea Honor came upon an object that clearly fell under the Agency's definition of a FAD. See 50 C.F.R. § 300.223(b). The F/V Sea Honor's action in placing a satellite buoy on this FAD constituted "repairing, cleaning, maintaining, or otherwise serviceing a FAD" as the satellite buoy deployed on the FAD was "electronic equipment used in association with a FAD". Id. Neither of the two exceptions for handling a FAD under 50 C.F.R. § 300.223(b) applied in this instance. Therefore, the alleged FAD violation on September 28, 2009 against the F/V Sea Honor Respondents is found **PROVED**.

## **Alleged Deploying/Servicing FAD Violation #2 – September 30, 2009**

On September 30, 2009, the F/V Sea Honor deployed a floating object with a satellite buoy. Tr. at 231:8-232:6 (Feb. 2, 2012); Agency Exh. 26 at Form PS-2, page 9 of 25; Agency Exh. 24 at 11. The object was described as a free floating object made of bamboo and yellow floats wrapped with old netting which draped underneath. Agency Exh. 24 at 11.

Credible record evidence thus establishes that on September 30, 2009, the F/V Sea Honor placed an object into the ocean that clearly fell under the Agency's definition of a FAD. See 50 C.F.R. § 300.223(b). Therefore, the alleged FAD violation on September 30, 2009 against the F/V Sea Honor Respondents is found **PROVED**.

### **VI. Ultimate Findings of Fact and Conclusions of Law**

1. The Western and Central Pacific Fisheries Convention Implementation Act states: “[a]ny person that violates any provision of this chapter is subject to the penalties ... provided in the Magnuson-Stevens Fishery Conservation and Management Act.” 16 U.S.C. § 6905(c).

2. Respondents Matthew James Freitas, Sea Quest LLC, Ching Wen Wu, Benjamin Brown Maughan, Jr., Ocean Conquest LLC, Wu Chin Pin, Russell Keith Bass, Jr., Ocean Encounter LLC, Ho-Ching Chang, Paul Magellan, Sea Honor LLC, Yen Hsing Tasai, John Zolezzi, Pacific Ranger LLC, and Su Tien Shih are all “persons” as defined by the Western and Central Pacific Fisheries Convention Implementation Act. See 50 C.F.R. § 300.211.

3. Title 50 C.F.R. § 300.223 was promulgated pursuant to the Western and Central Pacific Fisheries Convention Implementation Act.

4. Under 50 C.F.R. § 300.223(b)(1) it is unlawful to set a purse seine net around a fish aggregating device or within one nautical mile of a fish aggregating device during a FAD closure period.

5. Under 50 C.F.R. § 300.223(b)(2) it is unlawful to set a purse seine net in a manner intended to capture fish that have aggregated in association with a FAD, such as by setting the purse seine net in an area from which a FAD has been moved or removed within the previous eight hours, or setting the purse seine net in an area in which a FAD has been inspected or handled within the previous eight hours, or setting the purse seine net in an area into which fish were drawn by a vessel from the vicinity of a FAD during the prohibited FAD closure period.

6. Under 50 C.F.R. § 300.223(b)(3), it is unlawful to deploy a FAD into the water during the prohibited FAD closure period.

7. All of the fishing/operational activities that took place with respect to each of the Charges occurred in the Convention Area as defined by 50 C.F.R. § 300.211.

8. Respondents Benjamin Brown Maughan, Jr., Ocean Conquest LLC, Wu Chia Pin, Russell Keith Bass, Jr., Ocean Encounter LLC, and Ho-Ching Chang are all “persons” as defined by the MMPA at 16 U.S.C. § 1362(10).

9. Under the MMPA at 16 U.S.C. § 1372(a)(1), it is unlawful for any person subject to the jurisdiction of the United States or any vessel or conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas.

10. The F/V Ocean Conquest is a U.S. flagged vessel subject to the jurisdiction of the United States.

11. The F/V Ocean Encounter is a U.S. flagged vessel subject to the jurisdiction of the United States.

12. Mr. Kun Iohp’s testimony and documents he generated while aboard the F/V Sea Quest are found to be credible representations of what occurred during his time aboard the F/V Sea Quest as an observer.

13. Captain Matthew Freitas’ denials that the F/V Sea Quest used lights either to aggregate the fish or hold the fish in place during the alleged violations is found not credible in light of the contemporaneous documents generated by the observer.

14. Mr. Auto’o Siliomea’s testimony and documents he generated while aboard the F/V Pacific Ranger are found to be credible representations of what occurred during his time aboard the F/V Pacific Ranger as an observer.

15. Captain Zolezzi’s claims that the F/V Pacific Ranger’s workboat’s underwater lights were only illuminated for a minute or two is found not credible in light of the contemporaneous documents generated by the observer.

16. Mr. Anthony Lioliomola’s testimony and documents he generated while aboard the F/V Ocean Conquest are found to be credible representations of what occurred during his time aboard the F/V Ocean Conquest as an observer.

17. Captain Maughan’s denials that the F/V Ocean Conquest did not violate the MMPA or the FAD prohibition are found not credible in light of the contemporaneous documents generated by the observer. Furthermore, Captain Maughan’s claims that lights do not attract or aggregate fish is rejected as not credible given his admission that the Taiwanese fishing masters use such lights for this purpose and his admission that the F/V Ocean Conquest’s used such lights to hold the fish in place. See Agency Exh. 54 at 3 (answering “Yes” to the question posed by NOAA SA about whether light boats were used to hold the fish in place while the vessel moved away to begin the set).

18. Mr. Chris Nare's testimony and documents he generated while aboard the F/V Ocean Conquest are found to be credible representations of what occurred during his time aboard the F/V Ocean Encounter as an observer.

19. Captain Bass's written denials to SA Raterman that the F/V Ocean Encounter did not violate the MMPA or the FAD prohibition are found not credible in light of the contemporaneous documents generated by the observer.

20. Mr. Charles Belei's testimony and documents he generated while aboard the F/V Sea Honor are found to be credible representations of what occurred during his time aboard the F/V Sea Honor as an observer.

21. Captain Magellan's denial that the F/V Sea Honor deployed the two FADs as alleged is found not credible in light of the contemporaneous documents generated by the observer.

22. The Agency has established by a preponderance of the evidence that Respondents Matthew James Freitas, Sea Quest LLC and Chang Wen Wu violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on August 14, 2009, by setting a purse seine net on or within one nautical mile of a fish aggregating device or by setting a purse seine net in a manner intended to capture fish that have aggregated in association with a FAD.

23. The Agency has established by a preponderance of the evidence that Respondents Matthew James Freitas, Sea Quest LLC and Chang Wen Wu violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on September 17, 2009, by setting a purse seine net on or within one nautical mile of a fish aggregating device or by setting a purse seine net in a manner intended to capture fish that have aggregated in association with a FAD.

24. The Agency has established by a preponderance of the evidence that Respondents John Zolezzi, Pacific Ranger LLC, and Su Tien Shih violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on September 30, 2009, by setting a purse seine net on or within one nautical mile of a fish aggregating device or by setting a purse seine net in a manner intended to capture fish that have aggregated in association with a FAD.

25. The Agency has established by a preponderance of the evidence that Respondents Benjamin Brown Maughan, Jr., Ocean Conquest LLC, and Wu Chia Pin violated the Marine Mammal Protection Act at 16 U.S.C. § 1372(a)(1) on September 18, 2009, by taking a marine mammal on the high seas in a manner not encompassed by the commercial fishing exemption for incidental taking of marine mammals at 16 U.S.C. § 1387 and 50 C.F.R. Part 229.

26. The Agency has established by a preponderance of the evidence that Respondents Benjamin Brown Maughan, Jr., Ocean Conquest LLC, and Wu Chia Pin violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on September 24, 2009, by setting a purse seine net

on or within one nautical mile of a fish aggregating device or by setting a purse seine net in a manner intended to capture fish that have aggregated in association with a FAD.

27. The Agency has established by a preponderance of the evidence that Respondents Benjamin Brown Maughan, Jr., Ocean Conquest LLC, and Wu Chia Pin violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on September 25, 2009, by setting a purse seine net on or within one nautical mile of a fish aggregating device or by setting a purse seine net in a manner intended to capture fish that have aggregated in association with a FAD.

28. The Agency has established by a preponderance of the evidence that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC and Ho-Ching Chang violated the Marine Mammal Protection Act at 16 U.S.C. § 1372(a)(1) on September 17, 2009, by taking a marine mammal on the high seas in a manner not encompassed by the commercial fishing exemption for incidental taking of marine mammals at 16 U.S.C. § 1387 and 50 C.F.R. Part 229.

29. The Agency has established by a preponderance of the evidence that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC and Ho-Ching Chang violated the Marine Mammal Protection Act at 16 U.S.C. § 1372(a)(1) on September 24, 2009, by taking a marine mammal on the high seas in a manner not encompassed by the commercial fishing exemption for incidental taking of marine mammals at 16 U.S.C. § 1387 and 50 C.F.R. Part 229.

30. The Agency has established by a preponderance of the evidence that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC and Ho-Ching Chang violated the Marine Mammal Protection Act at 16 U.S.C. § 1372(a)(1) on September 25, 2009, at or around 06:17, by taking a marine mammal on the high seas in a manner not encompassed by the commercial fishing exemption for incidental taking of marine mammals at 16 U.S.C. § 1387 and 50 C.F.R. Part 229.

31. The Agency has established by a preponderance of the evidence that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC and Ho-Ching Chang violated the Marine Mammal Protection Act at 16 U.S.C. § 1372(a)(1) on September 25, 2009, at or around 16:01, by taking a marine mammal on the high seas in a manner not encompassed by the commercial fishing exemption for incidental taking of marine mammals at 16 U.S.C. § 1387 and 50 C.F.R. Part 229.

32. The Agency has established by a preponderance of the evidence that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC and Ho-Ching Chang violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on September 18, 2009, by setting a purse seine net on or within one nautical mile of a fish aggregating device or by setting a purse seine net in a manner intended to capture fish that have aggregated in association with a FAD.

33. The Agency has established by a preponderance of the evidence that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC and Ho-Ching Chang violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on September 20, 2009, by setting a purse seine net on or

within one nautical mile of a fish aggregating device or by setting a purse seine net in a manner intended to capture fish that have aggregated in association with a FAD.

34. The Agency has established by a preponderance of the evidence that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC and Ho-Ching Chang violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on September 21, 2009, by setting a purse seine net on or within one nautical mile of a fish aggregating device or by setting a purse seine net in a manner intended to capture fish that have aggregated in association with a FAD.

35. The Agency has established by a preponderance of the evidence that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC and Ho-Ching Chang violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on September 22, 2009, by setting a purse seine net on or within one nautical mile of a fish aggregating device or by setting a purse seine net in a manner intended to capture fish that have aggregated in association with a FAD.

36. The Agency has established by a preponderance of the evidence that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC and Ho-Ching Chang violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on September 23, 2009, by setting a purse seine net on or within one nautical mile of a fish aggregating device or by setting a purse seine net in a manner intended to capture fish that have aggregated in association with a FAD.

37. The Agency has established by a preponderance of the evidence that Respondents Paul Magellan, Sea Honor LLC and Yen Hsing Tasai violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(3) on September 28, 2009, by deploying a FAD into the water.

38. The Agency has established by a preponderance of the evidence that Respondents Paul Magellan, Sea Honor LLC and Yen Hsing Tasai violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(3) on September 30, 2009, by deploying a FAD into the water.

39. Under joint and several liability and the theory respondeat superior, Respondents are jointly and severally liable for the particular violations proven against them of the Western and Central Pacific Fisheries Convention Implementation Act and the Marine Mammal Protection Act. See 15 C.F.R. § 904.107; see also In re Bruce Stiller, et al., 1998 WL 1277931 (Aug. 10, 1998).

## **VII. Consideration of Penalty Assessment**

Under 16 U.S.C. § 6905(c), any person who violates the United States' implementation of the Western and Central Pacific Fisheries Convention is subject to the same penalties as provided in the Magnuson-Stevens Act (16 U.S.C. § 1801 et seq.). That Section also gave the

Secretary of Commerce the authority to enforce the implementation of the Convention “in the same manner, by the same means, and with the same jurisdiction, power, and duties” as if all applicable terms and provisions of the Magnuson-Stevens Act were incorporated into and made part of the WCPFC implementation statutes. Id. Therefore, in considering the penalty for Respondents’ FAD violations, I must look to the Magnuson-Stevens Act and relevant Agency precedent concerning such penalties.

The 1990 amendments to the Magnuson-Stevens Act increased the civil penalties from \$25,000 to \$100,000 per violation. See 16 U.S.C. § 1858(a). However, the House Report for the Committee on Merchant Marine and Fisheries cautioned that civil penalties of that magnitude “should be reserved for use in cases of significant and severe offenses or serious repeat offenses[.]” H.R. Rep. No. 101-393 at 30-31 (Dec. 15, 1989). The Magnuson-Stevens Act’s civil penalties are subject to the Federal Civil Penalties Inflation Adjustment Act of 1990 and have increased several times since then. The maximum penalty per violation at the time of Respondents’ conduct (i.e., 2009) was \$140,000. See 73 Fed. Reg. 75321 (Dec. 11, 2008).

The F/V Pacific Ranger Respondents are thus subject to a statutory maximum penalty of \$140,000 for their proven FAD violation; the F/V Ocean Conquest Respondents are subject to a total statutory maximum of \$280,000 for their two proven FAD violations; the F/V Ocean Encounter Respondents are subject to a total statutory maximum of \$700,000 for their five proven FAD violations; and the F/V Sea Honor Respondents are subject to a total statutory maximum of \$280,000 for their two proven FAD violations.

The MMPA provides a maximum civil penalty of \$10,000 for a proven violation. 16 U.S.C. § 1375. The maximum penalty per violation at the time of Respondents’ conduct (i.e., 2009) was \$11,000 under the Federal Civil Penalties Inflation Adjustment Act of 1990. See 73

Fed. Reg. 75321 (Dec. 11, 2008). The F/V Ocean Conquest Respondents are thus subject to a statutory maximum penalty of \$11,000 for their proven MMPA violation and the F/V Ocean Encounter Respondents are subject to a total statutory maximum penalty of \$44,000 for their four proven MMPA violations.

Agency regulations provide for joint and several liability under 15 C.F.R. § 904.107. See also In re James Chan Song Kim, et al., 2003 WL 22000639 (NOAA 2003); In re Corsair Corporation, F/V CORSAIR, 1998 WL 1277924 (NOAA 1998); In re Atlantic Spray Corporation, 1997 WL 1402870 (NOAA 1997). Generally, joint and several liability is imposed on the vessel's owner if the violation occurs within the scope of the crewmember's duties. See In re Corsair Corporation, F/V CORSAIR, 1998 WL 1277924 (NOAA 1998); see also In re Blue Horizon, Inc., 6 O.R.W. 467 (NOAA 1991) (holding that owners of a fishing vessel are jointly and severally liable for the acts of an employee if the acts are directly related to duties that the employees have broad authority to perform); In re Darcy Lynn Shawver, et al., 2 O.R.W. 301 (NOAA 1980) (imposing joint and several liability under the MMPA). Here, no Respondent disputed that joint and several liability should apply for any proven violation.

Furthermore, the doctrine of respondeat superior also applies to any individuals who would claim to be independent contractors. See In re Bruce Stiller, et al., 1998 WL 1277931 (Aug. 10, 1998); In re Kenneth Shulterbrandt, William Lewis, 1993 WL 495728 (NOAA 1993); In re Charles P. Peterson, James D. Weber, 1991 WL 288720 (NOAA 1991); see also In re Richard O'Barry, et al., 1999 WL 1417459 (NOAA 1999) (finding corporate respondents liable for MMPA violation under the doctrine). The company Respondents did not argue that the vessel captains or the fish masters named as Respondents acted outside the scope of their employment arrangement in conducting the fishing activities at issue. Therefore, all

Respondents are held jointly and severally liable for any assessed penalty relative to their particular charges.

In assessing a penalty, the judge must consider each of the factors required by law. The Magnuson-Stevens Act requires that penalty assessments take into account “the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require.” 16 U.S.C. § 1858(a). Agency regulations mirror these requirements. See 15 C.F.R. § 904.108(a).

As provided in the Agency’s regulations, the judge must assess an appropriate penalty with no deference attaching to the Agency’s proposed penalty; nor must the judge strictly adhere to the Agency’s penalty schedule. See 15 C.F.R. § 904.204(m).<sup>42</sup> Agency counsel must justify at the hearing “that [the Agency’s] proposed penalty or permit sanction is appropriate, taking into account all the factors required by applicable law”. See 75 Fed. Reg. 3563, 2010 WL 2505213 (June 23, 2010).

At the time of Respondents’ violations, the Agency had developed and used penalty schedules specific to particular fisheries and types of violations as the basis for calculating proposed penalties for various violations.<sup>43</sup> The Agency did not have a specific penalty schedule that included FAD closure violations in the Western Pacific. However, the Agency did have a schedule for the “Western Pacific Pelagic Fishery” that listed a base penalty amount for “Fishing

---

<sup>42</sup> The earlier presumption of correctness attaching to the Agency’s proposed penalty had its origin in no small part from efforts by the Agency to cabin the judge’s discretion in assessing a penalty given the Agency’s assertion that the recommended penalty schedules were “derived from experience and conversations with the National Marine Fisheries Service.” In re Verna, 4 O.R.W. 64, 65 (N.O.A.A. App. 1985); see also In re Kuhnle, 5 O.R.W. 514 (N.O.A.A. App. 1989) (observing that the previous version of the regulations requiring that the judge may only depart from the Agency’s assessed penalty for stated good reason was a codification of Verna).

<sup>43</sup> The Agency had kept available its now superseded penalty schedules on its General Counsel’s website but apparently has elected to take these down. See <http://www.gc.noaa.gov/enforce-office3.html>.

within closed areas”. See ALJ Exh. 1. That schedule provided a penalty range of \$10,000-\$20,000, plus the fair market value of the catch for a respondent committing a first-time violation. Id. While that penalty schedule also contained a penalty range for 2<sup>nd</sup> and 3<sup>rd</sup> time violators with significantly higher fines, those schedule amounts are inapplicable since Respondents have no prior fisheries violations. Id.

On March 16, 2011, the Agency published a new penalty policy. See [http://www.gc.noaa.gov/documents/031611\\_penalty\\_policy.pdf](http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf). This new policy characterizes the setting of a purse seine net near or in association with a FAD during a FAD closure period as a “Level V” offense on a general scale ranging from I (least serious) to VI (most serious). Id. at 40. A Level V Magnuson-Stevens Act violation results in a suggested range of \$15,000-\$20,000 per violation at the lowest level of culpability (negligence) to a \$60,000-\$100,000 range with a permit sanction of 60-180 days for the highest level of culpability (intentional). Id. at 25. Like the previous penalty policy, the new policy also includes the value of the catch as an additional amount to any base penalty ranges. See id. at 5. In formulating this new policy, the Agency clearly believed that a base penalty in the range of \$10,000-\$20,000 per violation (as in the arguably analogous Western Pacific Pelagic fishery policy) was far too low to account for the economic realities of purse seine fishing FAD violations.

However, the new policy explicitly only applies to all civil enforcement cases “charged on or after its issuance on March 16, 2011.” Id. at 1. Given that the Agency issued its NOVA against Respondents on September 29, 2010, the new policy does not apply and the penalties suggested by it will not be used to formulate the appropriate penalty in this case.

While the now-superseded Western Pacific Pelagic penalty policy and its range of penalties for a “closed area” fishing violation could be construed as broadly similar to

Respondents' fishing on a FAD during the closed period called for by CMM 2008-01, I find imposing such a penalty (i.e., \$10,000-\$20,000, plus the value of the catch) inadequate to properly address violations like the ones here. The purse seine tuna fishery in the Western Pacific is a large scale fishery with tremendous economic potential for large commercial operators in it. See Resp. Exh. A at 16 (noting that the 2009 value of the purse seine tuna catch in the WCPFC for 2009 was US\$2,300 million). As discussed below, the economic value of the catch must be considered in any penalty assessed in order to make the ramifications for any violations more than a cost of doing business. Here, if one were to impose a base penalty amount of only \$10,000-\$20,000 per violation and then add on the economic value, the incentives to continue to violate the regulations would continue because of the value of the catch can exceed the statutory maximum (\$140,000) when such catches results in hundreds of mt of tuna.

To ensure greater compliance and make the economic calculus more balanced in terms of the risk of being caught and successful enforcement action taken versus the large amount of fish potentially caught for committing these kinds of violations and associated economic benefit, a more significant penalty is required than the Western Pacific Pelagic penalty schedule recommends. Therefore, I find that a base penalty of \$25,000 for a FAD violation where no species targeted for protection by CMM 2008-01 were caught is appropriate; and a base penalty of \$50,000 for a FAD violation where such targeted species were caught is proper under the circumstances. This base penalty amount is reasonable to deter Respondents and other fishery participants from committing these violations.

The Agency also had developed a penalty schedule generally applicable to MMPA violations (revised as of 12/08). See ALJ Exh. 2. The MMPA Penalty Schedule divided those

taking violations into categories involving: 1) the killing of marine mammals; 2) the harming/hunting/capturing of marine mammals; 3) the harassing of marine mammals; and 4) the collecting of marine mammal parts. Id. For a respondent with no prior violation history, the MMPA Penalty Schedule suggested that a penalty in the range of \$1,000-Statutory Maximum was appropriate for a taking that harmed or captured a marine mammal and suggested a penalty range of \$500-\$8,000 for a taking that harassed a marine mammal. Id.

There is no allegation that the marine mammals involved in this case were injured or killed. However, these marine mammals were harassed by the encirclement in the purse seine net. The vessels also generally made efforts to get any marine mammals from the purse seine net; sometimes apparently at the loss of fish associated with the whale. Nevertheless, I find that a penalty at the high end of the statutory maximum is appropriate for these violations in this context. Because the possible value of the catch associated with/in proximity of these mammals is so high, the economic risk/reward for ignoring the MMPA prohibitions might lead these Respondents and others to further engage in this practice without larger civil penalties. Furthermore, SPTC was explicitly instructed that any such intentional sets on marine mammals were unlawful and yet did so anyway.

The Agency's then-current penalty policy also listed a number of aggravating and mitigating factors to be considered, including: (1) gravity of the violation; (2) harm to the resource; (3) condition and/or value of the resource; (4) whether fish were seized; (5) economic benefit derived from the violation; (6) all factors relevant to the violator's conduct, such as: (a) state of mind, knowledge, intent, willfulness, negligence, gross negligence or inadvertence; (b) whether the offense was committed in such a way as to avoid detection (by concealment or flight); (c) degree of dependence on illegal behavior for livelihood; and (d) whether the offense

was part of a pattern, course of conduct, common scheme or conspiracy, and violator's roles in the activity); (7) whether there were multiple violations; (8) degree of cooperation; (9) obstruction of justice during investigation or thereafter; (10) acceptance of responsibility; (11) danger of violence or injuries; (12) ability to pay; (13) history of past offenses; and (14) deterrence of future violations by violator. ALJ Exh. 3, Preface at ii-iii.

Respondents did not assert an inability to pay in accordance with the requirements of Agency regulations. See 15 C.F.R. § 904.108(b)-(h); see also 16 U.S.C. § 1858(a) (ability to pay to be considered as long as information served at least 30 days prior to an administrative hearing). Therefore, no adjustment to the penalties will be made based on that factor.

**A. Agency's Penalty Arguments**

The Agency seeks a total civil penalty of \$1,456,750.00 against Respondents for the alleged violations broken down as follows:<sup>44</sup>

<b>F/V Sea Quest:</b>	Count 1 (FAD Violation):	\$117,500
	Count 2 (FAD Violation):	<u>\$136,250</u>
	Total:	<b>\$253,750<sup>45</sup></b>
<b>F/V Sea Honor:</b>	Count 1 (FAD Violation)	\$80,000
	Count 2 (FAD Violation)	<u>\$80,000</u>
	Total:	<b>\$160,000<sup>46</sup></b>
<b>F/V Pacific Ranger:</b>	Count 1 (FAD Violation)	<u>\$117,500</u>
	Total	<b>\$117,500<sup>47</sup></b>
<b>F/V Ocean Conquest:</b>	Count 1 (MMPA Violation)	\$11,000
	Count 2 (FAD Violation)	\$116,750
	Count 3 (FAD Violation)	<u>\$140,000</u>
	Total:	<b>\$267,750<sup>48</sup></b>

<sup>44</sup> The Agency did not seek any permit sanctions against Respondents and I will not consider any such sanctions apart from my recommendation to the Administrator that Respondents' permits be conditioned to prohibit the respective Company Respondents from hiring or otherwise engaging the fishing master Respondents in any capacity for a period of at least 1 year.

<sup>45</sup> See Resp. Exh. U (Sept. 29, 2010 NOVA).

<sup>46</sup> See Resp. Exh. HH (Sept. 29, 2010 NOVA).

<sup>47</sup> See Resp. Exh. RR (Sept 29, 2010 NOVA).

<b>F/V Ocean Encounter:</b>	Count 1 (MMPA Violation)	\$11,000
	Count 2 (MMPA Violation)	\$11,000
	Count 3 (MMPA Violation)	\$11,000
	Count 4 (MMPA Violation)	\$11,000
	Count 5 (FAD Violation)	\$136,250
	Count 6 (FAD Violation)	\$140,000
	Count 7 (FAD Violation)	\$140,000
	Count 8 (FAD Violation)	\$102,500
	Count 9 (FAD Violation)	<u>\$95,000</u>
	Total:	<b>\$657,750</b>

Agency counsel thus sought the maximum allowable penalty for each of the MMPA violations, the maximum allowable penalty for three of the FAD violations, and well over 50% for all the remaining counts. For example, for the two servicing/deploying a FAD counts against the F/V Sea Honor Respondents, Agency counsel sought \$80,000 per count for those violations. Indeed, the total amount sought equals approximately 84% of the maximum allowed by the statutes violated.

### 1. The FAD Violations

Agency counsel attempts to justify the assessed penalty based on the alleged seriousness and gravity of the violations, exacerbated by the lucrative nature of the purse seine fishery in the Convention area; the need to take into account the economic benefit Respondents received from the unlawful fishing operations; and argued that the penalties sought were consistent with NOAA's new penalty policy matrix for FAD closure violations under the WCPFCIA. See Agency Post-Hearing Brief at 28-29.<sup>49</sup>

For the reasons discussed herein, the use of this explicitly inapplicable penalty policy as guidance is inappropriate. Agency counsel stated that a penalty in the upper range of the statutorily allowable penalty (i.e., \$140,000) was appropriate for the FAD violations at issue. Id.

---

<sup>48</sup> See Resp. Exh. ZZ (Sept. 29, 2010 NOVA).

<sup>49</sup> See also Agency Reply Brief at 19-24.

at 29. However, Agency counsel did not discuss the specific penalty calculation for any particular Count or how the specific amount requested was justified.

Agency counsel articulated the factors called for by 16 U.S.C. § 1858(a) in general terms. With respect to the nature of the violations, Agency counsel highlighted the fact that CMM 2008-01 was instituted due to the urgent need to protect the bigeye and yellowfin tuna stocks and that the FAD closure periods were the primary mechanism to reduce the impact of purse seine fishing on these species. Id. at 29-30.

Agency counsel also argued that the extent of Respondents' violations were significant because they were in direct violation of the express language of the regulations and reflected a blatant disregard for the FAD closure. Agency Reply at 20.

Agency counsel also asserted Respondents' actions were intentional and done with knowledge of the regulations. Agency Post-Hearing Brief at 32-34. Agency counsel countered Respondents' claim of confusion as to the requirements of the regulations and instead maintained that Respondents were well aware of the FAD restrictions. Id.

With respect to the gravity of the violations, Agency counsel argued that CMM 2008-01 covered only a three year period and that ignoring or minimizing the importance of the FAD closure period CMM 2008-01 instituted during its initial year would be inappropriate. Agency Post-Hearing Brief at 30-31.

Agency counsel strongly suggested that the economic benefit Respondents received for the unlawful sets must be accounted for in determining the penalty in terms of the gravity of the offenses. Id. at 31-32; Agency Reply at 21-23. To determine this economic benefit, Agency counsel presented the testimony and analysis of Dr. Christopher Reid related to the applicable market price for tuna caught during the period of the violations, which was higher than what

Respondents claim they received for the tuna they actually caught and sold. See Agency Exh. 16 (Dr. Reid's report); Tr. at 240:21-24 (July 11, 2012) and Resp. Exhs. T; BB (F/V Sea Quest trip price summary and supporting documents); GG (F/V Sea Quest trip price summary and supporting documents); XX (F/V Pacific Ranger trip price summary and supporting documents); LL (F/V Ocean Conquest trip price summary and supporting documents); BBBB (F/V Ocean Encounter trip price summary and supporting documents).<sup>50</sup> Dr. Reid's market analysis estimated that the total price for the tuna Respondents sold ranged from a low figure of \$532,345 and a high estimate of \$923,784, which was significantly higher than Respondents' claimed price of [REDACTED] for the fish. Agency Exhs. 64-65; Agency Reply at 21.

Despite the receipts Respondents proffered, Agency counsel also questioned whether the accuracy of Respondents' proffered prices. Agency Reply at 21-23. Specifically, Agency counsel pointed to Dr. Reid's analysis and the recorded market prices for skipjack and yellowfin tuna in 2009. Id. (citing Resp. Exh. A market analysis). Agency counsel also questioned the nature of the relationship between SPTC, Respondents' vessels, and the exclusive contract with FCF for the sale of the vessels' tuna, suggesting that these might have been "less-than-arms-length" transactions because of Mr. Chou's (CEO of SPTC) position in both companies. Id. Agency counsel thus urged the Court to reject Respondents' proffer on the value of the catch and impose the penalties requested as a result.

## **2. The MMPA Violations**

Agency counsel attempted to justify the proposed statutory maximum penalty for the MMPA violations by again pointing to the high value of the WCPFC tuna fishery and arguing

---

<sup>50</sup> This information is protected by the Court's Protective Order as confidential, proprietary information, which limits its disclosure. The Agency should ensure that all due protections are made for this and other commercially sensitive information.

that the potential benefits from making a set on a whale far exceed the statutory maximum penalty. Agency Post-Hearing Brief at 34-35. Furthermore, Agency counsel asserted that the statutory maximum was appropriate “[g]iven the recent increase in this type of violation by the purse seine fleet”. Id. at 35.<sup>51</sup>

## **B. Respondents’ Response**

### **1. The FAD Violations**

Respondents insisted they did not violate the FAD regulations and merely conducted allowable fish under the boat sets. Nevertheless, Respondents argued that any penalty assessed should be based on the actual price paid to the vessels for the fish and that Respondents had both explained how the vessels are paid and the price for the fish. Respondents’ Post-Hearing Memorandum at 21-23. Furthermore, Respondents maintained that a penalty, if any, should reflect the degree to which the tuna species CMM 2008-01 was meant to protect from exploitation during the FAD closure period were harmed and that the penalty should be based on the total amount, if any, of yellowfin and bigeye caught. Respondents’ Post-Hearing Memorandum at 25-26. Respondents argued that any harm to the bigeye and yellowfin fishery was negligible in terms of conservation effect given the small amount of such species caught in the alleged unlawful sets and that the penalty should reflect that fact. Id.

---

<sup>51</sup> Agency counsel provided no record cite for this assertion and the Court has been unable to find any justification in the record for it. Indeed, the only record information found indicates that in 2005, there were two marine mammals injured/killed on U.S. purse seine vessels in 293 observed sets in the WCPO fishery. The preliminary data from 2006 (88 sets) indicated no marine mammal observations on U.S. purse seine vessels. Resp. Exh. II at 91. These numbers pale in comparison to the numbers of the longline fleet. Id. The Agency’s MMPA regulations clearly make intentional sets on mammals unlawful even in connection with commercial fishing activities. However, since there is no record evidence since 2006 of whale injuries or deaths, Respondents’ argument that Level B Harassment should be permissible has merit. In this regard, the record evidence suggests that none of these whales were endangered or threatened and the degree of disturbance ranged from minor to modest. Nevertheless, despite Respondents arguments, this is a policy issue outside the scope of my authority. Indeed, the Administrator has the responsibility to carefully consider the operational and economic burden that this policy imposes on the U.S. purse seine fleet vs. the harm to the resource before determining whether to maintain this regulatory proscription.

Furthermore, Respondents claimed NOAA's efforts to assess such large penalties for a new regulatory program "that relies on inexperienced international observers not trained to U.S. specifications" were inappropriate and some allowance should be made for the implementation of new requirements on the purse seine fleet during this FAD closure. *Id.* at 25.<sup>52</sup>

Respondents also argued that Agency counsel had exaggerated the gravity of the alleged violations based on the yellowfin and bigeye stock status and the minimal effect Respondents' activities had on such stocks. Respondents' Reply at 16.

## **2. The MMPA Violations**

Respondents denied that they intentionally made any sets on whales and urged that no violation be found. In terms of a penalty for any proven MMPA violations, Respondents questioned Agency counsel's rationale for seeking the statutory maximum penalty under the MMPA for instances where at most the whales were harassed and suffered no apparent injury and were not killed. Respondents' Reply at 17.

## **C. General Background Applicable to All Counts**

### **1. The Harm to the Resource**

Unquestionably, CMM 2008-01 directed its conservation measures toward two particular species of tuna – the bigeye and the yellowfin. I agree with Respondents that where no such species were caught in the unlawful sets, there is no direct harm to the resource protected by CMM 2008-01 and the U.S. regulations implementing that conservation measure. At the time of Respondents' violations, skipjack tuna was not considered overfished or subject to overfishing, and the FAD closure was specifically designed to minimize purse seine fishing impacts on

---

<sup>52</sup> Respondents also pointed to the Commission's subsequent clarification of CMM 2008-01 with CMM 2009-02, which they argued represented an "acknowledged lack of clarity" in the measures adopted in CMM 2008-01. Respondents Post Hearing Memorandum at 32.

yellowfin and bigeye tuna – not skipjack. Respondents' vessels during the trips for which FAD violations (not including the F/V Sea Honor's landings because the violation had to do with deploying/servicing a FAD) were charged landed skipjack at a much higher percentage than yellowfin and bigeye. Resp. Exhs. T; BB (F/V Sea Quest trip price summary and supporting documents); GG (F/V Sea Quest trip price summary and supporting documents); XX (F/V Pacific Ranger trip price summary and supporting documents); LL (F/V Ocean Conquest trip price summary and supporting documents); BBBB (F/V Ocean Encounter trip price summary and supporting documents). Specifically, for these trips, the vessels landed a total of 4,178.93 mt of tuna, composed of [REDACTED] of [REDACTED] of [REDACTED] and [REDACTED] of [REDACTED]

Agency counsel is correct that the actual composition of the catch of yellowfin/bigeye is irrelevant as to fact of violation. The explicit violation was to set on a FAD and the regulations did not indicate that such sets had to be connected to the capture of yellowfin or bigeye tuna. However, that fact is crucial to determining the severity of the violations with respect to harm to the resource. Indeed, it is reasonable to base the civil penalty differently between those unlawful sets where yellowfin and/or bigeye were caught and those in which only skipjack were caught. As discussed above, I will therefore impose a base penalty for non-bigeye/yellowfin sets at \$25,000 per count and for those sets with bigeye/yellowfin tuna, \$50,000 per count. This difference will account for the harm to the resource that was specifically targeted for protection by the FAD closure measures in CMM 2008-01.

## **2. The Value of the Fish Caught**

Agency regulations and case law clearly make the economic benefit a violator derives from their unlawful activity a necessary recoupment for any penalty assessed. Under 15 C.F.R. §

904.108, a civil penalty may be increased for commercial violators “to make a civil penalty more than the cost of doing business.” See also In re Pesca Azteca, S.A. de C.V., 2009 WL 3721029 (NOAA 2009) (J. McKenna) (subsequently affirmed by the Agency Administrator on appeal); In re Christine Swanson, 2005 WL 776152 (NOAA 2005) (J. McKenna). A civil penalty must take into account the value of the catch obtained through unlawful means to alter the economic calculus that might lead a participant in a fishery to simply account for a potential fine as a cost that can be absorbed with the proceeds from such unlawful activity. Otherwise, enforcement would be severely compromised.

Respondents’ arguments that only the value of the bigeye/yellowfin caught should be reflected in any penalty must be rejected. But for Respondents’ violation of the FAD closure, the particular skipjack (and yellowfin/bigeye) caught in those unlawful sets would not have been obtained. To allow Respondents to violate the FAD closure and not account for the total economic value of the catch associated with their unlawful fishing activities would provide an unjust windfall to Respondents. Therefore, the economic value of all the tuna unlawfully caught must form part of the penalty for each Count proven.<sup>53</sup>

Several difficulties arise in this case concerning the economic benefit Respondents derived from their unlawful activities. First, the parties argued about the proper price to be used to measure the value of the fish caught. The Agency, without the benefit of actual receipts after extensive discovery, used Dr. Reid’s analysis as the basis for a reasonable price per metric ton. Agency counsel continued to suggest that Dr. Reid’s numbers be used even after Respondents provided the receipts and testimony from an SPTC witness that explained the prices paid for the fish.

---

<sup>53</sup> For the Charges at issue herein, no fish were seized by the Agency.

Respondents' arguments that the actual receipt value be used to calculate any penalty are more persuasive than Agency counsel's position. Dr. Reid's numbers concerning the economic value of the catch were based on general market conditions, different/multiple countries for offload/sale, and not the specific economic arrangements SPTC had with its exclusive purchaser FCF Trading Company. In any event, even Dr. Reid admitted that his numbers were a market estimate of the value of the fish and that the actual amount paid would be the value of the fish paid. See Tr. at 229:7-230:8 (July 11, 2012). The impact of Dr. Reid's analysis is thus undermined by the evidence Respondents put forth, and I find the data Respondents submitted to be more credible than Dr. Reid's in determining the value of the fish caught.<sup>54</sup>

Second, discrepancies exist between the estimates of the fish caught for most of the particular sets in terms of total mt of tuna caught and/or the species composition. The record on this subject is thus contradictory.

Under this circumstance, I find it more likely than not that the fish receipts reflect the actual catch more accurately than estimates made by the observer and/or the crew while underway. Visual estimates of the catch composition are not the same as the more detailed review and accounting of the product made when the product is offloaded and sold in port. The reliability of the latter is necessarily greater than attempts to characterize the species composition from brails of fish at sea. Respondents' Exhibits T; BB (F/V Sea Quest trip price summary and

---

<sup>54</sup> Agency counsel argued that Respondents' numbers might not be the result of a market, arms-length transaction, but no preponderant record evidence indicates this to be the case. There is some indication that Mr. Chou might have had (or possibly continues to have) connections with the fishing company with which SPTC has an exclusive contract for the sale of fish. Furthermore, the Court takes notice that there are some unexamined interlocking relationships between SPTC and Fong Kuo Fishing Company, as reflected in the F/V Ocean Encounter's coordination with a Fong Kuo vessel to capture fish that had aggregated under the Taiwanese vessel (see also ALJ Exh. 4). The extent, if any, of such relationships and connections, among FCF/Fong Kuo/SPTC are simply too nebulous based on the record to make any finding. Therefore, I will not make an assumption of alleged below market transactions without more credible evidence to support such assertions. Notably though, had Respondents' proffered prices been proven to have been below market with some ulterior purpose and/or shielding or distributing of profits among interlocking entities, prices along the lines of Dr. Reid's would have been used to determine the correct economic value of the catch.

supporting documents); GG (F/V Sea Quest trip price summary and supporting documents); XX (F/V Pacific Ranger trip price summary and supporting documents); LL (F/V Ocean Conquest trip price summary and supporting documents); and BBBB (F/V Ocean Encounter trip price summary and supporting documents) are thus the best evidence available to determine the composition of the fish caught.

Third, this determination thus raises the question of how to account for discrepancies between species composition in calculating the economic benefit Respondents received for a particular unlawful set. Because the tuna were not separated and sold by set but rather mixed into the holding tanks of the vessels, it is impossible to discretely determine the exact composition of any particular set's tuna. Moreover, the price varied depending on both the size and species of the tuna. Id.

Neither party fully addressed possible identification problems among bigeye, yellowfin and skipjack. Therefore, I am left to account for contradictory record evidence on the basis of the best available evidence in the record. A reasonable way to estimate the value of the catch for the unlawful sets is to take the weighted average of the tuna prices paid to the particular vessel for the trip on which violations were alleged and found proven and multiply that average price by the number of tuna caught. Using such a weighted average is reasonable because vastly more skipjack were caught than yellowfin or bigeye tuna. Indeed, for the F/V Ocean Encounter, the observer estimated that the vessel caught much more bigeye tuna for the sets in question than the receipts show were landed for the entire trip. It is more likely than not that the observer's species identification were wrong rather than the vessel was somehow intentionally not

accounting for what were generally higher value fish.<sup>55</sup> Nothing in the record allows me to allocate the tuna caught with any further precision. Finally, where the vessel's records and the observer's records differ as to the total amount of fish caught for a particular set related to a FAD violation, the amount of the two estimates will be averaged to arrive at the best possible estimate of the mt of fish caught for that particular set.

The facts of each Respondent's violations will be analyzed in detail with respect to their particular catches on the sets in question.

#### **D. Respondents' General Degree of Culpability**

Each individual Respondent's degree of culpability merits a separate discussion. As indicated in this Initial Decision, I find the fishing masters to be clearly the most culpable, followed by the company Respondents who hired these fishing masters, and then respective vessel captains, who were not responsible for directing the specific fishing operations on the vessel. A complete discussion of the fishing masters is set forth below.

The company Respondents cannot be exonerated because of the bad acts of its employees – the fishing masters. The company Respondents elected to hire these fishing masters who acted with little sense of complying with the FAD closure regulations and MMPA requirements.

The vessel captains were given the task of running the vessel generally as its master – not to conduct fishing operations. Certainly, each was aware of, and should have ensured compliance with, the applicable FAD closure regulations and MMPA requirements. To the extent they failed to do so, they are liable for such failures. Furthermore, as masters of the vessels, these violations occurred under their respective watches. It is possible that the

---

<sup>55</sup> Interestingly, the same holds true for the F/V Sea Quest charges. However, Agency counsel conceded in responses to Respondents' Proposed Findings of Fact on these charges that the ship's logsheet numbers were correct as opposed to the observers. This issue is fully discussed in the analysis of the particular charges against the F/V Sea Quest Respondents.

individual captains elected to maintain ignorance of the details concerning the fishing activities of the fishing masters. The record does not reveal these nuances. However, at the very least a heightened vigilance would have been the prudent course of action during the newly instituted requirements.

**E. Respondents' Prior Offenses**

Nothing in the record indicates that Respondents have any prior violations.

**F. Other Matters As Justice Requires**

Generally, Respondents' conduct was willful and deliberate. Within a very short period during which the FAD closure was in place, Respondents violated both the FAD regulations and the MMPA regulations. Certainly some Respondents' conduct was more egregious than others. For example, the F/V Ocean Encounter Respondents committed 4 MMPA violations (2 of which resulted in the capture of approximately 46 mt of fish total) and 5 FAD violations (the results of which accounted for approximately 56% of the total catch for the trip)<sup>56</sup> and the F/V Ocean Conquest Respondents committed 1 MMPA violation and 2 FAD violations (the results of which accounted for approximately 26% of the total catch for the trip).<sup>57</sup> Regardless of the specific numbers of violations and/or the particular results, the unlawful sets, which should not have been made, were quite beneficial to Respondents. Thus, the economic value of any unlawful catch must be taken into account for the reasons given above.

Contrary to Agency counsel's protestations, I am sympathetic to Respondents' arguments concerning the timing of the new restrictions called for in Agency regulations implementing the FAD closure. CMM 2008-01 imposed new limitations on the purse seine industry, and it can be expected that direct, clear communication about the requirements of a new U.S. law might not be

---

<sup>56</sup> See Resp. Exh. BBBB.

<sup>57</sup> See Resp. Exh. LLL.

delivered effectively to the field, particularly given the dynamics of multi-national crews. However, Respondents were absolutely under an obligation to know the rules and abide by them. On balance, weighing all factors, some allowance should be made for a change in law that imposes new sets of obligations when assessing the proper sanction for such conduct.

Furthermore, the fact that the Commission clarified certain portions of CMM 2008-01 via CMM 2009-02 verifies that some “kinks” needed to be worked out on how the FAD closure would operate. However, such modifications/clarifications are only a minor mitigating factor due to the fact that CMM 2009-02 addressed issues not directly at play in Respondents’ FAD sets (but acknowledging that there were concerns “to ensure clear rules for the applications of the provisions relating to the FAD closure and catch retention”). See CMM 2009-02 at 1. Finally, the Agency clarified the FAD rules in 2013 as discussed above to account more explicitly for both fish under the boat sets and use of lights to aggregate fish.

#### **G. The Responsibility of the Fishing Masters**

The most troubling aspect for me in making the penalty determination involves the fishing master Respondents: Ching Wen Wu, Wu Chin Pin, Ho-Ching Chang, Yen Hsing Tasai, and Su Tien Shih. None of these individuals appeared at the hearing and I did not hear their respective sides of the story. However, the record indicates that the fishing masters, as the director of fishing operations at sea, bear the largest, direct brunt of responsibility for the violations. The fishing masters directed all the fishing operations conducted by directing the crew where, when, and how to fish for the tuna.

Importantly, there is no way to render an effective sanction for these fishing masters. Each appears to be a citizen of Taiwan. The enforcement of any penalty against such Respondents is extremely problematic and in all likelihood, despite the imposition of joint and

several liability, the Agency will look to the company respondents for payment of the penalty assessed. The end result is that primary bad actors in these cases essentially get away with their unlawful activities and resultant likely large paydays without effective means of consequence or direct deterrence.

Joint and several liability is thus inadequate to address the fundamental facts leading up to the violations. While I am not authorized to impose the kind of sanction that would really affect the fishing masters, I can and do recommend that the Agency take action with respect to all of Respondent companies' fishing permits **prohibiting the hiring and/or retention** by them of any of the Respondent fishing masters – Ching Wen Wu, Wu Chin Pin, Ho-Ching Chang, Yen Hsing Tasai, and Su Tien Shih for a period of no less than **1 year**. With respect to the F/V Ocean Encounter's fishing master, I recommend that the period of prohibition be **5 years** due to the repeated and multiple violations (both MMPA and FAD violations) in such a short period of time. It is simply unacceptable for a U.S. flagged vessel to continue to employ these foreign nationals in such a key role who act with little or no recognition and adherence to the United States regulations directly impacting these fishing activities. Moreover, it is equally unacceptable to allow the company Respondents to financially benefit from hiring these individuals and then turning a virtual blind eye to their conduct.

#### **H. Analysis and Calculation of Civil Penalty for Each Respondent's Violations**

##### **1. F/V Sea Quest Respondents**

##### **Charge 1 – FAD Violation**

The record demonstrates that on August 14, 2009, the F/V Sea Quest Respondents unlawfully made a set on fish that had aggregated under the vessel overnight in violation of 50 C.F.R. § 300.223(b). Both the observer and the vessel's Regional Purse Seine Logsheet recorded

that the vessel caught [REDACTED] of tuna. However, the vessel recorded the catch as consisting completely of skipjack tuna; whereas the observer recorded [REDACTED] of [REDACTED] and [REDACTED] of [REDACTED] caught in this set. Given that Respondents' receipts for this trip indicated that the vessel caught a total of only [REDACTED] for the entire trip, the observer's estimate of the set's composition is not reliable and not supported by the record evidence.

The observer's estimates of species composition are thus not credible in light of the evidence Respondents produced. However, the observer's failure to accurately record the exact amount of particular species caught in a given set does not invalidate his general observations of the vessel's fishing activities or necessarily make the vessel's equally suspect estimates of species composition inherently more credible than the observer's. The identification of species as they are being brailled from the purse seine net and placed in the hold is a difficult process for observers and crewmembers alike. It is more likely than not that the observer misidentified the amount of the particular species of fish being loaded into the vessel, but not necessarily that no such species formed part of the catch.

Indeed, the vessel's Regional Purse Seine Logsheet is inaccurate in such estimates as well. For example, the F/V Sea Quest's Logsheet for this trip estimated that the vessel caught [REDACTED] of [REDACTED] and only [REDACTED] of [REDACTED]. See Agency Exh. 34. Yet, the trip receipts Respondents produced indicate that [REDACTED] [REDACTED] were caught on this trip. See Resp. Exh. BB. Therefore, neither the observer nor the vessel can account for the fish as they came on board the vessel with any reasonable degree of accuracy.

Under these circumstances, the most reasonable way to resolve these inaccuracies is to accept the fact of the observer's identification of at least some of those species brought aboard as it is the general method for observers to estimate the catch by sampling the fish as they come aboard. See, e.g., Tr. at 49:13-51:23 (Aug. 14, 2012) (Captain Freitas discussing the method the vessel used to estimate the amount of fish and species composition and noting that it is "pretty much guessing on the species and everything else" but stating that the observers usually take out samples of fish and examine/measure them). Observers thus have greater time to evaluate the set's composition as opposed to the crew/vessel which is loading the fish into the holding wells.

However, Agency counsel conceded in replying to Respondents' Proposed Finding of Fact No. 63, no yellowfin or bigeye were caught in this set. But for Agency counsel's agreement to Respondents' proposed finding of fact (effectively stipulating to a fact over which I have no power to reject), I would have found the observer's records indicating that the catch consisted of at least some bigeye and/or yellowfin tuna credible (and thus increased the base civil penalty to \$50,000). The amount of any such tuna would have been determined based on the amount he recorded and the actual amounts of such tuna for the trip as a whole.<sup>58</sup>

Given the agreement of the parties that the catch resulted in [REDACTED] I find the estimated total gross ex-vessel economic value of this set's catch thus equals [REDACTED]. Because no species targeted by CMM 2008-01 were caught in this set, the base penalty amount for the violation equals \$25,000 for the reasons stated in this Decision and Order. The total civil penalty assessed for this violation thus equals [REDACTED].

---

<sup>58</sup> A weighted average of species composition for the entire trip leads to the more likely catch results for this set consisting of: [REDACTED]

See Resp. Exh. BB.

## **Charge 2 – FAD Violation**

The record demonstrates that on September 17, 2009, the F/V Sea Quest Respondents unlawfully made a set on fish that had aggregated under the vessel overnight in violation of 50 C.F.R. § 300.223(b). The observer estimated that this set resulted in the capture of 75 mt of fish consisting of 18.75 mt of skipjack, 37.5 mt of yellowfin, and 18.75 mt of bigeye. The vessel's Regional Purse Seine Logsheet recorded the results of this set as capturing 75 mt of tuna, consisting of 65 mt of skipjack and 10 mt of yellowfin. For the entire trip during which this set occurred, Respondents' receipts reflect the catch of [REDACTED] to be only [REDACTED] mt. The observer's estimates of the set's composition are questionable and not supported by the record evidence of Respondents' catch receipts. See Resp. Exh. GG.

Agency counsel conceded in replying to Respondents' Proposed Finding of Fact No. 67, that the catch for this set included approximately [REDACTED] and [REDACTED]

[REDACTED] Given the parties' agreement that the catch resulted in approximately [REDACTED] [REDACTED] I find the estimated total gross ex-vessel economic value of this set's catch thus equals [REDACTED]

[REDACTED] Because some species targeted by CMM 2008-01 were caught in this set, the base penalty amount for the violation equals \$50,000 for the reasons stated in this Decision and Order. The total civil penalty assessed for this violation thus equals [REDACTED]

## **2. F/V Sea Honor Respondents**

### **Charge 1 – FAD Violation**

The record demonstrates that on September 28, 2009, the F/V Sea Honor Respondents unlawfully deployed a FAD in violation of 50 C.F.R. § 300.223(b). Specifically, the F/V Sea

Honor Respondents came upon an existing FAD and deployed a satellite beacon/buoy on that FAD. Agency counsel did not allege that the F/V Sea Honor made a set upon this FAD during the FAD closure period or caught any fish in connection with this unlawful activity during the trip. However, such servicing/deploying of a FAD clearly violated the mandates of Agency regulations. This is more than a mere technical violation. The F/V Sea Honor Respondents could return to this FAD – now equipped with a satellite tracking buoy – to catch any fish that aggregated under that FAD and reap the economic rewards for their unlawful deployment of this FAD. However, nothing in the record allows me to assess whether Respondents have yet benefited from this unlawful conduct. Therefore, I find the base penalty assessed in this Decision and Order of **\$25,000** appropriate for this FAD violation.

#### **Charge 2 – FAD Violation**

Credible record evidence demonstrates that on September 30, 2009, the F/V Sea Honor Respondents placed an object into the ocean that clearly fell under the Agency’s definition of a FAD during the FAD closure period. This action violated Agency regulations at 50 C.F.R. § 300.223(b). Like the F/V Sea Honor’s first FAD violation, there are no allegations that the F/V Sea Honor made a set upon this FAD during the FAD closure period or caught any fish in connection with this unlawful activity during the trip. For the same reasons as provided above for Charge 1 against these Respondents, I find the base penalty assessed in this Decision and Order of **\$25,000** appropriate for this FAD violation.

### **3. F/V Pacific Ranger Respondents**

#### **Charge 1 – FAD Violation**

The record demonstrates that on September 30, 2009, the F/V Pacific Ranger Respondents unlawfully made a set on fish that had aggregated under the vessel overnight in

violation of 50 C.F.R. § 300.223(b). Both the observer and the vessel's Regional Purse Seine Logsheet estimated the vessel caught [REDACTED] of [REDACTED] as a result of this set. The price the vessel received for these [REDACTED] See Resp. Exh. XX. Given that no species targeted for conservation by CMM 2008-01 were caught as a result of this unlawful set, the base penalty of \$25,000, plus the economic value of the catch is warranted for this violation. Therefore, I find a civil penalty in the total amount of [REDACTED] appropriate for this violation.

#### **4. F/V Ocean Conquest Respondents**

##### **Charge 1 – MMPA Violation**

The record demonstrates that on September 18, 2009, the F/V Ocean Conquest Respondents intentionally set on a live whale in order to capture the tuna associated with that whale in violation of the MMPA. The vessel did not catch any fish as a result of this set and the whale apparently escaped from the net unharmed. Given the incentives for making unlawful sets on marine mammals when the amount of potential economic gain associated with a catch of large tuna is so great, compliance with the mandates not to set on marine mammals is difficult to enforce. Here, Respondents knew not to intentionally set on whales and yet elected to do so anyway presumably because the economic benefits outweighed the potential cost under the MMPA. For these reasons, I find the statutory maximum of **\$11,000** an appropriate civil penalty for this violation.

##### **Charge 2 – FAD Violation**

The record demonstrates that on September 23, 2009, the F/V Ocean Conquest Respondents unlawfully made a set on fish that had aggregated under the vessel overnight in violation of 50 C.F.R. § 300.223(b). Specifically, the F/V Ocean Conquest used lights overnight

in an effort to aggregate fish while it drifted and then deployed auxiliary boats the next morning with submerged lights to hold the fish in place while the F/V Ocean Conquest made a set.

The observer estimated that this set resulted in the capture of 49 mt of fish consisting of 46 mt of skipjack and 3 mt of yellowfin. The vessel's Regional Purse Seine Logsheet recorded the results of this set as capturing 50 mt of tuna, consisting of 47 mt of skipjack and 3 mt of yellowfin. [REDACTED] the observer's recorded mt for this set with the Regional Purse Seine Logsheet leads to the conclusion that the set more likely than not resulted in the catch of [REDACTED] mt total, consisting of [REDACTED] and [REDACTED]

The estimated total gross ex-vessel economic value of this set's catch equals [REDACTED]

[REDACTED] See Resp. Exh.

LLL. Because some species targeted by CMM 2008-01 were caught in this set, the base penalty amount for the violation equals \$50,000 for the reasons stated in this Decision and Order. The total civil penalty assessed for this violation thus equals [REDACTED]

### **Charge 3 – FAD Violation**

The record demonstrates that on September 25, 2009, the F/V Ocean Conquest Respondents unlawfully made a set on fish that had aggregated under a Taiwanese vessel overnight in violation of 50 C.F.R. § 300.223(b). Specifically, the F/V Ocean Conquest used deployed auxiliary boats that morning with submerged lights to hold the fish in place while the F/V Ocean Conquest made a set on the fish that had aggregated under the Fong Kuo 736.

The observer estimated that the set resulted in the catch of 166 mt of tuna; whereas the vessel estimated the catch at 160 mt, composed of 70% skipjack (i.e., 116.2 mt); 20% yellowfin (i.e., 33.2 mt) and 10% big eye tuna (i.e., 16.6). The vessel's Regional Purse Seine Logsheet recorded the results of this set as capturing 160 mt of tuna, consisting of 130 mt of skipjack and

30 mt of yellowfin. [REDACTED] the observer's recorded mt for this set with the Regional Purse Seine Logsheet leads to the conclusion that the set more likely than not resulted in the catch of [REDACTED] total of tuna caught for this set. The observer's recorded estimate of [REDACTED] of [REDACTED] is problematic as the total amount of [REDACTED] caught for this trip totaled only [REDACTED]. See Resp. Exh. LLL. This one unlawful set thus would have had to result in the catch of a statistically disproportionate amount of [REDACTED] for the observer's estimate to be accurate. A more reasonable method of calculating the amount of [REDACTED] caught in this set is to take a [REDACTED] of [REDACTED] caught for this set relative to the entire trip and modify the observer's estimate accordingly (i.e., only [REDACTED] of the trip's entire catch was [REDACTED]).

Taking the average of the vessel's Regional Purse Seine Logsheet's estimate of yellowfin and skipjack and the observer's estimated yellowfin and skipjack leads to the conclusion that for this set, the vessel caught [REDACTED] of [REDACTED] and [REDACTED] of [REDACTED] with the remaining [REDACTED] more likely than not consisting of [REDACTED] tuna. The estimated total gross ex-vessel economic value of this set's catch equals [REDACTED].

[REDACTED] See Resp. Exh. LLL. Because some species targeted by CMM 2008-01 were caught in this set, the base penalty amount for the violation equals \$50,000 for the reasons stated in this Decision and Order. The total civil penalty assessed for this violation thus equals [REDACTED].

##### **5. F/V Ocean Encounter Respondents**

###### **Charge 1 – MMPA Violation**

The record demonstrates that on September 17, 2009, the F/V Ocean Encounter Respondents intentionally set on a live whale in order to capture the tuna associated with that whale in violation of the MMPA. The vessel did not catch any fish as a result of this set and the

whale apparently escaped from the net unharmed. Given the incentives for making unlawful sets on marine mammals when the amount of potential economic gain associated with a catch of large tuna is so great, compliance with the mandates not to set on marine mammals is difficult to enforce. Here, Respondents knew not to intentionally set on whales and yet elected to do so anyway presumably because the economic benefits outweighed the potential cost under the MMPA. For these reasons, I find the statutory maximum of **\$11,000** an appropriate civil penalty for this violation.

#### **Charge 2 – MMPA Violation**

The record demonstrates that on September 24, 2009, the F/V Ocean Encounter Respondents intentionally set on a live whale in order to capture the tuna associated with that whale in violation of the MMPA. The vessel did not catch any fish as a result of this set and the whale apparently escaped from the net unharmed. For the same reasons as articulated for Charge 1 against these Respondents, I find the statutory maximum of **\$11,000** an appropriate civil penalty for this violation.

#### **Charge 3 – MMPA Violation**

The record demonstrates that on September 25, 2009, the F/V Ocean Encounter Respondents intentionally set on a live whale in order to capture the tuna associated with that whale in violation of the MMPA. For the same reasons as articulated for Charge 1 against these Respondents, I find the statutory maximum of **\$11,000** an appropriate civil penalty for this violation.

#### **Charge 4 – MMPA Violation**

The record demonstrates that for a second time on September 18, 2009, the F/V Ocean Encounter Respondents intentionally set on a live whale in order to capture the tuna associated

with that whale in violation of the MMPA. For the same reasons as articulated for Charge 1 against these Respondents, I find the statutory maximum of \$11,000 an appropriate civil penalty for this violation.

**Charge 5 – FAD Violation**

The record demonstrates that on September 18, 2009, the F/V Ocean Encounter Respondents unlawfully made a set on fish that had aggregated under the vessel overnight in violation of 50 C.F.R. § 300.223(b). Specifically, the F/V Ocean Encounter deployed auxiliary boats that morning with submerged lights to hold the fish in place while the F/V Ocean Encounter made the set.

The observer estimated that this set resulted in the capture of 90 mt of tuna consisting of 45 mt of skipjack; 23 mt of yellow fin and 22 mt of bigeye tuna. The F/V Ocean Encounter's Regional Purse Seine Logsheet indicates that the vessel caught 75 mt of skipjack tuna.

the observer's recorded mt for this set with the Regional Purse Seine Logsheet leads to the conclusion that the set more likely than not resulted in the catch of total. Given that Respondents' receipts for this trip indicated that the vessel caught a total of only

(see Resp. Exh. BBBB), the observer's estimate of the set's composition is not supported by the record evidence of Respondents' catch receipts. Indeed, the observer's estimated catch of tuna for the vessel on this trip for the alleged unlawful sets equals which far exceeds the total amount reflected on Respondents' receipts. This is not to say the vessel did not catch any or – just that the observer's numbers for such catches are more likely than not inflated due to probable misidentification. Therefore, the use of a weighted average of species

composition more accurately reflects the likely composition of the sets than the observer's questionable totals.

A weighted average of species composition for the entire trip leads to the more likely catch results for this set consisting of: [REDACTED]

[REDACTED] See Resp. Exh. BBBB. The estimated total gross ex-vessel economic value of this set's catch equals [REDACTED]. Because some species targeted by CMM 2008-01 were caught in this set, the base penalty amount for the violation equals \$50,000 for the reasons stated in this Decision and Order. Therefore, I find that a total civil penalty of [REDACTED] is appropriate for this violation.

#### **Charge 6 – FAD Violation**

The record demonstrates that on September 20, 2009, the F/V Ocean Encounter Respondents unlawfully made a set on fish that had aggregated under the vessel overnight in violation of 50 C.F.R. § 300.223(b). Specifically, the F/V Ocean Encounter had used lights to aggregated the fish under the vessel at night and deployed auxiliary boats that morning with submerged lights to hold the fish in place while the F/V Ocean Encounter made the set.

The observer estimated that the set resulted in the catch of 255 mt of tuna consisting of 179 mt of skipjack; 25 mt of yellow fin and 51 mt of bigeye tuna. The vessel's Regional Purse Seine Logsheet recorded the results of this set as capturing 226 mt of tuna, consisting of 225 mt of skipjack and 1 mt of yellowfin. [REDACTED] the observer's recorded mt for this set with the Regional Purse Seine Logsheet leads to the conclusion that the set more likely than not resulted in the catch of [REDACTED] total of tuna caught for this set. As noted above for Charge 5, the

observer's recorded estimates of such large amounts of bigeye caught are problematic given Respondents' receipts for this trip.

Taking the weighted average of the vessel's Regional Purse Seine Logsheet's estimate of yellowfin and skipjack (and the receipts for the trip as a whole showing how much skipjack, yellowfin, and bigeye were landed) and the observer's estimated yellowfin and skipjack leads to the conclusion that for this set, the vessel caught [REDACTED] and [REDACTED]. The estimated total gross ex-vessel economic value of this set's catch equals [REDACTED].

[REDACTED] See Resp. Exh. LLL. Because some species targeted by CMM 2008-01 were caught in this set, the base penalty amount for the violation equals \$50,000 for the reasons stated in this Decision and Order. Therefore, I find that a total civil penalty equaling [REDACTED] is appropriate for this violation.

#### **Charge 7 – FAD Violation**

The record demonstrates that on September 21, 2009, the F/V Ocean Encounter Respondents unlawfully made a set on fish that had aggregated under the vessel overnight in violation of 50 C.F.R. § 300.223(b). Specifically, the F/V Ocean Encounter deployed auxiliary boats that morning with submerged lights to hold the fish in place while the F/V Ocean Encounter made the set.

The observer estimated that the set resulted in the catch of 200 mt of tuna consisting of 160 mt of skipjack; 20 mt of yellow fin and 40 mt of bigeye tuna. The vessel's Regional Purse Seine Logsheet recorded the results of this set as capturing 180 mt of skipjack tuna. [REDACTED] the observer's recorded mt for this set with the Regional Purse Seine Logsheet leads to the conclusion that the set more likely than not resulted in the catch of [REDACTED] total of [REDACTED] caught

for this set. As noted above for Charge 5, the observer's recorded estimates of such large amounts of bigeye caught are problematic given Respondents' receipts for this trip.

Taking the weighted average of the vessel's Regional Purse Seine Logsheet's estimate of yellowfin and skipjack (and the receipts for the trip as a whole showing how much skipjack, yellowfin, and bigeye were landed) and the observer's estimated yellowfin and skipjack leads to the conclusion that for this set, the vessel caught [REDACTED]

and [REDACTED]. The estimated total gross ex-vessel economic value of this set's catch equals [REDACTED]

[REDACTED] See Resp. Exh. LLL. Because some species targeted by CMM 2008-01 were caught in this set, the base penalty amount for the violation equals \$50,000 for the reasons stated in this Decision and Order. Therefore, I find that a total civil penalty of [REDACTED] is appropriate for this violation.

#### **Charge 8 – FAD Violation**

The record demonstrates that on September 22, 2009, the F/V Ocean Encounter Respondents unlawfully made a set on fish that had aggregated under the vessel overnight in violation of 50 C.F.R. § 300.223(b). Specifically, the F/V Ocean Encounter deployed auxiliary boats that morning with submerged lights to hold the fish in place while the F/V Ocean Encounter made the set.

The observer estimated that the set resulted in the catch of 30 mt of tuna consisting of 14 mt of skipjack; 6 mt of yellowfin and 10 mt of bigeye tuna. The vessel's Regional Purse Seine Logsheet recorded the results of this set as capturing the vessel caught 30 mt of skipjack tuna for this set. The parties thus agreed that the set resulted in the catch of [REDACTED] total of [REDACTED] caught for this set but disagreed as to the set's composition. As noted above for Charge 5, the observer's

recorded estimates of such large amounts of [REDACTED] caught are problematic given Respondents' receipts for this trip.

Taking the weighted average of the vessel's Regional Purse Seine Logsheet's estimate of yellowfin and skipjack (and the receipts for the trip as a whole showing how much skipjack, yellowfin, and bigeye were landed) and the observer's estimated yellowfin and skipjack leads to the conclusion that for this set, the vessel caught [REDACTED] and [REDACTED]

[REDACTED] The estimated total gross ex-vessel economic value of this set's catch equals [REDACTED]

[REDACTED] See Resp. Exh. LLL. Because it is more likely than not that some species targeted by CMM 2008-01 were caught in this set, the base penalty amount for the violation equals \$50,000 for the reasons stated in this Decision and Order. Therefore, I find that a total civil penalty of [REDACTED] is appropriate for this violation.

**Charge 9 – FAD Violation**

The record demonstrates that on September 23, 2009, the F/V Ocean Encounter Respondents unlawfully made a set on fish that had aggregated under the vessel overnight in violation of 50 C.F.R. § 300.223(b). Specifically, the F/V Ocean Encounter deployed auxiliary boats that morning with submerged lights to hold the fish in place while the F/V Ocean Encounter made the set.

The observer estimated that the set resulted in the catch of 20 mt of tuna consisting of 15 mt of skipjack and 5 mt of yellowfin tuna. The vessel's Regional Purse Seine Logsheet recorded the results of this set as capturing 20 mt of skipjack tuna. The parties thus agreed that no bigeye tuna were caught in this set and the set resulted in the catch of [REDACTED] total of [REDACTED] caught for this set.

Taking the weighted average of the vessel's Regional Purse Seine Logsheet's estimate of yellowfin and skipjack and the observer's estimated yellowfin and skipjack leads to the conclusion that for this set, the vessel caught [REDACTED]. The estimated total gross ex-vessel economic value of this set's catch equals [REDACTED]. [REDACTED] See Resp. Exh. LLL. Because some species targeted by CMM 2008-01 were caught in this set, the base penalty amount for the violation equals \$50,000 for the reasons stated in this Decision and Order. Therefore, I find that a total civil penalty of [REDACTED] is appropriate for this violation.

### I. Conclusion

Taking into account the record as a whole, the parties' arguments, the economic value of the catch and all of the factors required to be considered by law, I find the appropriate sanction for each Respondent to be as indicated in the following Table.<sup>59</sup>

		Agency Request	Base Penalty Assessed	Economic Value of the Catch	Total Assessed
F/V Sea Quest	Charge 1	\$117,500.00	\$25,000.00	[REDACTED]	[REDACTED]
	Charge 2	\$136,250.00	\$50,000.00	[REDACTED]	[REDACTED]
	Total				\$147,959.68
F/V Sea Honor	Charge 1	\$80,000.00	\$25,000.00	\$0.00	\$25,000.00
	Charge 2	\$80,000.00	\$25,000.00	\$0.00	\$25,000.00
	Total				\$50,000.00
F/V Pacific Ranger	Charge 1	\$117,500.00	\$25,000.00	[REDACTED]	[REDACTED]
	Total				[REDACTED]

<sup>59</sup> The Agency did not distinguish between any base penalty amounts requested and the economic value of the catch associated with the unlawful set.

<b>F/V Ocean Conquest</b>				
Charge 1	\$11,000.00	\$11,000.00	\$0.00	\$11,000.00
Charge 2	\$116,750.00	\$50,000.00		
Charge 3	\$140,000.00	\$50,000.00		
Total				\$215,776.77
<b>F/V Ocean Encounter</b>				
Charge 1	\$11,000.00	\$11,000.00	\$0.00	\$11,000.00
Charge 2	\$11,000.00	\$11,000.00	\$0.00	\$11,000.00
Charge 3	\$11,000.00	\$11,000.00	\$0.00	\$11,000.00
Charge 4	\$11,000.00	\$11,000.00	\$0.00	\$11,000.00
Charge 5	\$136,250.00	\$50,000.00		
Charge 6	\$140,000.00	\$50,000.00		
Charge 7	\$140,000.00	\$50,000.00		
Charge 8	\$102,500.00	\$50,000.00		
Charge 9	\$95,000.00	\$50,000.00		
Total				\$497,617.98
<b>TOTAL</b>	<b>\$1,456,750.00</b>	<b>\$550,000.00</b>		<b>\$953,053.93</b>

**WHEREFORE:**

**VII. Order**

**IT IS HEREBY ORDERED** that a civil penalty in the total amount of **ONE HUNDRED FORTY SEVEN THOUSAND NINE HUNDRED FIFTY NINE DOLLARS AND SIXTY EIGHT CENTS (\$147,959.68)** is assessed, jointly and severally against Respondents **MATTHEW JAMES FREITAS, SEA QUEST LLC, and CHANG WEN WU.**

**IT IS HEREBY FURTHER ORDERED** that a civil penalty in the total amount of **FIFTY THOUSAND DOLLARS (\$50,000.00)** is assessed, jointly and severally against Respondents **PAUL MAGELLAN,<sup>60</sup> SEA HONOR LLC, and YEN HSING TSAI.**

**IT IS HEREBY FURTHER ORDERED** that a civil penalty in the total amount of [REDACTED] is assessed, jointly and severally against Respondents **JOHN ZOLEZZI, PACIFIC RANGER LLC, and SU TIEN SHIH.**

**IT IS HEREBY FURTHER ORDERED** that a civil penalty in the total amount of **TWO HUNDRED FIFTEEN THOUSAND SEVEN HUNDRED SEVENTY SIX DOLLARS AND**

<sup>60</sup> On November 7, 2012, counsel for Respondent Captain Paul Magellan informed the Court that Captain Magellan had passed away.

**SEVENTY SEVEN CENTS (\$215,776.77)** is assessed, jointly and severally against Respondents **BENJAMIN BROWN MAUGHAN, JR., OCEAN CONQUEST LLC, and WU CHIA PIN.**

**IT IS HEREBY FURTHER ORDERED** that a civil penalty in the total amount of **FOUR HUNDRED NINETY SEVEN THOUSAND SIX HUNDRED SEVENTEEN DOLLARS AND NINETY EIGHT CENTS (\$497,617.98)** is assessed, jointly and severally against Respondents **RUSSELL KEITH BASS, JR., OCEAN ENCOUNTER LLC, and HO-CHING CHANG.**

**IT IS FURTHER STRONGLY RECOMMENDED** that the Agency Administrator immediately condition all of **SEA QUEST LLC's, SEA HONOR LLC's, PACIFIC RANGER LLC's, OCEAN CONQUEST LLC's, and OCEAN ENCOUNTER LLC's** permits to prohibit the hiring and/or retaining of Respondents **CHANG WEN WU, YEN HSING TSAI, SU TIEN SHIH, and WU CHIA PIN** in any capacity on any of its fishing vessels for a period of no less than **ONE (1) YEAR** and Respondent **HO-CHING CHANG** for a period of no less than **FIVE (5) YEARS.**

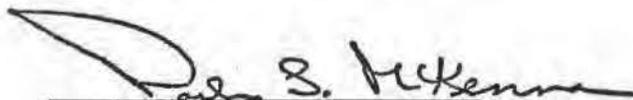
**PLEASE BE ADVISED** that a failure to pay the penalty within thirty (30) days from the date on which this decision becomes final Agency action will result in interest being charged at the rate specified by the United States Treasury regulations and an assessment of charges to cover the cost of processing 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 23rd day of August, 2013  
at Alameda, CA.



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

## ATTACHMENT A: LIST OF WITNESSES AND EXHIBITS

### **Agency Witnesses**

1. Raymond Clarke, NOAA
2. Dr. Charles Karnella, NOAA
3. Siosifa Fukafuka
4. Keith Bigelow, NOAA
5. Dr. Christopher Reid
6. Kun Iohp
7. SA Take Tomson
8. Anthony Lioliomola
9. SA Charles Raterman
10. John Charles Belei
11. Auto'o Siliomea
12. SA Brandon Jim On
13. Chris Nare
14. SA Charles Raterman

### **Respondents' Witnesses**

1. Brian Hallman, Executive Director, American Tunaboat Association
2. Robert Virissimo, VP Operations South Pacific Tuna Corporation
3. Annette Schlife, CFO South Pacific Tuna Corporation
4. Jesse Fang, South Pacific Tuna Corporation
5. Captain Benjamin B. Maughan, Jr.
6. Captain Matthew Freitas
7. Captain John Zolezzi
8. Captain Paul Magellan

### **Agency's Exhibits (Agency Exh. 1 through Agency Exh. 65)**

1. Kun Iohp Trip Diary, F/V Sea Quest, 22LP-12, 49 pages
2. Kun Iohp Purse Seine Observer Workbook, F/V Sea Quest, 22LP-12, 84 pages
3. Kun Iohp Trip Diary, F/V Sea Quest, 22LP-43, 37 pages
4. Kun Iohp Purse Seine Observer Workbook, F/V Sea Quest, 22LP-43, 126 pages
5. Auto'o Siliomea Trip Diary, F/V Pacific Ranger, 22LP-59, 36 pages
6. Auto'o Siliomea Purse Seine Trip Report, F/V Pacific Ranger, 22LP-59, 40 pages
7. Auto'o Siliomea Purse Seine Observer Workbook, F/V Pacific Ranger, 22LP-59, 69 pages
8. NO EXHIBIT
9. NO EXHIBIT
10. Anthony Lioliomola Purse Seine Trip Report, F/V Ocean Conquest, 22LP-23, 40 pages
11. Anthony Lioliomola Purse Seine Observer Workbook, F/V Ocean Conquest, 22LP-23, 37 pages

12. Anthony Lioliomola Trip Diary, F/V Ocean Conquest, 22LP-37, 56 pages
13. Anthony Lioliomola Purse Seine Trip Report, F/V Ocean Conquest, 22LP-37, 40 pages
14. Anthony Lioliomola Purse Seine Observer Workbook, F/V Ocean Conquest, 22LP-37, 178
15. NO EXHIBIT
16. NO EXHIBIT
17. Chris Nare Trip Diary, F/V Ocean Encounter, 22LP-24, 64 pages
18. Chris Nare Purse Seine Trip Report, F/V Ocean Encounter, 22LP-24, 38 pages
19. Chris Nare Purse Seine Observer Workbook, F/V Ocean Encounter, 22LP-24, 62 pages
20. Chris Nare Trip Diary, F/V Ocean Encounter, 22LP-57, 20 pages
21. Chris Nare Purse Seine Trip Report, F/V Ocean Encounter, 22LP-57, 40 pages
22. Chris Nare Purse Seine Observer Workbook, F/V Ocean Encounter, 22LP-57, 62 pages
23. NO EXHIBIT
24. John Charles Belei Trip Diary, F/V Pacific Ranger, 22LP-64, 46 pages
25. John Charles Belei Purse Seine Trip Report, F/V Pacific Ranger, 22LP-64, 38 pages
26. John Charles Belei Purse Seine Observer Workbook, F/V Pacific Ranger, 22LP-64, 57 pages
27. Narrative portion of the Offense Investigation Report, SA Take Tomson – F/V Sea Honor, 8 pages
28. Certificate of Documentation – F/V Sea Honor, 1 page
29. Regional Purse Seine Logsheet – F/V Sea Honor, dated October 16, 2009, 3 pages
30. Memorandum of Interview – Paul Magellan, dated July 28, 2010, 5 pages
31. Memorandum of Interview – John Charles Belei, dated August 13, 2010, 3 pages
32. Narrative portion of Offense Investigation Report, SA Take Tomson – F/V Sea Quest, 8 pages
33. Certificate of Documentation – F/V Sea Quest, 1 page
34. Regional Purse Seine Logsheet – F/V Sea Quest, August 17, 2009, 3 pages
35. Regional Purse Seine Logsheet – F/V Sea Quest, October 10, 2009, 5 pages
36. Memorandum of Interview – Matthew James Freitas, dated June 4, 2010, 6 pages
37. Memorandum of Interview – Kun Iohp, dated July 26, 2010, 4 pages
38. Narrative portion of Offense Investigation Report, SA Brandon Jim On – F/V Pacific Ranger, 9 pages
39. Certificate of Documentation – F/V Pacific Ranger, 1 page
40. Email between SA Jim On and Captain John Zolezzi, dated June 1, 2010, 2 pages
41. Regional Purse Seine Logsheet – F/V Pacific Ranger, dated October 25, 2009, 3 pages
42. Supplement to Offense Investigation Report, Telephonic Interview – Chris Nare, dated April 30, 2010, 7 pages
43. Narrative portion of Offense Investigation Report, SA Charles Raterman – F/V Ocean Encounter, 25 pages
44. Supplement to OIR, Memorandum of Interview – Keith Bass, dated April 30, 2010, 6 pages
45. Completed Additional Questions – Keith Bass, dated June 25, 2010, 10 pages
46. Certificate of Documentation – F/V Ocean Encounter, 1 page
47. Regional Purse Seine Logsheet – F/V Ocean Encounter, September 6, 2009, 4 pages
48. Regional Purse Seine Logsheet – F/V Ocean Encounter, October 6, 2009, 4 pages

49. Narrative portion of Offense Investigation Report, SA Charles Raterman – F/V Ocean Conquest, 29 pages
50. Memorandum of Interview – Anthony Lioliomola, dated July 29, 2010, 4 pages
51. Memorandum of Follow-Up Interview – Anthony Lioliomola, dated July 30, 2010, 2 pages
52. Memorandum of Interview, Benjamin Maughan, April 29, 2010, 2 pages
53. Memorandum of Interview – Benjamin Maughan, dated August 20, 2010, 2 pages
54. Completed email questions, Benjamin Maughan, dated June 29, 2010, 5 pages
55. Letter from Benjamin Maughan to SA Raterman, dated May 5, 2010, 4 pages
56. Certificate of Documentation – F/V Ocean Conquest, 1 page
57. Regional Purse Seine Logsheet – F/V Ocean Conquest, dated August 11, 2009, 6 pages
58. WCPFC Conservation and Management Measure 2008-01, 42 pages
59. Proposed Rule – Fishing Restrictions and Observer Requirements in Purse Seine Fisheries for 2009 – 2011 and Turtle Mitigation Requirements in Purse Seine Fisheries, 74 FR 26160 38544 (June 1, 2009), 11 pages
60. Final Rule – Fishing Restrictions and Observer Requirements in Purse Seine Fisheries for 2009 – 2011 and Turtle Mitigation Requirements in Purse Seine Fisheries, 74 FR 38544 (August 4, 2009), 15 pages (exhibit 8 – PI0904340)
61. Curriculum Vitae, Keith Bigelow, 4 pages (exhibit 14 – PI0904340)
62. Curriculum Vitae, Dr. Chris Reid, 5 pages (exhibit 15 – PI0904340)
63. Note Estimating Ex-Vessel Prices for Certain Vessel Trips During the Period July – October 2009, dated June 2012, 4 pages **[SUBJECT TO PROTECTIVE ORDER]**
64. Fish sale price information provided by Respondents, 3 pages **[SUBJECT TO PROTECTIVE ORDER]**
65. Estimated catch values by vessel and count, 1 page **[SUBJECT TO PROTECTIVE ORDER]**

**Respondents' Exhibits (Resp. Exh. A through Resp. Exh. IIIII)**

- A. WCPFC Scientific Committee Sixth Regular Session, Overview of Tuna Fisheries in the Western and Central Pacific Ocean, Including Economic Conditions – 2009, WCPFC-SC6-2010/GN WP-1 (10-19 August 2010)
- B. Photo – Purse Seine Vessel
- C. Diagram Purse Seine Fishing
- D. Photo – Vessel with Net
- E. Photo – Catch
- F. Photo – Bailer
- G. NO EXHIBIT
- H. Conservation and Management Measure 2007-01: WCPFC Fourth Regular Session, Conservation and Management Measure for the Regional Observer Programme (2-7 December 2007)
- I. Conservation and Management Measure 2008-01: WCPFC Fifth Regular Session, Conservation and Management Measure for Bigeye and Yellowfin Tuna in the Western and Central Pacific Ocean (8-12 December 2008)

- J. Conservation and Management Measure 2009-02: WCPFC Sixth Regular Session, Conservation and Management Measure on the Application of High Seas FAD Closures and Catch Retention (7-11 December 2009)
- K. WCPFC Seventh Regular Session, Review of the Implementation and Effectiveness of CMM 2008-01, WCPFC7-2010/15.1rev 1 (29 November 2010)
- L. Federal Register Notice, 74 Fed. Reg. 26160-170 (Jun. 1, 2009) (Proposed Rule)
- M. American Tuna Boat Association, Comments to Proposed Rule (June 19, 2009)
- N. Federal Register Notice, 74 Fed. Reg. 38544-558 (Aug. 4, 2009) (Final Rule)
- O. Memorandum of Understanding between the Pacific Islands Forum Fisheries Agency and the American Tunaboat Owners Association (October 15, 2010)
- P. Memorandum of Understanding between the Pacific Islands Forum Fisheries Agency and the American Tunaboat Owners Association (March 25, 2011)
- Q. WCPFC Seventh Regular Session, Draft Compliance Monitoring Scheme (9 December 2010)
- R. NOAA Final Regulation Regarding Use of Fish Aggregating Devices (50 C.F.R. §§ 300.211 (Definitions), 300.222 (Prohibitions), and 300.223 (Purse Seine Restrictions))
- S. Environmental Review, FONSI for Fishing Restrictions and Observer Requirements in Purse Seine Fisheries for 2009-2011 (July 13, 2009)
- T. SPTC Proposed Penalty Calculations: NOAA Penalty Cases  
[CONFIDENTIAL/SUBJECT TO PROTECTIVE ORDER]
- U. NOAA Notice of Violation and Assessment (September 29, 2010) [SEA QUEST]
- V. Memorandum of Interview, Matthew James Freitas (June 4, 2010)

W to AA. NO EXHIBITS

BB. SEA QUEST Trip Price Summary, Trip #22, August 17, 2009

CC to FF. NO EXHIBITS

GG. SEA QUEST Trip Price Summary, Trip #23, October 10, 2009

HH. Notice of Violation and Assessment (September 29, 2010) [SEA HONOR]

II. Environmental Assessment for the Implementation of the Decision of the Fifth Regular Annual Session of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean; Fishing Restrictions and Observer Requirements in Purse Seine Fisheries in 2009, 2010, and 2011; National Marine Fisheries Services, Pacific Island Regional Office; July 2009

JJ to QQ. NO EXHIBITS

RR. Notice of Violation and Assessment (September 29, 2010) [PACIFIC RANGER]

SS to WW. NO EXHIBITS

XX. PACIFIC RANGER Trip Price Summary, Trip#9, Trip ending October 25, 2009  
[CONFIDENTIAL/SUBJECT TO PROTECTIVE ORDER]

YY. NO EXHIBIT

ZZ. Notice of Violation and Assessment (September 29, 2010) [OCEAN CONQUEST]

AAA. NO EXHIBIT

BBB. Memorandum of Interview, Anthony Lioliomola (July 21, 2010)

CCC. Memorandum of Interview, Anthony Lioliomola (July 29, 2010)

DDD to KKK. NO EXHIBITS

LLL. OCEAN CONQUEST Trip Price Summary, Trip#20, trip end date 10/5/2009  
[CONFIDENTIAL/SUBJECT TO PROTECTIVE ORDER]

MMM to RRR. NO EXHIBITS

SSS. Notice of Violation and Assessment (September 29, 2009) [OCEAN ENCOUNTER]

TTT. NO EXHIBIT

UUU. NO EXHIBIT

VVV. Memorandum of Interview, Chris Nare (April 23, 2010)

WWW to AAAA. NO EXHIBITS

BBBB. OCEAN ENCOUNTER Trip Price Summary, Trip#20, trip end date 10/5/2009  
[CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER]

CCCC to AAAAAA. NO EXHIBITS

BBBBBB. Summary of tons per trip by vessel

CCCCCC. Summary --- Prices Paid for Fish, Year 2009

[CONFIDENTIAL/SUBJECT TO PROTECTIVE ORDER]

EEEEEE to HHHHHH. NO EXHIBITS

IIIII. Fish and Fisheries, "*Is it good or bad to fish with FADs? What are the real impacts of the use of drifting FADs on pelagic marine ecosystems?*" L. Dagorn, K. Holland, V. Restrepo, and G. Moreno (Nov. 7, 2011)

#### **ALJ Exhibits**

1. Western Pacific Pelagic Fishery Penalty Schedule (Revised 11/3/94)
2. MMPA Penalty Schedule (Revised 12/08)
3. Preface to Penalty Schedules (Revised 8/02)
4. Fong Kuo Fishery Co., Ltd webpage  
([www.fongkuo.com.tw/ENGLISH/index\\_pro1.html](http://www.fongkuo.com.tw/ENGLISH/index_pro1.html)) (last visited on 7/22/2013)

**ATTACHMENT B: RULINGS ON PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

**Agency's Proposed Findings of Fact:**

In December 2008, the Western and Central Pacific Fisheries Commission (WCPFC) adopted Conservation and Management Measure 2008-01 to conserve Bigeye and Yellowfin Tuna. Agency Exhibit 6.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

The United States is a party to the Western and Central Pacific Fisheries Convention and has agreed to be bound by the measures adopted by the Commission and to implement the requirements domestically.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

The measure covers a three-year period -- 2009 through 2011 -- and provides specific measures for both purse seine and longline fishing vessels. *See* Agency Exhibit 6.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

Among other things, it established a closed period in each of the three years when purse seine vessels are prohibited from fishing on fish aggregating devices (FADs). *Id.*

**Respondents' Response:** Disputed. This statement is vague and ambiguous as to what the term "it" refers to. The Commission measures are not self-executing and only the prohibited activities under the U.S. regulations are relevant here.

**Ruling: ACCEPTED AND INCORPORATED as MODIFIED. "It" clearly refers to CMM 2008-01, a management measure promulgated under the WCPFC, which the United States implemented in its regulations pursuant to that treaty.**

In 2009, the FAD closure period was from August 1 through September 30. *Id.*

**Respondents' Response:** Disputed. This statement does not refer to NOAA's regulations, which establish the closure period.

**Ruling: ACCEPTED AND INCORPORATED. This closure period was mandated by CMM 2008-01, which the United States was obligated to observe and implement through regulations under the WCPFC. Pursuant thereto, NOAA implemented regulations to conform to CMM 2008-01.**

In addition, during the 2009 FAD closure, purse seine vessels were required to have 100% observer coverage. *Id.*

**Respondents' Response:** Disputed to the extent this statement is incomplete. In fact, every U.S. vessel that went fishing during this time did so with an observer.

**Ruling: ACCEPTED AND INCORPORATED.**

U.S. purse seine vessels utilize Pacific Islands Forum Fisheries Agency (FFA) observers to meet their 100% observer coverage requirement. Agency Exhibit 58.

**Respondents' Response: Undisputed.**

**Ruling: ACCEPTED AND INCORPORATED.**

FFA observers go through a lengthy training process that includes training about purse seine fishing. TR 113-1126 generally (July 9-11, 2012 Hearing).

**Respondents' Response:** Disputed to the extent this statement is vague and ambiguous as to the nature and extent of the training.

**Ruling: ACCEPTED IN PART AND INCORPORATED AND REJECTED IN PART.**

**The fact that the observers' training included elements associated with purse seine fishing is accepted; whereas the characterization of the training as "lengthy" is rejected as vague.**

On August 4, 2009, NOAA published a final rule implementing the purse seine measures. Agency Exhibit 8, "*Final Rule - Fishing Restrictions and Observer Requirements in Purse Seine Fisheries for 2009-2011 and Turtle Mitigation Requirements in Purse Seine Fisheries*," 74 FR 38544 (August 4, 2009), codified at 50 C.F.R. § 300.223; Agency Exhibit 60.

**Respondents' Response:** Disputed in part. NOAA improperly waived the statutory 30-day notice and comment period before publishing the final rule. Thus, any alleged violations that occurred before the final rule should have become effective had the agency adhered to the Administrative Procedures Act are unenforceable. The agency's own documents show that it was the agency's own internal delay and not any "unavoidable limitation of time" that caused it to shorten the notice and comment period. *See* Respondents' Reply to NOAA's Post Hearing Brief at Section IV and attached exhibits (Admin. Record at B16-001066-67; E14-002202; E33-002359-60).

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments concerning the Agency's waiver of the 30-day notice and comment period were rejected by the NOAA Administrator.**

The measures went immediately into effect. *Id.*

**Respondents' Response:** Disputed in part. *See* Response to Agency's FF No. 9 above. Notably, the regulations went into effect retroactively starting on August 1, 2009.

**Ruling: ACCEPTED AND INCORPORATED.** Respondents' arguments concerning the Agency's waiver of the 30-day notice and comment period were rejected by the NOAA Administrator. As for the effective date, the Final Rule published in the Federal Register explicitly provided the "rule is effective August 3, 2009 . . ." See 74 Fed. Reg. 38544 (August 4, 2009).

The regulations at 50 C.F.R. § 300.223(b) prohibit the following activities during a FAD closure:

- Setting a purse seine around a FAD or within (1) one nautical mile of a FAD
- Setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD, such as by setting the purse seine in an area from which a FAD has been moved or removed within the previous eight hours, or setting the purse seine in an area in which a FAD has been inspected or handled within the previous eight hours, or setting the purse seine in an area into which fish were drawn by a vessel from the vicinity of a FAD
- Deploying a FAD into the water
- Repairing, cleaning, maintaining, or otherwise servicing a FAD, including any electronic equipment used in association with a FAD, in the water or on a vessel while at sea, except that: FAD may be inspected and handled as needed to identify the owner of the FAD, identify and release incidentally captured animals, un-foul fishing gear, or prevent damage to property or risk to human safety; and
- A FAD may be removed from the water and if removed, may be cleaned, provided that it is not returned to the water.

**Respondents' Response:** Disputed to the extent Agency FF No. 11 paraphrases the regulations. The regulations speak for themselves.

**Ruling: REJECTED AS A FINDING OF FACT. The text of the regulations is ACCEPTED AND INCORPORATED AS A PRINCIPLE OF LAW.**

The regulations define a fish aggregating device as "any artificial or natural floating object, whether anchored or not and whether situated at the water surface or not, that is capable of aggregating fish, as well as any objects used for that purpose that are situated on board a vessel or otherwise out of the water. The meaning of FAD does not include a fishing vessel, provided that the fishing vessel is not used for the purpose of aggregating fish." 50 C.F.R. § 300.211.

**Respondents' Response:** Disputed to the extent Agency FF No. 12 paraphrases the regulations. The regulations speak for themselves.

**Ruling: REJECTED AS A FINDING OF FACT. The text of the regulations, including the definition of a FAD, is ACCEPTED AND INCORPORATED AS A PRINCIPLE OF LAW.**

At the time of the charged violations, the F/V Sea Quest was a U.S.-flagged purse seine vessel owned by Sea Quest LLC. Agency Exhibit 33. .

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

14. At the time of the charged violations, the captain of the F/V Sea Quest was Respondent Mathew James Freitas. Agency Exhibit 36.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

15. At the time of the charged violations, the fishing master of the F/V Sea Quest was Respondent Chang Wen Wu. Agency Exhibit 36 at 2.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

16. Respondent Chang Wen Wu did not testify in this case and provided no rebuttal against the evidence presented by the Agency.

**Respondents' Response:** Undisputed that Respondent Chang Wen Wu did not testify in this case; disputed as to what he would have said had he testified.

**Ruling: ACCEPTED AND INCORPORATED. Agency Counsel's proposed finding of fact makes no statement about the content of what the fishing master might have said in any testimony but merely notes that as a result of his not testifying, Mr. Chang Wen Wu did not rebut any allegations made against him or the vessel.**

17. At the time of the charged violations, the F/V Sea Quest carried an observer, Kun Iohp, on board the vessel. Agency Exhibit 37.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

18. Mr. Iohp was a trained Pacific Islands Forum Fisheries Agency (FFA) observer. TR 24 at 8 - 19 (February 1, 2012 Hearing).

**Respondents' Response:** Disputed. This statement is vague as to the nature of the training Mr. Iohp purportedly received. It was only his first trip as an observer and first trip on a tuna boat. Resp. FF No. 48.

**Ruling: ACCEPTED AND INCORPORATED. The proposed finding of fact is not vague as it only states that Mr. Iohp was trained by FFA.**

19. While Mr. Iohp was aboard the F/V Sea Quest, he maintained observer reports - including his Trip Diary, Purse Seine Trip Report and Purse Seine Observer Workbook - that documented the events that he observed while on board the F/V Sea Quest. TR 37 at 5 - 9 (February 1, 2012 Hearing).

**Respondents' Response:** Disputed that the observer reports accurately document the events at issue, particularly in light of the observer's inexperience both as an observer and on a tuna boat. *See Resp. FF Nos. 48, 51-57.*

**Ruling: ACCEPTED AND INCORPORATED. Mr. Iohp's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

#### SEA QUEST - COUNT 1

20. On August 14, 2009, the F/V Sea Quest set its purse seine net on or within one nautical mile of a FAD or set its purse seine in a manner intended to capture fish that have aggregated in association with a FAD. Specifically, Respondents used the F/V Sea Quest and its auxiliary boats to aggregate fish and then set on those fish.

**Respondents' Response:** Disputed. This was a fish under the boat set and Respondents did not intentionally set on any FAD. *See Resp. FF Nos. 39-45, 51 and 59.* The vessel did not set on or around any log, raft, buoy or other traditional form of a FAD.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' contentions that this was a lawful set are rejected for the reasons given in this Decision and Order.**

21. Mr. Iohp testified that on August 14, 2009, he "got up early and the fishing vessel was attracting the fish with aggregating lights." TR 26 at 15- 16 (February 1, 2012 Hearing).

**Respondents' Response:** Disputed that the vessel used "aggregating lights" or "drop lights" to attract fish. NOAA provided no regulatory guidance as to what kinds of lighting on either the purse seine vessel or the workboats were considered as unlawful "aggregating lights." In Captain Freitas' testimony, he distinguished between what he believed were "fish aggregating lights" when the vessel is FAD fishing and other submerged lights used in fish under the boat sets. Although some lights were used on the light boat to set on fish under the boat, these lights would be submerged two feet below the surface of the water "just so it illuminates the boat so you can see where you're going around with the net...." Freitas Test., Tr. at 48:5-12 (August 24, 2012). NOAA's regulations did not ban the use of submerged lights for navigation purposes. He testified that "fish aggregating lights" were "more of a bigger light...like a thousand watt. They're huge and they really light up the whole area...." *Id.* at 48:13-18. He believed that fish aggregating lights are submerged much deeper and will be dropped 20 feet into the water. *Id.* at 48:19-22. He testified that no "fish aggregating lights" were used for any of the charged sets. *Id.* at 48:23-49:1. The agency provided no regulatory guidance with respect to the use of lights.

However, in a new rulemaking (78 Fed. Reg. 14755-14762; March 7, 2013), the agency is now proposing to clarify the FAD regulations to address specifically the use of lights.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order. Captain Freitas' testimony that the vessel did not use fish aggregating lights is found not credible.**

22. He further explained that "and then they drop two of their two auxiliary boats. Those two auxiliary boats dropped their submarine lights into the ocean and then we went away about half a mile, then came back a few minutes later and they make a set around it." *Id.* at 18-22.

**Respondents' Response:** Disputed that any lights used were fish aggregating lights or that the agency has ever defined in rulemaking what are considered fish aggregating lights. The observer mistakenly identified regular working lights used for safety on the vessel or work boats in the normal course of setting on fish under the boat with what Mr. Freitas believed to be fish aggregating lights. *See* Respondents' Response to Agency FF No. 21 above. Without a regulatory definition and evidence of a clear understanding as to what are aggregating lights, the observer's views are unreliable as evidence.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order.**

23. He noted that when the set was made it was still dark outside. TR 27 at 2 (February 1, 2012 Hearing).

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

24. He described the lights on the main fishing vessel as consisting of three lights, one green and two bright white lights. *Id.* at 9 -11.

**Respondents' Response:** Disputed to the extent the observer claimed lights used for safety to illuminate the boat were fish aggregating lights. The vessel uses deck lights and "boom lights to illuminate the...decks to people can see where they are working" when the vessel is setting on fish under the boat in the dark. The vessel also uses running lights so that other vessels in the area can see it. Freitas Test., Tr. at 47:11-19 (August 23, 2012). *See also* Response to Agency FF No. 21 and 22 above.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order. Captain Freitas' testimony that the vessel did not use fish aggregating lights is found not credible.**

25. Those lights “all were pointed into the ocean.” TR 27 at 25 (February 1, 2012 Hearing).

**Respondents’ Response:** Disputed that any lights used were fish aggregating lights dropped into the water or as to what aggregating lights are. *See* Response to Agency FF Nos. 21, 22 and 24 above.

**Ruling: ACCEPTED AND INCORPORATED.**

26. In addition, Mr. Iohp described the use of submerged lights by the auxiliary boats that were deployed by the F/V Sea Quest. TR 28- 30 (February 1, 2012 Hearing).

**Respondents’ Response:** Disputed that the vessel used “aggregating lights” or “drop lights” to attract fish. In Captain Freitas’ testimony, he distinguished between what he believed are “fish aggregating lights” when the vessel is FAD fishing and other submerged lights used in fish under the boat sets. Although some lights were used on the light boat to set on fish under the boat, these lights would be submerged two feet below the surface of the water “just so it illuminates the boat so you can see where you’re going around with the net....” Freitas Test., Tr. at 48:5-12 (August 24, 2012). He testified that “fish aggregating lights” were “more of a bigger light...like a thousand watt. They’re huge and they really light up the whole area....” *Id.* at 48:13-18. Fish aggregating lights are submerged much deeper and will be dropped 20 feet into the water. *Id.* at 48:19-22. He testified that no “fish aggregating lights” were used for any of the charged sets. *Id.* at 48:23-49:1. *See* Response to Agency FF Nos. 21, 22 and 24 above.

**Ruling: ACCEPTED AND INCORPORATED. Respondents’ arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order. Captain Freitas’ testimony that the vessel did not use submerged fish aggregating lights is found not credible.**

27. He stated that the auxiliary boats dropped their submarine lights into the ocean and turned them on to attract the fish. TR 30 at 17- 20 (February 1, 2012 Hearing).

**Respondents’ Response.** Disputed that the vessel used “aggregating lights” to attract fish. In Captain Freitas’ testimony, he distinguished between what he believed were “fish aggregating lights” when the vessel is FAD fishing and other submerged or “drop” lights used in fish under the boat sets. Although some lights were used on the light boat to set on fish under the boat, these lights would be submerged two feet below the surface of the water “just so it illuminates the boat so you can see where you’re going around with the net....” Freitas Test., Tr. at 48:5-12 (August 24, 2012). He testified that “fish aggregating lights” were “more of a bigger light...like a thousand watt. They’re huge and they really light up the whole area....” *Id.* at 48:13-18. Fish aggregating lights, he believed, are submerged much deeper and will be dropped 20 feet into the water. *Id.* at 48:19-22. He testified that no “fish aggregating lights” were used for any of the charged sets. *Id.* at 48:23-49:1. *See* Response to Agency FF Nos. 21, 22 and 24 above.

**Ruling: ACCEPTED AND INCORPORATED. Respondents’ arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this**

**Decision and Order. Captain Freitas' testimony that the vessel did not use submerged fish aggregating lights is found not credible.**

28. Mr. Iohp also explained that on the F/V Sea Quest, the lights that had been on all night were turned off once the auxiliary boats turned on their submarine lights, and that the F/V Sea Quest then moved away from the auxiliary boats. TR 31 and 32 (February 1, 2012 Hearing).

**Respondents' Response:** Undisputed that the purse seine vessels, lights were turned off, as it is the common practice in a fish-under-the-boat set in the early morning; disputed that the observer saw underwater lights as opposed to lights that simply illuminated the auxiliary boat and the water around it.

**Ruling: ACCEPTED AND INCORPORATED.**

29. A few minutes later, the F/V Sea Quest made a set around the auxiliary boats. TR 34 at 1 - 21 (February 1, 2012 Hearing).

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

30. Mr. Freitas, the Captain of the F/V Sea Quest, conceded that the auxiliary boats deployed submerged drop lights, and that the purpose of those lights was to hold the fish that had aggregated under the main vessel, while the main vessel pulled away to make a set around them. TR 57- 61 (February 1, 2012 Hearing).

**Respondents' Response:** Disputed that the lights used were fish aggregating lights. Captain Freitas distinguished between submerged or drop lights, which went just below the surface and were used in the regular course of setting on fish under the boat and fish aggregating lights. *See* Response to Agency FF No. 21 above. He testified that the "hope" was that the submerged lights used with the work boats would hold the fish, but that the fish were not necessarily under the work boat, which is why they have sonar to use instead. Freitas Test., Tr. at 60:8-16 (August 23, 2012). He testified that the lights were not used to aggregate the fish because the fish were already "under the vessel, we're just doing that so we can pull away from the set list." *Id.* at 60:23-61:2. *See* Response to Agency FF Nos. 21, 22 and 24 above.

**Ruling: ACCEPTED AND INCORPORATED. Captain Freitas' testimony that the vessel did not use submerged fish aggregating lights is found not credible.**

31. Mr. Iohp's contemporaneous records while on board the F/V Sea Quest document that the F/V Sea Quest set on or within one nautical mile of a FAD or set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD on August 14, 2009, and his testimony, and the testimony of Mr. Freitas, supports those reports.

**Respondents' Response:** Disputed. This was a regular, fish-under-the-boat set. It was not FAD fishing. *See* Resp. FF Nos. 39-45; 55-57; 59; *see also* Response to Agency FF Nos. 21-27,

and 30 above. The vessel did not set on or around any log, raft, buoy or other traditional form of a FAD.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order.**

32. At all times during the events of August 14, 2009 described above, the F/V Sea Quest was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. TR 281 at 16- 20 (July 11, 2012 Hearing).

**Respondents' Response:** Undisputed that the vessel was located within the Convention area. However, the regulation and definitions speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

SEA QUEST - COUNT 2

33. On August 17, 2009, the F/V Sea Quest set its purse seine net on or within one nautical mile of a FAD or set its purse seine in a manner intended to capture fish that have aggregated in association with a FAD. Specifically, Respondents used the F/V Sea Quest and its auxiliary boats to aggregate fish and then set on those fish.

**Respondents' Response:** Disputed. This was a fish-under-the-boat set and Respondents did not intentionally set on any FAD. *See* Resp. FF Nos. 39-45, 51 and 65. The vessel did not set on or around any log, raft, buoy or other traditional form of a FAD.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order. Captain Freitas' testimony that the vessel did not use submerged fish aggregating lights is found not credible.**

34. Mr. Iohp's Trip Diary and Purse Seine Observer Workbook detail this activity in his records for August 17, 2009. Agency Exhibit 3 at 27 and Agency Exhibit 4 at PS-2, page 27 of 51.

**Respondents' Response:** Disputed that the observer's records accurately reflect the events that took place. His testimony and records lack credibility given his inexperience as an observer. *See* Resp. FF No. 48. Disputed that the vessel set on or near a FAD. *See* Response to Agency FF No. 33 above.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Iohp's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

35. In his trip diary, Mr. Iohp states that "at 0400 they started their fishing activity. I went outside and noticed that the auxiliary boats were attracting fish with submarine lights. Forty-five

minutes after, we make a set. ... All the fish were attracted by the lights on board.” Agency Exhibit 3 at 27.

**Respondents’ Response:** Disputed that the lights on the auxiliary boats were used to attract fish or that fish were attracted by the lights. This was a fish under the boat set and the vessel was following its regular method for setting on fish that were already under the vessel. Freitas Test., Tr. at 48:5-12; 48:13-18; 48:19-22; 48:23-49:1; 60:8-16; and 60:23-61:2 (August 23, 2012). Disputed that the observer’s records accurately reflect the events that took place. His testimony and records lack credibility given his inexperience as an observer. *See* Resp. FF No. 48. *See* Response to Agency FF Nos. 33 and 34 above.

**Ruling: ACCEPTED AND INCORPORATED. Respondents’ arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order. Captain Freitas’ testimony that the vessel did not use submerged fish aggregating lights is found not credible.**

36. This description corresponds exactly to the activity codes and notes made in his Purse Seine Observer Workbook, which shows that: 1) at 0400, activity code 14, drifting- with fish aggregating lights, and the comment “attracting the fish” and 2) at 0449, a set was made. Agency Exhibit 4 at PS-2, page 27 of 51.

**Respondents’ Response:** Disputed that fish aggregating lights were used to attract fish. *See* Response to Agency FF No. 35 above.

**Ruling: ACCEPTED AND INCORPORATED. Captain Freitas’ testimony that the vessel did not use submerged fish aggregating lights is found not credible.**

37. Mr. Iohp’s testimony corresponds to his written records. Mr. Iohp testified that when he got up at 0400 on August 17, 2009, the two auxiliary boats “were already in the ocean attracting the fish by their submarine lights. TR 35- 36 (February 1, 2012 Hearing). He further testified that the vessel otherwise followed the same process for making a set as it had on August 14, 2009. TR 36- 37 (February 1, 2012 Hearing).

**Respondents’ Response:** Disputed that fish aggregating lights were used to attract fish. *See* Response to Agency FF No. 35 above.

**Ruling: ACCEPTED AND INCORPORATED. Captain Freitas’ testimony that the vessel did not use submerged fish aggregating lights is found not credible.**

38. Mr. Iohp’s contemporaneous records while on board the F/V Sea Quest document that the F/V Sea Quest set on or within one nautical mile of a FAD or set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD on August 17, 2009, and his testimony supports those reports.

**Respondents’ Response:** Disputed. This was a regular, fish-under-the-boat set. It was not FAD fishing. *See* Resp. FF Nos. 39-45; 51; and 65-66; *see also* Response to Agency FF Nos.

33-37 above. The vessel did not set on or around any log, raft, buoy or other traditional form of a FAD. Disputed that the observer's records accurately reflect the events that took place. His testimony and records lack credibility given his inexperience as an observer. *See Resp. FF No. 48.*

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order. Mr. Iohp's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

39. At all times during the events of August 17, 2009 described above, the F/V Sea Quest was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. TR 281 at 16- 20 (July 11, 2012 Hearing).

**Respondents' Response:** Undisputed that the vessel was located within the Convention area. However, the regulation and definitions speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

PACIFIC RANGER

40. At the time of the charged violations, the F/V Pacific Ranger was a U.S.-flagged purse seine vessel owned by Pacific Ranger LLC. Agency Exhibit 39.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

41. At the time of the charged violations, the captain of the F/V Pacific Ranger was respondent John Zolezzi. Agency Exhibit 40.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

42. At the time of the charged violations, the fishing master of the F/V Pacific Ranger was respondent Su Tieh Shih. Agency Exhibit 38.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

43. Respondent Su Tieh Shih did not testify in this case and provided no rebuttal against the evidence presented by the Agency.

**Respondents' Response:** Undisputed that Respondent Su Tieh Shih did not testify in this case; disputed as to what he would have said had he testified.

**Ruling: ACCEPTED AND INCORPORATED.** Agency Counsel's proposed finding of fact makes no statement about the content of what the fishing master might have said in any testimony but merely notes that as a result of his not testifying, Mr. Su Tieh Shih did not rebut any allegations made against him or the vessel.

44. At the time of the charged violations, the F/V Pacific Ranger carried an observer, Auto'o Siliomea, on board the vessel. Agency Exhibit 5-7, 38.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

45. Mr. Siliomea was a trained Pacific Islands Forum Fisheries Agency (FFA) observer. TR 52-53 (February 1, 2012 Hearing).

**Respondents' Response:** Disputed. This statement is vague as to the nature and extent of the training Mr. Siliomea purportedly received.

**Ruling: ACCEPTED AND INCORPORATED. The proposed finding of fact is not vague as it only states that Mr. Siliomea was trained by FFA.**

46. While Mr. Siliomea was aboard the F/V Pacific Ranger, he maintained observer reports - including his Trip Diary, Purse Seine Trip Report and Purse Seine Observer Workbook - that documented the events that he observed while on board the F/V Pacific Ranger. TR 54- 59 (February 1, 2012 Hearing).

**Respondents' Response:** Disputed that the observer's reports accurately reflect the events that took place, given his lack of experience.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Siliomea's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

PACIFIC RANGER - COUNT 1

47. On September 30, 2009, the F/V Pacific Ranger set its purse seine net on or within one nautical mile of a FAD or set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD. Specifically, Respondents used the F/V Pacific Ranger and its auxiliary boats to aggregate fish and then set on those fish.

**Respondents' Response:** Disputed. This was a regular, fish-under-the-boat set and Respondents did not intentionally set on any FAD. *See* Resp. FF Nos. 39-45; 93-98. Respondents did not set on any log, raft, buoy or other generally recognized form of FAD.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order.**

48. Mr. Siliomea's Trip Diary and Purse Seine Observer Workbook detail this activity in his records for September 30, 2009. Agency Exhibit 5 at 7 and Agency Exhibit 7 at PS-2, page 7 of 30.

**Respondents' Response:** Disputed. The observer recorded the set under the school association code that stood for "drifted log, debris, or dead animal." He did not record the set as a FAD set meaning that the F/V Pacific Ranger and its auxiliary boats were used to aggregate fish and then set on them. *See* Resp. FF No. 90-92.

**Ruling: ACCEPTED AND INCORPORATED.**

49. In his trip diary, Mr. Siliomea states that the vessel at 0550 made set number 3, during which the vessel used fish aggregating lights. Agency Exhibit 5 at 7.

**Respondents' Response:** Disputed that the vessel used fish aggregating lights. This was a fish under the boat set and not FAD fishing. *See* Response to Agency FF Nos. 47 and 48 above.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order.**

50. Specifically, "I saw auxiliary boat# 6 was drifted with fish aggregating light and the vessel made set around it." Agency Exhibit 5 at 7.

**Respondents' Response:** Disputed that the vessel used fish aggregating lights. This was a fish under the boat set and not FAD fishing. *See* Response to Agency FF Nos. 47 and 48 above.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order.**

51. He noted the presence of drifting log close to the auxiliary boat. Agency Exhibit 5 at 7.

**Respondents' Response:** Disputed that the observer saw a log. His claims that he saw a log are not credible given that he admitted that it was still dark outside during the set and could not describe the size of the log or otherwise know how big it was. *See* Resp. FF Nos. 89-91.

**Ruling: ACCEPTED AND INCORPORATED as to the fact that Mr. Siliomea saw a log. REJECTED as a basis for the violation found proven. There is no preponderant evidence that the vessel saw the log before making a set around it. The violation is found PROVED due to the vessel's use of lights to hold the fish in place while the set was made.**

52. This description dovetails with the activity codes and notes made in his Purse Seine Observer Workbook, which shows that: 1) at 0545, activity code 9- investigate floating object; and 2) at 0550, set #3 was made. Agency Exhibit 7 at PS-2, page 7 of 30.

**Respondents' Response:** Disputed that the observer saw a log. His claims that he saw a log are not credible given that he admitted that it was still dark outside during the set and could not describe the size of the log or otherwise know how big it was. *See* Resp. FF Nos. 89-91.

**Ruling: ACCEPTED AND INCORPORATED as to the fact that Mr. Siliomea saw a log. REJECTED as a basis for the violation found proven. There is no preponderant evidence that the vessel saw the log before making a set around it. The violation is found PROVED due to the vessel's use of lights to hold the fish in place while the set was made.**

53. Mr. Siliomea's testimony corresponds to his written records. Mr. Siliomea described set #3 and explained that the auxiliary boat drifted with fish aggregating lights that were deployed into the ocean and were green in color. TR 55 - 56.

**Respondents' Response:** Disputed that any lights were used with the purpose of aggregating fish that the auxiliary boat drifted with fish aggregating lights or that lights were used underwater for any significant amount of time. In particular, the captain testified that although the fishing master went to put on the underwater light in the workboat, the captain told him that he could not use and it and to turn it off, which the fishing master did. The light was on for at most only a minute or two. *See* Resp. FF Nos. 95-98.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Siliomea's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' assertion that the submerged lights were illuminated only for a minute or two is rejected as not credible.**

54. He further testified to seeing a drifting log beside the auxiliary boat just before the set began. TR 55 at 8- 12.

**Respondents' Response:** Disputed that the observer saw a log. His claims that he saw a log are not credible given that he admitted that it was still dark outside during the set and could not describe the size of the log or otherwise know how big it was. *See* Resp. FF Nos. 89-91.

**Ruling: ACCEPTED AND INCORPORATED as to the fact that Mr. Siliomea saw a log. REJECTED as a basis for the violation found proven. There is no preponderant evidence that the vessel saw the log before making a set around it. The violation is found PROVED due to the vessel's use of lights to hold the fish in place while the set was made.**

55. Mr. Siliomea's contemporaneous records while on board the F/V Pacific Ranger document that the F/V Pacific Ranger set on or within one nautical mile of a FAD or set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD on September 30, 2009, and his testimony supports those reports.

**Respondents' Response:** This was a regular, fish-under the boat set. It was not FAD fishing. *See* Response to Agency FF Nos. 47 and 48.

**Ruling: ACCEPTED AND INCORPORATED.** Mr. Siliomea's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order.

56. At all times during the events of September 30, 2009 described above, the F/V Pacific Ranger was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. TR 302 at 12- 23 (July 11, 2012 Hearing).

**Respondents' Response:** Undisputed that the vessel was located within the Convention area. However, the regulation and definitions speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

OCEAN CONQUEST

57. At the time of the charged violations, the F/V Ocean Conquest was a U.S.-flagged purse seine vessel owned by Ocean Conquest LLC. Agency Exhibit 56.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

58. At the time of the charged violations, the captain of the F/V Ocean Conquest was respondent Benjamin Maughan, Jr. Agency Exhibit 52.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

59. At the time of the charged violations, the fishing master of the F/V Ocean Conquest was respondent Wu Chia Pin. Agency Exhibit 49.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

60. Respondent Wu Chia Pin did not testify in this case and provided no rebuttal against the evidence presented by the Agency

**Respondents' Response:** Undisputed that Respondent Wu Chia Pin did not testify in this case: disputed as to what he would have said had he testified.

**Ruling: ACCEPTED AND INCORPORATED.** Agency Counsel's proposed finding of fact makes no statement about the content of what the fishing master might have said in any

**testimony but merely notes that as a result of his not testifying, Mr. Wu Chia Pin did not rebut any allegations made against him or the vessel.**

61. At the time of the charged violations, the F/V Ocean Conquest carried an observer, Anthony Lioliomola, on board the vessel. Agency Exhibit 50; TR 66 at 13 - 17 (February 1, 2012 Hearing).

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

62. Mr. Lioliomola was a trained Pacific Islands Forum Fisheries Agency (FFA) observer. TR 65- 66 (February 1, 2012 Hearing).

**Respondents' Response:** Disputed as to the nature and extent of the training that Mr. Lioliomola received.

**Ruling: ACCEPTED AND INCORPORATED. The proposed finding of fact is not vague as it only states that Mr. Lioliomola was trained by FFA.**

63. While Mr. Lioliomola was aboard the F/V Ocean Conquest, he maintained observer reports- including his Trip Diary, Purse Seine Trip Report and Purse Seine Observer Workbook - that documented the events that he observed while on board the F/V Ocean Conquest. TR 90 - 104 (February 1, 2012 Hearing).

**Respondents' Response:** Disputed that the observer's reports accurately reflect the events as they took place.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Lioliomola's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

#### OCEAN CONQUEST - COUNT 1

64. On September 18, 2009, the F/V Ocean Conquest did violate the MMPA by taking a marine mammal upon the high seas. Specifically, the Respondents knowingly set the purse seine fishing gear on a whale.

**Respondents' Response:** Disputed that there was a violation of the MMPA or that Respondents intentionally set on a whale within the meaning of the statute. The observer admitted that the fishing master said he did not see the whale before the set. The captain did not see the whale before the set. He testified that the crew has no control whether a whale comes into the net. Respondents took extraordinary measures to help the whale escape unharmed and in the process loss all the fish in the set. The whale was not harmed in the set. *See* Resp. FF Nos. 107-110; *see also* Maughan Test., Tr. at 98:20-99:11; 101:5-16 (August 23, 2012). In any event, Respondents are authorized under Section 118 of the Marine Mammal Protection Act to incidentally take marine mammals under the circumstances described here.

**Ruling: ACCEPTED AND INCORPORATED.** Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.

65. Mr. Lioliomola's Trip Diary and Purse Seine Observer Workbook detail this activity in his records for September 18, 2009. Agency Exhibit 12 at 59 and Agency Exhibit 11 at PS-2, page 32 of 43.

**Respondents' Response:** Disputed that Respondents intentionally set on a whale or that it makes any difference under Section 118 of the Marine Mammal Protection Act. *See* Response to Agency FF No. 64 above.

**Ruling: ACCEPTED AND INCORPORATED.** Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.

66. In his trip diary, Mr. Lioliomola states that in a set that began at 1246, the vessel set on a school associated with a live whale. Shortly after the winch came on "we saw the whale in the net. Master told two towboats to chase the whale out of the net and the whale out before hauling of the net." Agency Exhibit 12 at 59.

**Respondents' Response:** Disputed that Respondents intentionally set on a whale or that it makes any difference under Section 118 of the Marine Mammal Protection Act. *See* Response to Agency FF No. 64 above.

**Ruling: ACCEPTED AND INCORPORATED.** Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.

67. This description corresponds to the activity codes and notes made in his Purse Seine Observer Workbook, which shows that: at 1246, the vessel made set #6 in association with a live whale (school association code 6). Agency Exhibit 11 at PS-2, page 32 of 43.

**Respondents' Response:** Disputed that Respondents intentionally set on a whale or that it makes any difference under Section 118 of the Marine Mammal Protection Act. *See* Response to Agency FF No. 64 above.

**Ruling: ACCEPTED AND INCORPORATED.** Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.

68. Mr. Lioliomola's testimony corresponds to his written records. Mr. Lioliomola testified that on September 18, 2009, the F/V Ocean Conquest made a set on or around a whale. TR 67-75.

**Respondents' Response:** Disputed that Respondents intentionally set on a whale or that it makes any difference under Section 118 of the Marine Mammal Protection Act. The observer admitted that the fishing master said he did not see the whale before the set. Moreover, no whale was harmed in the set. *See* Resp. FF Nos. 107, 108.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.**

69. In addition, he noted that the auxiliary boats were used to try and drive the whale out of the net before the net was pursed. TR 73 - 74. Mr. Lioliomola stated that the whale reacted to the noise of the auxiliary vessels and escaped the net before it was fully pursed. TR 75 at 4- 20.

**Respondents' Response:** Disputed that Respondents intentionally set on a whale or that it makes any difference under Section 118 of the Marine Mammal Protection Act. The observer admitted that the fishing master said he did not see the whale before the set. Respondents took extraordinary measures to help the whale escape unharmed and in the process lost all the fish in the set. No whale was harmed in the set. *See* Resp. FF Nos. 107-110.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.**

70. Mr. Lioliomola's contemporaneous records while on board the F/V Ocean Conquest document that the F/V Ocean Conquest did take a marine mammal upon the high seas on September 18, 2009, and his testimony supports those reports. Therefore, the Agency has met its burden of proof for Count 1 of the NOVA involving the F/V Ocean Conquest.

**Respondents' Response:** Disputed that Respondents intentionally set on a whale within the meaning of the statute. *See* Response to Agency FF No. 64 above. Disputed that the Agency met its burden of proof.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.**

71. At all times during the events of September 18, 2009 described above, the F/V Ocean Conquest was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. TR 347 at 2- 7 (July 12, 2012 Hearing).

**Respondents' Response:** Undisputed that the vessel was located within the Convention area. However, the regulation and definitions speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

OCEAN CONQUEST - COUNT 2

72. On September 24, 2009, the F/V Ocean Conquest set its purse seine net on or within one nautical mile of a FAD or set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD. Specifically, Respondents used the F/V Ocean Conquest and its auxiliary boats to aggregate fish and then set on those fish.

**Respondents' Response.** Disputed. This was a fish-under-the-boat set and Respondents did not intentionally set on any FAD. *See* Resp. FF Nos. 39-45 and 113-114.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' contentions that this was a lawful set are rejected for the reasons given in this Decision and Order.**

73. Mr. Lioliomola's Trip Diary and Purse Seine Observer Workbook detail this activity in his records for September 24, 2009. Agency Exhibit 12 at 2, Agency Exhibit 13, page 13 and Agency Exhibit 14 at PS-2, page 38 of 43.

**Respondents' Response:** Disputed as to whether his records are accurate; undisputed that he kept records.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Lioliomola's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

74. In his trip diary, Mr. Lioliomola states that at 0450 "alarm was sounds on the deck and noticed that light been put into the water portside of the vessel and also fish under the boat. However, they used two light boat, to keep the school and the vessel easily moving away from the two light boats." Agency Exhibit 12 at 2.

**Respondents' Response:** Disputed that the vessel or workboats used lights to aggregate fish. This was a fish-under-the-boat set. The captain, with over 50 years of experience, testified that fish come under the vessel sometime without lights at night, sometimes with lights on, and with no apparent connection. Maughan Test., Tr. at 64:1-15 (August 23, 2012); *Id.* at 79:23-25 ("lights don't attract the fish. If it did, we would have fish under the boat every night"). The captain explained that the lights used by the workboat (or towboat) were put into the water so that the workboat could be seen by the main vessel as it moves away in the morning. *Id.* at 85:6-9. He also said that, even without the lights, the fish will stay with the workboat as the vessel pulls away. *Id.* at 88:20-22.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' contentions that this was a lawful set are rejected for the reasons given in this Decision and Order. Captain Maughan's assertions concerning the use/claimed lack of efficacy of the submerged lights is found not credible.**

75. In his trip report, Mr. Lioliomola described the vessel's setting technique as including: "When setting on school came under the boat, the vessel uses light boats (2) to keep the school and then the vessel easily moved away from the school before it actually set." Agency Exhibit 13 at 13.

**Respondents' Response:** Disputed that the vessel or workboats used lights to aggregate the fish. *See* Response to Agency FF No. 74 above.

**Ruling: ACCEPTED AND INCORPORATED.** Respondents' contentions that this was a lawful set are rejected for the reasons given in this Decision and Order.

76. This description corresponds to the activity codes and notes made in his Purse Seine Observer Workbook, which shows that: 1) at 0450, activity code 9- investigate floating object, fish under the boat; and 2) at 0518, set #27 was made. Agency Exhibit 14 at PS-2, page 38 of 43.

**Respondents' Response:** Undisputed that such entries were made; disputed as to accuracy.

**Ruling: ACCEPTED AND INCORPORATED.** Mr. Lioliomola's observer documents are found credible representations of the fishing activities of the vessel during his trip.

77. Mr. Lioliomola's testimony corresponds to his written records. Mr. Lioliomola described how, on the evening of September 23, 2009, the F/V Ocean Conquest "turn on the fishing aggregate lights in the evening. That's the- they put lights in the water and they turn all their lights very bright lights on the boat and then we just drift." TR 76 at 12- 16.

**Respondents' Response:** Disputed that the vessel or workboats used lights to aggregate the fish. *See* Response to Agency FF No. 74 above.

**Ruling: ACCEPTED AND INCORPORATED.** Respondents' contentions that this was a lawful set are rejected for the reasons given in this Decision and Order.

78. He described the lights on the F/V Ocean Conquest as located on the port side and being very bright, some light green and some white. TR 77.

**Respondents' Response:** Disputed that the vessel used lights to aggregate the fish. *See* Response to Agency FF No. 74 above.

**Ruling: ACCEPTED AND INCORPORATED.** Respondents' contentions that this was a lawful set are rejected for the reasons given in this Decision and Order.

79. These lights were pointed downwards towards the water. TR 77-78.

**Respondents' Response:** Disputed that lights used were anything other than lights used in the regular course of setting the net or that the vessel or workboats used lights to aggregate the fish. *See* Response to Agency FF No. 74 above.

**Ruling: ACCEPTED AND INCORPORATED.** Respondents' contentions that these lights were not used for the purpose of aggregating/holding the fish in place while the set was made are rejected.

80. The next morning, according to Mr. Lioliomola, when he work around 0400, it was completely dark outside. TR 80 at 15- 19.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

81. He described the set as follows: the F/V Ocean Conquest deployed two workboats, once in the water, the two workboats turned on their light, including submerged lights, and the F/V Ocean Conquest extinguished its lights and moved away. TR 81 - 83.

**Respondents' Response:** Disputed that lights used were anything other than lights used in the regular course of setting the net or that the vessel used lights to aggregate the fish. *See* Response to Agency FF No. 74 above.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' contentions that this was a lawful set are rejected for the reasons given in this Decision and Order.**

82. The vessel then made the set around the small boat under which the fish were aggregated. TR 83-84.

**Respondents' Response:** Disputed. This was fish under the boat; it was not FAD fishing. Disputed that vessel or workboats used lights to aggregate the fish. *See* Response to Agency FF Nos. 72 and 74 above.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' contentions that this was a lawful set are rejected for the reasons given in this Decision and Order.**

83. At all times during the events of September 24, 2009 described above, the F/V Ocean Conquest was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. TR 347 at 2- 7 (July 12, 2012 Hearing).

**Respondents' Response:** Undisputed that the vessel was located within the Convention area. However, the regulation and definitions speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

#### OCEAN CONQUEST - COUNT 3

84. On September 25, 2009, the F/V Ocean Conquest set its purse seine net on or within one nautical mile of a FAD or set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD. Specifically, Respondents used the F/V Ocean Conquest and its auxiliary boats to aggregate fish and then set on those fish.

**Respondents' Response.** Disputed. This was a fish-under-the boat-set. There were no fish that had gathered under the F/V OCEAN CONQUEST. The vessel did not set on any log, raft, buoy or other generally recognized form of FAD. *See e.g.*, Resp. FF Nos. 39-45 and 119.

**Ruling: REJECTED to the extent this proposed finding of fact states that the vessel made a set upon fish that had gathered under the F/V Ocean Conquest. The record demonstrates the F/V Ocean Conquest made a set on fish that had aggregated under the Taiwanese vessel, the Fong Kuo 736. The use of the F/V Ocean Conquest's auxiliary boats with submerged fish aggregating lights in connection with this set is ACCEPTED and INCORPORATED.**

85. Mr. Lioliomola's Trip Diary and Purse Seine Observer Workbook detail this activity in his records for September 25, 2009. Agency Exhibit 12 at 3, Agency Exhibit 13, page 14 and Agency Exhibit 14 at PS-2, page 39 of 43.

**Respondents' Response:** Disputed. Mr. Liliomola's reports lack credibility given his inexperience. Moreover, the observer's reports record that the vessel set on fish that had aggregated under another vessel and not the F/V OCEAN CONQUEST. *See e.g.*, Resp. FF Nos. 39-45 and 119.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Lioliomola's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

86. In his trip diary, Mr. Lioliomola records that at approximately 0430 the F/V Ocean Conquest prepared to make a set on fish that had aggregated under the Taiwanese vessel Fong Kuo 736. Agency Exhibit 12 at 3.

**Respondents' Response:** Disputed that the observer's records support a violation. This was fish under another boat. There was no FAD. The vessel did not set on any log, raft, buoy or other generally recognized form of FAD. *See e.g.*, Resp. FF Nos. 39-45 and 119.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' contentions that this was a lawful set are rejected for the reasons given in this Decision and Order.**

87. He noted "Fishing Master said Taiwanese vessel are not allowed to set on fish under the boat but US boats its ok." Agency Exhibit 12 at 3.

**Respondents' Response:** Disputed as lacking in foundation with regard to the truth of the statement that was quoted.

**Ruling: ACCEPTED AND INCORPORATED.**

88. At 0500, the observer recorded that the F/V Ocean Conquest moved alongside the Fong Kuo 736 and deployed "two lights boat down to keep the school in water. Fong Kuo 736 moved slowly away from the light boats and we made the set, set #31 at 0530 hours." *Id.*

**Respondents' Response:** Disputed as to what a "light boat" is or what kinds of lights were used.

**Ruling: ACCEPTED AND INCORPORATED.**

89. Mr. Lioliomola made a corresponding entry in his Trip Report, noting that they set on fish found under a Taiwanese vessel. Agency Exhibit 13 at 14.

**Respondents' Response:** Disputed that the vessel set on any FAD fish. In fact, the observer's own records even point to the fact that this was a "free school" not fish caught on a FAD. Agency Ex. 14 at PS-2 page 39 of 43.

**Ruling: ACCEPTED AND INCORPORATED.**

90. This description corresponds to the activity codes and notes made in his Purse Seine Observer Workbook, which shows that: 1) at 0500 the vessel was investigating a free school while using it light boats; and 2) at 0530, set# 31 was made. Agency Exhibit 14 at PS-2, page 39 of 43.

**Respondents' Response:** Disputed that the vessel set on any FAD fish. In fact, the observer's own records even point to the fact that this was a "free school" not fish caught on a FAD. Agency Ex. 14 at PS-2 page 39 of 43.

**Ruling: ACCEPTED AND INCORPORATED.**

91. Mr. Lioliomola's testimony corresponds to his written records. He details how upon awaking on the morning of September 25, 2009, and was informed that the F/V Ocean Conquest would be setting on fish that had aggregated under a Taiwanese vessel the Fong Kuo 736. TR 85 - 87.

**Respondents' Response:** Disputed that there is any evidence that the F/V Ocean Conquest or the F/V Fong Kuo had purposefully aggregated fish under the Fong Kuo.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' contentions that this was a lawful set are rejected for the reasons given in this Decision and Order.**

92. He testified that when he asked the fishing master if it was permitted to set on fish under the boat, the fishing master informed him that it was allowed for U.S. boats but not Taiwanese boats. TR 87 - 88.

**Respondents' Response:** Disputed as lacking in foundation with regard to the truth of the statement that was quoted.

**Ruling: ACCEPTED AND INCORPORATED.**

93. He testified that the F/V Ocean Conquest deployed two work boats, who moved close to the Fong Kuo 736 and directed their lights downward, and the Fong Kuo 736 turned off their lights and moved away so that the F/V Ocean Conquest could complete the set on the fish beneath the work boats. TR 88 - 90.

**Respondents' Response:** Disputed that this was a FAD set; it was fish under the boat.

**Ruling: ACCEPTED AND INCORPORATED.** Respondents' contentions that this was a lawful set are rejected for the reasons given in this Decision and Order.

94. At all times during the events of September 25, 2009 described above, the F/V Ocean Conquest was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. TR 347 at 2- 7 (July 12, 2012 Hearing).

**Respondents' Response:** Undisputed that the vessel was located within the Convention area. However, the regulation and definitions speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

#### OCEAN ENCOUNTER

95. At the time of the charged violations, the F/V Ocean Encounter was a U.S.-flagged purse seine vessel owned by Ocean Encounter LLC. Agency Exhibit 46.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

96. At the time of the charged violations, the captain of the F/V Ocean Encounter was respondent Russell Keith Bass. Agency Exhibit 44.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

97. Respondent Russell Keith Bass did not testify in this case and provided no testimony against the evidence presented by the Agency.

**Respondents' Response:** Undisputed that Captain Bass did not testify in this case. However, disputed that Captain Bass provided no statements against the evidence presented by the Agency. He provided two statements to the NOAA investigator recounting the events and disputing the agency's evidence. *See* Agency Exhibits 44 and 45.

**Ruling: ACCEPTED AND INCORPORATED.** Agency Counsel's proposed finding of fact makes no statement about the content of what the Captain Bass might have said in any testimony but merely notes that as a result of his not testifying, Captain Bass did not rebut any allegations made against him or the vessel through such testimony at the hearing. Captain Bass' explanations and statements given to the NOAA Special Agent have been fully evaluated in considering the charges against the F/V Ocean Encounter Respondents.

98. At the time of the charged violations, the fishing master of the F/V Ocean Encounter was respondent Ho-Ching Chang. Agency Exhibit 43.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

99. Respondent Ho-Ching Chang did not testify in this case and provided no rebuttal against the evidence presented by the Agency.

**Respondents' Response:** Undisputed that Respondent Ho-Ching Chang did not testify in this case; disputed as to what he would have said had he testified.

**Ruling: ACCEPTED AND INCORPORATED. Agency Counsel's proposed finding of fact makes no statement about the content of what the fishing master might have said in any testimony but merely notes that as a result of his not testifying, Mr. Ho-Ching Chang did not rebut any allegations made against him or the vessel.**

100. At the time of the charged violations, the F/V Ocean Encounter carried an observer, Chris Nare, on board the vessel. Agency Exhibit 42.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

101. Mr. Nare was a trained Pacific Islands Forum Fisheries Agency (FFA) observer. TR 114 - 115 (February 2, 2012 Hearing).

**Respondents' Response:** Disputed. This is vague as to the nature and extent of the training Mr. Nare purportedly received. He was inexperienced. The trip on the F/V Ocean Encounter was Mr. Nare's first time as an observer and he had never been on a purse seine vessel before. Resp. FF Nos. 125-126.

**Ruling: ACCEPTED AND INCORPORATED. The proposed finding of fact is not vague as it only states that Mr. Nare was trained by FFA.**

102. While Mr. Nare was aboard the F/V Ocean Encounter, he maintained observer reports- including his Trip Diary, Purse Seine Trip Report and Purse Seine Observer Workbook- that documented the events that he observed while on board the F/V Ocean Encounter. Agency Exhibits 17 - 22.

**Respondents' Response:** Disputed. It is questionable that Mr. Nare's records accurately document the alleged events. The captain told the NOAA investigator that Mr. Nare was inexperienced and had "no clue" how to complete the forms, make proper log entries, identify species, measure tuna or observe or assess objectively. Resp. FF Nos. 125-126.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

OCEAN ENCOUNTER - COUNT 1

103. On September 17, 2009, the F/V Ocean Encounter did violate the MMPA by taking a marine mammal upon the high seas. Specifically, the Respondents knowingly set the purse seine fishing gear on a whale.

**Respondents' Response:** Disputed that there was a violation of the MMPA or that Respondents intentionally set on a whale within the meaning of the statute. Captain Bass told the NOAA investigator that he only recalled one instance of whale interaction during the closure. He told the investigator that "a pilot whale...was discovered on the far side of the net after it was closed. When the master noticed this, he went into action and had two auxiliary boats escort the whale out and over the side of the yellow floats. There was no contact with the whale and no noticed injury." Agency Exh. 44 at p. 3-4. That was the only whale he noticed during the closure. *Id.* at p. 4 and 5. The observer never informed the captain of any whale interactions. Agency Exh. 45 at p. 9. No whale was harmed in this set. Resp. FF Nos. 128-129. No fish were caught in this set. Resp. FF No. 131.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.**

104. Mr. Nare's Trip Diary and Purse Seine Observer Workbook detail this activity in his records for September 17, 2009. Agency Exhibit 17 at 53 and Agency Exhibit 22 at PS-2, page 6.

**Respondents' Response:** Disputed that the observer accurately recorded the events at issue. The observer's records and testimony lacks credibility given his inexperience as an observer. *See* Resp. FF No. 125-126. Further, the captain told the investigator that "the observers were to write in pencil so that they could change what they recorded." Agency Exh. 44 at p. 4. He also said that observers had told him that the FFA wanted them to find violations so the FFA countries could get extra money. *Id.* The observer's own actions also cast doubt that his reports were accurate. Although he noted whales in his various reports, he never informed the captain of any whale interactions. Agency Exh. 45 at p. 9.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. The observer was not required to inform the captain of his observations or potential violations.**

105. In his trip diary, Mr. Nare states that in set #4 that began at 0842, the vessel set on a school associated with a live whale. He reports that although the fishing master claims to have unintentionally set on the whale, he and other crew members saw the whale in the school of fish. Agency Exhibit 17 at 53.

**Respondents' Response:** Disputed that the observer accurately recorded the events. *See* Response to Agency FF No. 104 above. Moreover, Respondents did not intentionally set on a whale and no whale was harmed. *See* Response to Agency FF No. 103 above.

**Ruling: ACCEPTED AND INCORPORATED.** Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.

106. This description corresponds to the activity codes and notes made in his Purse Seine Observer Workbook, which shows that: 1) at 0847, it notes set #4 being made in association with a live whale (school association code 6). Agency Exhibit 22 at PS-2, page 6.

**Respondents' Response:** Disputed that the observer accurately recorded the events. *See* Response to Agency FF No. 104 above. Moreover, Respondents did not intentionally set on a whale and no whale was harmed. *See* Response to Agency FF No. 103 above.

**Ruling: ACCEPTED AND INCORPORATED.** Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.

107. Mr. Nare's testimony corresponds to his written records. Mr. Nare testified that on September 17, 2009, the F/V Ocean Encounter made a set on or around a whale. TR 116 - 127.

**Respondents' Response:** Disputed that the observer accurately recorded the events. *See* Response to Agency FF No. 104 above. Moreover, Respondents did not intentionally set on a whale and no whale was harmed. *See* Response to Agency FF No. 103 above.

**Ruling: ACCEPTED AND INCORPORATED.** Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.

108. In particular, he noted from his vantage point on the helideck he could see a whale association with a school of tuna. TR 116 - 117.

**Respondents' Response:** Disputed that the observer could see the whale before the set when Respondents did not. His testimony lacks credibility given his inexperience as an observer. *See* Resp. FF No. 125-126. The observer never informed the captain of any whale interactions. Agency Exh. 45 at p. 9. Moreover, Respondents did not intentionally set on a whale. *See* Response to Agency FF No. 103 above.

**Ruling: ACCEPTED AND INCORPORATED.** Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents'

**arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.**

109. He expected that the vessel would not set on this school, given that there was a whale associated with it, but the vessel proceed to attempt to set on the fish. *Id.*

**Respondents' Response:** Disputed that the observer could see the whale before the set when Respondents did not. His testimony lacks credibility given his inexperience as an observer. *See* Resp. FF No. 125-126. The observer never informed the captain of any whale interactions. Agency Exh. 45 at p. 9. Moreover, Respondents did not intentionally set on a whale. *See* Response to Agency FF No. 103 above.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.**

110. Once the whale was caught in the center of the net, the F/V Ocean Encounter crew attempted to chase the whale out of the net, using two light boats. *Id.*

**Respondents' Response:** Disputed that Respondents intentionally set on a whale or that any attempt to assist the whale in escaping was unsuccessful. *See* Response to Agency FF No. 103 above. The fishing master helped the whale escape "calmly, safely and with a favorable result/outcome." Agency Exh. 45 at p. 9.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.**

111. But they were unsuccessful. *Id.*

**Respondents' Response:** Disputed that Respondents intentionally set on a whale or that any attempt to assist the whale in escaping was unsuccessful. *See* Response to Agency FF No. 103 above. The fishing master helped the whale escape "calmly, safely and with a favorable result/outcome." Agency Exh. 45 at p. 9.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.**

112. Mr. Nare testified that eventually they had to open the bow end of the net to free the whale. *Id.*

**Respondents' Response:** Disputed that Respondents intentionally set on a whale or that any attempt to assist the whale in escaping was unsuccessful. *See* Response to Agency FF No. 103

above. The fishing master helped the whale escape “calmly, safely and with a favorable result/outcome.” Agency Exh. 45 at p. 9.

**Ruling: ACCEPTED AND INCORPORATED. Respondents’ arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.**

113. At all times during the events of September 17, 2009 described above, the F/V Ocean Encounter was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. TR 347 at 9- 13 (July 12, 2012 Hearing).

**Respondents’ Response:** Undisputed that the vessel was located within the Convention area. However, the regulation and definitions speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

#### OCEAN ENCOUNTER - COUNT 2

114. On September 24, 2009, the F/V Ocean Encounter did violate the MMPA by taking a marine mammal upon the high seas. Specifically, the Respondents knowingly set the purse seine fishing gear on a whale.

**Respondents’ Response:** Disputed that there was a violation of the MMPA or that Respondents intentionally set on a whale within the meaning of the statute. Captain Bass told the NOAA investigator that he only recalled one instance of whale interaction during the closure. He told the investigator that “a pilot whale...was discovered on the far side of the net after it was closed. When the master noticed this, he went into action and had two auxiliary boats escort the whale out and over the side of the yellow floats. There was no contact with the whale and no noticed injury.” Agency Exh. 44 at p. 3-4. That was the only whale he noticed during the closure. *Id.* at p. 4 and 5. The observer never informed the captain of any whale interactions. Agency Exh. 45 at p. 9. No whale was harmed in this set. Resp. FF Nos. 134. No fish were caught in this set. Resp. FF No. 136.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare’s observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents’ arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.**

115. Mr. Lioliomola’s Trip Diary and Purse Seine Observer Workbook detail this activity in his records for September 24, 2009. Agency Exhibit 20 at 67 and Agency Exhibit 22 at PS-2, page 13.

**Respondents’ Response:** Disputed that the observer accurately recorded the events at issue. The observer’s records and testimony lacks credibility given his inexperience as an observer. *See* Resp. FF No. 125-126. Further, the captain told the investigator that “the observers were to write in pencil so that they could change what they recorded.” Agency Exh. 44 at p. 4. He also said that observers had told him that the FFA wanted them to find violations so the FFA

countries could get extra money. *Id.* The observer's own actions also cast doubt that his reports were accurate. Although he noted whales in his various reports, he never informed the captain of any whale interactions. Agency Exh. 45 at p. 9.

**Ruling: ACCEPTED AND INCORPORATED.** Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.

116. In his trip diary, Mr. Nare states that in a set that began at 1631, the vessel once again set on a school associated with a live whale. Agency Exhibit 20 at 67.

**Respondents' Response:** Disputed that the observer accurately recorded the events. *See* Response to Agency FF No. 115 above. Moreover, Respondents did not intentionally set on a whale and no whale was harmed. *See* Response to Agency FF No. 114 above.

**Ruling: ACCEPTED AND INCORPORATED.** Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.

117. He identified it as a Pilot whale and noted it was able to escape the net. Agency Exhibit 20 at 67.

**Respondents' Response:** Disputed that the observer accurately recorded the events. *See* Response to Agency FF No. 115 above. Moreover, Respondents did not intentionally set on a whale and no whale was harmed. *See* Response to Agency FF No. 114 above.

**Ruling: ACCEPTED AND INCORPORATED.** Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.

118. This description corresponds to the activity codes and notes made in his Purse Seine Observer Workbook, which shows that: 1) at 1620, investigating free school associated with a live whale; and 2) at 1631 the vessel made set #16 in association with a live whale (school association code 6). Agency Exhibit 22 at PS-2, page 13.

**Respondents' Response:** Disputed that the observer accurately recorded the events. *See* Response to Agency FF No. 115 above. Moreover, Respondents did not intentionally set on a whale and no whale was harmed. *See* Response to Agency FF No. 114 above.

**Ruling: ACCEPTED AND INCORPORATED.** Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.

119. Mr. Nare's testimony corresponds to his written records. Mr. Nare testified that on September 24, 2009, the F/V Ocean Encounter made a set on or around a whale. TR 127 - 135.

**Respondents' Response:** Disputed that the observer accurately recorded the events. *See* Response to Agency FF No. 115 above. Moreover, Respondents did not intentionally set on a whale and no whale was harmed. *See* Response to Agency FF No. 114 above. **Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.**

**Ruling: ACCEPTED AND INCORPORATED.**

120. Once again he saw a whale associated with a school of tuna. TR 128 - 130. The F/V Ocean Encounter attempted to set on the school of fish. *Id.*

**Respondents' Response:** Disputed. Mr. Nare testified specifically that the vessel only set on a school associated with a whale. Resp. FF No. 133. It did not intentionally set on a whale.

**Ruling: ACCEPTED AND INCORPORATED.**

121. The whale escaped before the vessel was able to complete the set. *Id.*

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

122. At all times during the events of September 24, 2009 described above, the F/V Ocean Encounter was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. TR 347 at 9- 13 (July 12, 2012 Hearing).

**Respondents' Response:** Undisputed that the vessel was located within the Convention area. However, the regulation and definitions speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

OCEAN ENCOUNTER - COUNT 3

123. On September 25, 2009, the F/V Ocean Encounter did violate the MMPA by taking a marine mammal upon the high seas. Specifically, the Respondents knowingly set the purse seine fishing gear on a whale.

**Respondents' Response:** Disputed that there was a violation of the MMPA or that Respondents intentionally set on a whale within the meaning of the statute. Captain Bass told the NOAA investigator that he only recalled one instance of whale interaction during the closure. He told the investigator that "a pilot whale...was discovered on the far side of the net after it was closed. When the master noticed this, he went into action and had two auxiliary boats escort the whale

out and over the side of the yellow floats. There was no contact with the whale and no noticed injury.” Agency Exh. 44 at p. 3-4. That was the only whale he noticed during the closure. *Id.* at p. 4 and 5. The observer never informed the captain of any whale interactions. Agency Exh. 45 at p. 9. No whale was harmed in this set and it escaped on its own. Resp. FF Nos. 138.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare’s observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents’ arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.**

124. Mr. Nare’s Trip Diary and Purse Seine Observer Workbook detail this activity in his records for September 25, 2009. Agency Exhibit 20 at 68 and Agency Exhibit 22 at PS-2, page 14.

**Respondents’ Response:** Disputed that the observer accurately recorded the events at issue. The observer’s records and testimony lacks credibility given his inexperience as an observer. *See* Resp. FF No. 125-126. Further, the captain told the investigator that “the observers were to write in pencil so that they could change what they recorded.” Agency Exh. 44 at p. 4. He also said that observers had told him that the FFA wanted them to find violations so the FFA countries could get extra money. *Id.* The observer’s own actions also cast doubt that his reports were accurate. Although he noted whales in his various reports, he never informed the captain of any whale interactions. Agency Exh. 45 at p. 9.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare’s observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents’ arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.**

125. In his trip diary, Mr. Nare states “a school was sighted at far distance and is well seen to have associate with one false killer whale” which nonetheless the vessel set on. Agency Exhibit 20 at 68.

**Respondents’ Response:** Disputed that the observer accurately recorded the events. *See* Response to Agency FF No. 124 above. Moreover, Respondents did not intentionally set on a whale and no whale was harmed. *See* Response to Agency FF No. 123 above.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare’s observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents’ arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.**

126. This description corresponds to the activity codes and notes made in his Purse Seine Observer Workbook, which shows that: at 0617, the vessel made set#17 in association with a live whale (school association code 6). Agency Exhibit 22 at PS-2, page 14.

**Respondents' Response:** Disputed that the observer accurately recorded the events. *See* Response to Agency FF No. 124 above. Moreover, Respondents did not intentionally set on a whale and no whale was harmed. *See* Response to Agency FF No. 123 above.

**Ruling: ACCEPTED AND INCORPORATED.** Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.

127. Mr. Nare's testimony corresponds to his written records. Mr. Nare testified that on September 25, 2009, the F/V Ocean Encounter made a set on or around a whale. TR 135 - 144.

**Respondents' Response:** Disputed that the observer accurately recorded the events. *See* Response to Agency FF No. 124 above. Moreover, Respondents did not intentionally set on a whale and no whale was harmed. *See* Response to Agency FF No. 123 above.

**Ruling: ACCEPTED AND INCORPORATED.** Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.

128. At all times during the events of September 25, 2009 described above, the F/V Ocean Encounter was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. TR 347 at 9- 13 (July 12, 2012 Hearing).

**Respondents' Response:** Undisputed that the vessel was located within the Convention area. However, the regulation and definitions speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

#### OCEAN ENCOUNTER - COUNT 4

129. On September 25, 2009, the F/V Ocean Encounter did violate the MMPA by taking a marine mammal upon the high seas. Specifically, the Respondents knowingly set the purse seine fishing gear on a whale.

**Respondents' Response:** Disputed that there was a violation of the MMPA or that Respondents intentionally set on a whale within the meaning of the statute. Captain Bass told the NOAA investigator that he only recalled one instance of whale interaction during the closure. He told the investigator that "a pilot whale...was discovered on the far side of the net after it was closed. When the master noticed this, he went into action and had two auxiliary boats escort the whale out and over the side of the yellow floats. There was no contact with the whale and no noticed injury." Agency Exh. 44 at p. 3-4. That was the only whale he noticed during the closure. *Id.* at p. 4 and 5. The observer never informed the captain of any whale interactions. Agency Exh. 45 at p. 9. No whale was harmed in this set and it escaped on its own. Resp. FF No. 138.

**Ruling: ACCEPTED AND INCORPORATED.** Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.

130. Mr. Nare's Trip Diary and Purse Seine Observer Workbook detail this activity in his records for September 25, 2009. Agency Exhibit 20 at 68- 69 and Agency Exhibit 22 at PS-2, page 14.

**Respondents' Response:** Disputed that the observer accurately recorded the events at issue. The observer's records and testimony lacks credibility given his inexperience as an observer. *See* Resp. FF No. 125-126. Further, the captain told the investigator that "the observers were to write in pencil so that they could change what they recorded." Agency Exh. 44 at p. 4. He also said that observers had told him that the FFA wanted them to find violations so the FFA countries could get extra money. *Id.* The observer's own actions also cast doubt that his reports were accurate. Although he noted whales in his various reports, he never informed the captain of any whale interactions. Agency Exh. 45 at p. 9.

**Ruling: ACCEPTED AND INCORPORATED.** Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.

131. In his trip diary, Mr. Nare states the vessel made a second set on September 25, 2009, associated with a live whale. Agency Exhibit 20 at 68- 69.

**Respondents' Response:** Disputed that the observer accurately recorded the events. *See* Response to Agency FF No. 130 above. Moreover, Respondents did not intentionally set on a whale and no whale was harmed. *See* Response to Agency FF No. 129 above.

**Ruling: ACCEPTED AND INCORPORATED.** Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.

132. Mr. Nare noted in his trip diary that "I heard the watchman up the crow's nest told the F/Master that there's a whale in the school but that doesn't sound much concerning the F/Master as went on and set on this school." *Id.*

**Respondents' Response:** Disputed that the observer accurately recorded the events. *See* Response to Agency FF No. 130 above. Moreover, Respondents did not intentionally set on a whale and no whale was harmed. *See* Response to Agency FF No. 129 above.

**Ruling: ACCEPTED AND INCORPORATED.** Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents'

**arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.**

133. This description corresponds to the activity codes and notes made in his Purse Seine Observer Workbook, which shows that: at 1601, the vessel made set #18 in association with a live whale (school association code 6). Agency Exhibit 22 at PS-2, page 14.

**Respondents' Response:** Disputed that the observer accurately recorded the events. *See* Response to Agency FF No. 130 above. Moreover, Respondents did not intentionally set on a whale and no whale was harmed. *See* Response to Agency FF No. 129 above.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.**

134. Mr. Nare's testimony corresponds to his written records. Mr. Nare testified that on a second occasion on September 25, 2009, the F/V Ocean Encounter set on a school associated with a whale. TR 144- 149.

**Respondents' Response:** Disputed that the observer accurately recorded the events. *See* Response to Agency FF No. 130 above. Moreover, Respondents did not intentionally set on a whale and no whale was harmed. *See* Response to Agency FF No. 129 above.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip. Respondents' arguments regarding the scope of activities authorized under Section 118 of the MMPA are rejected for the reasons given in this Decision and Order.**

135. At all times during the events of September 25, 2009 described above, the F/V Ocean Encounter was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. TR 347 at 9- 13 (July 12, 2012 Hearing).

**Respondents' Response:** Undisputed that the vessel was located within the Convention area. However, the regulation and definitions speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

OCEAN ENCOUNTER - COUNT 5

136. On September 18, 2009, the F/V Ocean Encounter set its purse seine net on or within one nautical mile of a FAD or set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD. Specifically, Respondents used the F/V Ocean Encounter and its auxiliary boats to aggregate fish and then set on those fish.

**Respondents' Response:** Disputed. This was a regular, fish-under-the-boat set and Respondents did not intentionally set on any FAD. *See* Resp. FF Nos. 39-45; 143-144.

Respondents did not set on any log, raft, buoy or other generally recognized form of FAD. *See e.g.*, Agency Exh. 44 at p. 2.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order.**

137. Mr. Nare's Trip Diary and Purse Seine Observer Workbook detail this activity in his records for September 18, 2009. Agency Exhibit 17 at 57 and Agency Exhibit 22 at PS-2, page 7.

**Respondents' Response:** Disputed that the observer accurately recorded the events at issue. The observer's records and testimony lacks credibility given his inexperience as an observer. *See* Resp. FF No. 125-126. Further, the captain told the investigator that "the observers were to write in pencil so that they could change what they recorded." Agency Exh. 44 at p. 4. He also said that observers had told him that the FFA wanted them to find violations so the FFA countries could get extra money. *Id.*

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

138. In his trip diary, Mr. Nare states that he was awakened at 0510 and when he went on deck he "saw two of our auxiliary boats were out there with the fish aggregating lights." Agency Exhibit 17 at 57.

**Respondents' Response:** Disputed as to what "fish aggregating" lights are or that fish aggregating lights were used. The captain told the NOAA investigator that he did not recall seeing or noticing special or green lights on the vessel or the auxiliary boats. Agency Exh. 44 at p. 3. Moreover, the observer's records and testimony lack credibility given his inexperience as an observer. *See* Response to Agency FF No. 137 above.

**Ruling: ACCEPTED AND INCORPORATED. Captain Bass's denial of the use of fish aggregating lights is found not credible. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

139. He further described an interaction with the Captain, who explained to him that although early morning sets were usually on FADs, in this case this was not a FAD set and they were setting on fish that aggregated below the vessel. *Id.*

**Respondents' Response:** Disputed that setting on fish under the vessel is FAD fishing. *See* Response to Agency FF No. 136 above.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order.**

140. This description corresponds to the activity codes and notes made in his Purse Seine Observer Workbook, which shows that: 1) at 0519, the vessel investigated a free school that was associated with a drifting log; and 2) at 0532, set #3 was made on that school. Agency Exhibit 22 at PS-2, page 7.

**Respondents' Response:** Undisputed that the observer made records; disputed as to whether they are accurate.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

141. Mr. Nare's testimony corresponds to his written records. TR 151- 156.

**Respondents' Response:** Disputed that the observer's testimony and records accurately record the events. The observer's records and testimony lack credibility given his inexperience as an observer. *See* Response to Agency FF No. 137 above.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

142. Mr. Nare described how when he arrived on deck in the morning, the lights on the F/V Ocean Encounter were turned off and as the F/V Ocean Encounter drifted away from the lights boat which had deployed their fish aggregating lights. TR 152.

**Respondents' Response:** Disputed as to what "fish aggregating" lights are or that fish aggregating lights were used. The captain told the NOAA investigator that he did not recall seeing or noticing special or green lights on the vessel or the auxiliary boats. Agency Exh. 44 at p. 3. Moreover, the observer's records and testimony lack credibility given his inexperience as an observer. *See* Response to Agency FF No. 137 above.

**Ruling: ACCEPTED AND INCORPORATED. Captain Bass's denial of the use of fish aggregating lights is found not credible. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

143. He described the lights and green and white, submerged approximately 20 meters down in the water. TR 153. He testified to his conversation with Respondent Keith Bass. TR 152

**Respondents' Response:** Disputed as to what "fish aggregating" lights are or that fish aggregating lights were used. The captain told the NOAA investigator that he did not recall seeing or noticing special or green lights on the vessel or the auxiliary boats. Agency Exh. 44 at p. 3. Moreover, the observer's records and testimony lack credibility given his inexperience as an observer. *See* Response to Agency FF No. 137 above.

**Ruling: ACCEPTED AND INCORPORATED. Captain Bass's denial of the use of fish aggregating lights is found not credible. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

144. Mr. Nare's contemporaneous records while on board the F/V Ocean Encounter document that the F/V Ocean Encounter set on or within one nautical mile of a FAD or set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD on September 18, 2009, and his testimony supports those reports.

**Respondents' Response:** Disputed that this was FAD fishing; it was fish under the boat. *See* Response to Agency FF No. 136 above.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order.**

145. At all times during the events of September 18, 2009 described above, the F/V Ocean Encounter was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. TR 347 at 9- 13 (July 12, 2012 Hearing).

**Respondents' Response:** Undisputed that the vessel was located within the Convention area. However, the regulation and definitions speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

#### OCEAN ENCOUNTER - COUNT 6

146. On September 20, 2009, the F/V Ocean Encounter set its purse seine net on or within one nautical mile of a FAD or set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD. Specifically, Respondents used the F/V Ocean Encounter and its auxiliary boats to aggregate fish and then set on those fish.

**Respondents' Response:** Disputed. This was a regular, fish-under-the-boat set and Respondents did not intentionally set on any FAD. *See* Resp. FF Nos. 39-45; 150-151. Respondents did not set on any log, raft, buoy or other generally recognized form of FAD. *See e.g.*, Agency Exh. 44 at p. 2.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order.**

147. Mr. Nare's Trip Diary and Purse Seine Observer Workbook detail this activity in his records for September 20, 2009. Agency Exhibit 17 at 60, Agency Exhibit 13, page 13 and Agency Exhibit 22 at PS-2, page 9.

**Respondents' Response:** Disputed that the observer accurately recorded the events at issue. The observer's records and testimony lacks credibility given his inexperience as an observer. *See* Resp. FF No. 125-126. Further, the captain told the investigator that "the observers were to write in pencil so that they could change what they recorded." Agency Exh. 44 at p. 4. He also

said that observers had told him that the FFA wanted them to find violations so the FFA countries could get extra money. *Id.*

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

148. In his trip diary, Mr. Nare described the set made on at 0551 on September 20, 2009 as follows: "Drift last night, all the tuna came under the vessel; deploy boats with fish aggregating lights, we gently pulls away and then do the set." Agency Exhibit 17 at 60.

**Respondents' Response:** Disputed as to what "fish aggregating" lights are or that fish aggregating lights were used. The captain told the NOAA investigator that he did not recall seeing or noticing special or green lights on the vessel or the auxiliary boats. Agency Exh. 44 at p. 3. Moreover, the observer's records and testimony lack credibility given his inexperience as an observer. *See* Response to Agency FF No. 147 above.

**Ruling: ACCEPTED AND INCORPORATED. Captain Bass's denial of the use of fish aggregating lights is found not credible. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

149. This description corresponds to the activity codes and notes made in his Purse Seine Observer Workbook, which shows that: 1) at 0423, the vessel was drifting with fish aggregating lights; and 2) at 0551, set #10 was made. Agency Exhibit 22 at PS-2, page 9.

**Respondents' Response:** Disputed as to what "fish aggregating" lights are or that fish aggregating lights were used. The captain told the NOAA investigator that he did not recall seeing or noticing special or green lights on the vessel or the auxiliary boats. Agency Exh. 44 at p. 3. Moreover, the observer's records and testimony lack credibility given his inexperience as an observer. *See* Response to Agency FF No. 147 above.

**Ruling: ACCEPTED AND INCORPORATED. Captain Bass's denial of the use of fish aggregating lights is found not credible. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

150. At all times during the events of September 20, 2009 described above, the F/V Ocean Encounter was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. TR 347 at 9- 13 (July 12, 2012 Hearing).

**Respondents' Response:** Undisputed that the vessel was located within the Convention area. However, the regulation and definitions speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

OCEAN ENCOUNTER - COUNT 7

151. On September 21, 2009, the F/V Ocean Encounter set its purse seine net on or within one nautical mile of a FAD or set a purse seine in a manner intended to capture fish that have

aggregated in association with a FAD. Specifically, Respondents used the F/V Ocean Encounter and its auxiliary boats to aggregate fish and then set on those fish.

**Respondents' Response:** Disputed. This was a regular, fish-under-the-boat set and Respondents did not intentionally set on any FAD. *See* Resp. FF Nos. 39-45; 157-158. Respondents did not set on any log, raft, buoy or other generally recognized form of FAD. *See e.g.*, Agency Exh. 44 at p. 2.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order.**

152. Mr. Nare's Trip Diary and Purse Seine Observer Workbook detail this activity in his records for September 21, 2009. Agency Exhibit 17 at 62 and Agency Exhibit 22 at PS-2, page 10.

**Respondents' Response:** Disputed that the observer accurately recorded the events at issue. The observer's records and testimony lacks credibility given his inexperience as an observer. *See* Resp. FF No. 125-126. Further, the captain told the investigator that "the observers were to write in pencil so that they could change what they recorded." Agency Exh. 44 at p. 4. He also said that observers had told him that the FFA wanted them to find violations so the FFA countries could get extra money. *Id.*

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

153. In his trip diary, Mr. Nare noted that a third early morning set on fish that aggregated under the vessel was made on September 21, 2009. Agency Exhibit 17 at 62.

**Respondents' Response:** Disputed that the observer accurately recorded the events at issue. The observer's records and testimony lacks credibility given his inexperience as an observer. *See* Resp. FF No. 125-126. Further, the captain told the investigator that "the observers were to write in pencil so that they could change what they recorded." Agency Exh. 44 at p. 4. He also said that observers had told him that the FFA wanted them to find violations so the FFA countries could get extra money. *Id.*

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

154. This description corresponds to the activity codes and notes made in his Purse Seine Observer Workbook, which shows that: 1) at 0456, drifting with fish aggregating lights; and 2) at 0544, set #11 was made. Agency Exhibit 22 at PS-2, page 10.

**Respondents' Response:** Disputed as to what "fish aggregating" lights are or that fish aggregating lights were used. The captain told the NOAA investigator that he did not recall seeing or noticing special or green lights on the vessel or the auxiliary boats. Agency Exh. 44 at

p. 3. Moreover, the observer's records and testimony lack credibility given his inexperience as an observer. *See* Response to Agency FF No. 152 above.

**Ruling: ACCEPTED AND INCORPORATED. Captain Bass's denial of the use of fish aggregating lights is found not credible. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

155. At all times during the events of September 21, 2009 described above, the F/V Ocean Encounter was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. TR 347 at 9- 13 (July 12, 2012 Hearing).

**Respondents' Response:** Undisputed that the vessel was located within the Convention area. However, the regulation and definitions speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

OCEAN ENCOUNTER - COUNT 8

156. On September 22, 2009, the F/V Ocean Encounter set its purse seine net on or within one nautical mile of a FAD or set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD. Specifically, Respondents used the F/V Ocean Encounter and its auxiliary boats to aggregate fish and then set on those fish.

**Respondents' Response:** Disputed. This was a regular, fish-under-the-boat set and Respondents did not intentionally set on any FAD. *See* Resp. FF Nos. 39-45; 164-165. Respondents did not set on any log, raft, buoy or other generally recognized form of FAD. *See e.g.*, Agency Exh. 44 at p. 2.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order.**

157. Mr. Nare's Trip Diary and Purse Seine Observer Workbook detail this activity in his records for September 22, 2009. Agency Exhibit 20 at 64 and Agency Exhibit 22 at PS-2, page 11.

**Respondents' Response:** Disputed that the observer accurately recorded the events at issue. The observer's records and testimony lacks credibility given his inexperience as an observer. *See* Resp. FF No. 125-126. Further, the captain told the investigator that "the observers were to write in pencil so that they could change what they recorded." Agency Exh. 44 at p. 4. He also said that observers had told him that the FFA wanted them to find violations so the FFA countries could get extra money. *Id.*

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

158. In his trip diary, Mr. Nare notes that "this set is the fourth early hour set we made." Agency Exhibit 20 at 64. He also states that "without these early hour sets we would have not up to half the vessel capacity as this F/Master is only specialize in FAD fishing than free schools." *Id.*

**Respondents' Response:** Disputed that this was FAD fishing. It was fish under the boat. *See* Response to Agency FF No. 156 above.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order.**

159. This description corresponds to the activity codes and notes made in his Purse Seine Observer Workbook, which shows that: 1) at 0506, drifting with fish aggregating lights; and 2) at 0549, set #12 was made. Agency Exhibit 22 at PS-2, page 11.

**Respondents' Response:** Disputed as to what "fish aggregating" lights are or that fish aggregating lights were used. The captain told the NOAA investigator that he did not recall seeing or noticing special or green lights on the vessel or the auxiliary boats. Agency Exh. 44 at p. 3. Moreover, the observer's records and testimony lack credibility given his inexperience as an observer. *See* Response to Agency FF No. 157 above.

**Ruling: ACCEPTED AND INCORPORATED. Captain Bass's denial of the use of fish aggregating lights is found not credible. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

160. At all times during the events of September 22, 2009 described above, the F/V Ocean Encounter was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. TR 347 at 9- 13 (July 12, 2012 Hearing).

**Respondents' Response:** Undisputed that the vessel was located within the Convention area. However, the regulation and definitions speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

#### OCEAN ENCOUNTER - COUNT 9

161. On September 23, 2009, the F/V Ocean Encounter set its purse seine net on or within one nautical mile of a FAD or set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD. Specifically, Respondents used the F/V Ocean Encounter and its auxiliary boats to aggregate fish and then set on those fish.

**Respondents' Response:** Disputed. This was a regular, fish-under-the-boat set and Respondents did not intentionally set on any FAD. *See* Resp. FF Nos. 39-45; 171-172. Respondents did not set on any log, raft, buoy or other generally recognized form of FAD. *See e.g.*, Agency Exh. 44 at p. 2.

**Ruling: ACCEPTED AND INCORPORATED. Respondents' arguments concerning the scope of conducted prohibited by the regulations are rejected for the reasons given in this Decision and Order.**

162. Mr. Nare's Trip Diary and Purse Seine Observer Workbook detail this activity in his records for September 23, 2009. Agency Exhibit 20 at 66 and Agency Exhibit 22 at PS-2, page 12.

**Respondents' Response:** Disputed that the observer accurately recorded the events at issue. The observer's records and testimony lacks credibility given his inexperience as an observer. *See Resp. FF No. 125-126.* Further, the captain told the investigator that "the observers were to write in pencil so that they could change what they recorded." Agency Exh. 44 at p. 4. He also said that observers had told him that the FFA wanted them to find violations so the FFA countries could get extra money. *Id.*

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

163. In his trip diary, Mr. Nare describes the set on the morning of September 23, 2009, as the vessel's fifth early morning set. Agency Exhibit 20 at 66.

**Respondents' Response:** Disputed that the observer accurately recorded the events at issue. The observer's records and testimony lacks credibility given his inexperience as an observer. *See Resp. FF No. 125-126.* Further, the captain told the investigator that "the observers were to write in pencil so that they could change what they recorded." Agency Exh. 44 at p. 4. He also said that observers had told him that the FFA wanted them to find violations so the FFA countries could get extra money. *Id.*

**Ruling: ACCEPTED AND INCORPORATED. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

164. This description corresponds to the activity codes and notes made in his Purse Seine Observer Workbook, which shows that: 1) at 0506, drifting with fish aggregating lights; and 2) at 0535, set #14 was made. Agency Exhibit 22 at PS-2, page 12.

**Respondents' Response:** Disputed as to what "fish aggregating" lights are or that fish aggregating lights were used. The captain told the NOAA investigator that he did not recall seeing or noticing special or green lights on the vessel or the auxiliary boats. Agency Exh. 44 at p. 3. Moreover, the observer's records and testimony lack credibility given his inexperience as an observer. *See Response to Agency FF No. 162 above.*

**Ruling: ACCEPTED AND INCORPORATED. Captain Bass's denial of the use of fish aggregating lights is found not credible. Mr. Nare's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

165. At all times during the events of September 23, 2009 described above, the F/V Ocean Encounter was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. TR 347 at 9- 13 (July 12, 2012 Hearing).

**Respondents' Response:** Undisputed that the vessel was located within the Convention area. However, the regulation and definitions speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

SEA HONOR

166. At the time of the charged violations, the F/V Sea Honor was a U.S.-flagged purse seine vessel owned by Sea Honor LLC. Agency Exhibit 28.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

167. At the time of the charged violations, the captain of the F/V Sea Honor was respondent Paul Magellan. Agency Exhibit 30.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

168. At the time of the charged violations, the fishing master of the F/V Sea Honor was respondent Yen Hsing Tasai. Agency Exhibit 27.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

169. Respondent Yen Hsing Tasai did not testify in this case and provided no rebuttal against the evidence presented by the Agency.

**Respondents' Response:** Undisputed that Yen Hsing Tasai did not testify in this case; disputed as to what he would have said had he testified.

**Ruling: ACCEPTED AND INCORPORATED. Agency Counsel's proposed finding of fact makes no statement about the content of what the fishing master might have said in any testimony but merely notes that as a result of his not testifying, Mr. Yen Hsing Tasai did not rebut any allegations made against him or the vessel.**

170. At the time of the charged violations, the F/V Sea Honor carried an observer, John Charles Belei, on board the vessel. Agency Exhibit 31.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

171. Mr. Belei was a trained Pacific Islands Forum Fisheries Agency (FFA) observer. TR 225 - 226 (February 2, 2012 Hearing).

**Respondents' Response:** Disputed as to the nature and extent of the training that Mr. Belei received. The observer received only one month of training in 2008 before he served as an observer on the SEA HONOR the next year in September 2009. The trip on the SEA HONOR was the only time he served as an observer. Resp. FF Nos. 72, 73.

**Ruling: ACCEPTED AND INCORPORATED. The proposed finding of fact is not vague as it only states that Mr. Belei was trained by FFA.**

172. While Mr. Belei was aboard the F/V Sea Honor, he maintained observer reports - including his Trip Diary, Purse Seine Trip Report and Purse Seine Observer Workbook- that documented the events that he observed while on board the F/V Sea Honor. TR 228 (February 2, 2012 Hearing).

**Respondents' Response:** Disputed that the observer reports accurately record the nature of the actions at issue. Moreover, Mr. Belei's interpretation of what he may have seen lacks credibility given this was his first time as an observer. Resp. FF Nos. 72, 73.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Belei's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

SEA HONOR - COUNT 1

173. On September 28, 2009, the F/V Sea Honor deployed a FAD. Mr. Belei's Trip Diary and Purse Seine Observer Workbook detail this activity in his records for September 28, 2009. Agency Exhibit 24 at 8 and Agency Exhibit 26 at PS-2, page 7 of 25.

**Respondents' Response:** Disputed that the vessel deployed a FAD. The captain of the vessel, Paul Magellan, stated that he did not witness the vessel deploy a FAD on either September 28, 2009 or September 30, 2009. Magellan Test., Tr. at 35:8-10 (October 29, 2012). Captain Magellan noted that the observer said the discovery of the FAD came when the vessel was in the middle of a set. *Id.* at 36:8-22. He said this didn't make any sense because when they were in a set, the vessel is not looking for FADs. Captain Magellan also said the vessel could not have found the FAD by sonar because sonar is not used during a set. *Id.* at 39:2-9. Respondents deny that hooking up to a FAD during a set, then deploying a new FAD makes any sense at all. *Id.* at 39:2-22. In addition, no set was made on any FAD. Resp. FF No. 80.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Belei's observer documents are found credible representations of the fishing activities of the vessel during his trip. Captain Magellan's denial that the vessel deployed a FAD as described by Mr. Belei is found not credible. Whether the vessel made a set on the deployed FAD is not relevant for the fact of violation.**

174. In his trip diary, Mr. Belei describes the events on September 28, 2009, as follows: “we investigate a drifting FAD ... The drifting FAD that was found and investigated was not attached with any GPS buoy or radio buoy however, during the investigation time a fishing master command the crews to deployed another FAD alongside a seen FAD and attached with S-H GPS buoy #01 at 1730 hrs.” Agency Exhibit 24 at 8.

**Respondents’ Response.** Disputed that a FAD was deployed. *See* Response to Agency FF No. 173 above.

**Ruling: ACCEPTED AND INCORPORATED.**

175. Mr. Belei noted the description of the FAD in great detail: “The FAD that was found was a man-made object (drifting FAD) consists of (1) ten yellow floats tied together supported by bamboos and attached with a netting hanging underneath FAD. The deployed FAD also consists of a long netting about 35 meters in length hanging underneath a FAD, with many small canvas different in colored with empty salt bags tied all over together with a hanging net supported with bamboos.” Agency Exhibit 24 at 8.

**Respondents’ Response.** Disputed that a FAD was deployed. *See* Response to Agency FF No. 173 above.

**Ruling: ACCEPTED AND INCORPORATED.**

176. This description corresponds to the activity codes and notes made in his Purse Seine Observer Workbook, which shows that: at 1730, activity code 1OD (deploy - raft, FAD or payao) with the comments “deploy FAD alongside with a seen FAD and attached GPS B #01”. Agency Exhibit 26 at PS-2, page 7 of 25.

**Respondents’ Response.** Disputed that a FAD was deployed. *See* Response to Agency FF No. 173 above. Disputed that the observer reports accurately record the nature of the actions at issue. Moreover, Mr. Belei’s interpretation of what he may have seen lacks credibility given this was his first time as an observer. Resp. FF Nos. 72, 73.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Belei’s observer documents are found credible representations of the fishing activities of the vessel during his trip.**

177. Mr. Belei’s testimony corresponds to his written records. TR 225 - 237.

**Respondents’ Response:** Disputed that a FAD was deployed. *See* Response to Agency FF No. 173 above

**Ruling: ACCEPTED AND INCORPORATED.**

178. At all times during the events of September 28, 2009 described above, the F/V Sea Honor was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. TR 275 at 20-25 (July 11, 2012 Hearing).

**Respondents' Response:** Undisputed that the vessel was located within the Convention area. However, the regulation and definitions speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

SEA HONOR - COUNT 2

179. On September 30, 2009, the F/V Sea Honor deployed a FAD.' Mr. Belei's Trip Diary and Purse Seine Observer Workbook detail this activity in his records for September 30, 2009. Agency Exhibit 24 at 11 and Agency Exhibit 26 at PS-2, page 9 of 25.

**Respondents' Response:** Disputed that the vessel deployed a FAD. The captain of the vessel, Paul Magellan, stated that he did not witness the vessel deploy a FAD on either September 28, 2009 or September 30, 2009. Magellan Test., Tr. at 35:8-10 (October 29, 2012). In addition, no set was made on a FAD. Resp. FF No. 83.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Belei's observer documents are found credible representations of the fishing activities of the vessel during his trip. Captain Magellan's denial that the vessel deployed a FAD as described by Mr. Belei is found not credible. Whether the vessel made a set on the deployed FAD is not relevant for the fact of violation.**

180. In his trip diary, Mr. Belei again notes that the F/V Sea Honor deployed a FAD, stating "0838 hrs a vessel deployed a FAD and attached with GPS buoy #02." Agency Exhibit 24 at 11.

**Respondents' Response:** Captain Magellan contradicted Mr. Belei's claim in his testimony by stating as follows: "I'm absolutely certain we didn't deploy any FADs at any time in the closure and on these [sic] particular day at 0838, no." Magellan Test., Tr. at 40:12-14 (October 29, 2012). Captain Magellan further testified on cross examination that there is no way the fishing master would have put two FADs together, as alleged by the observer. *Id.* at 50:10-20.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Belei's observer documents are found credible representations of the fishing activities of the vessel during his trip. Captain Magellan's denial that the vessel deployed a FAD as described by Mr. Belei is found not credible.**

181. He again describes the FAD in great detail. *Id.*

**Respondents' Response:** Disputed that a FAD was deployed. *See* Response to Agency FF Nos. 179-180 above.

**Ruling: ACCEPTED AND INCORPORATED.**

182. This description corresponds to the activity codes and notes made in his Purse Seine Observer Workbook, which shows that: at 0838, activity code 10D (deploy- raft, FAD or payao) with the comments "deployed FAD attached with GPS Buoy #02". Agency Exhibit 26 at PS-2, page 9 of 25.

**Respondents' Response:** Disputed that a FAD was deployed or that Mr. Belei's reports accurately record the nature of the actions at issue. See Response to Agency FF Nos. 179-181 above.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Belei's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

183. Mr. Belei's testimony corresponds to his written records. TR 225- 237.

**Respondents' Response:** Disputed that a FAD was deployed or that Mr. Belei's reports accurately record the nature of the actions at issue. See Response to Agency FF Nos. 179-181 above.

**Ruling: ACCEPTED AND INCORPORATED. Mr. Belei's observer documents are found credible representations of the fishing activities of the vessel during his trip.**

184. At all times during the events of September 30, 2009 described above, the F/V Sea Honor was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. TR 275 at 20-25 (July 11, 2012 Hearing).

**Respondents' Response:** Undisputed that the vessel was located within the Convention area. However, the regulation and definitions speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

**Agency's Proposed Conclusions of Law:**

1. The Western and Central Pacific Fisheries Convention Implementation Act states that "[a]ny person that violates any provision of this chapter is subject to the penalties ... provided in the Magnuson-Stevens Fishery Conservation and Management Act." 16 U.S.C. § 6905(c).

**Respondents' Response:** Undisputed. The statute speaks for itself.

**Ruling: ACCEPTED AND INCORPORATED.**

2. Respondents Matthew James Freitas, Sea Quest LLC and Chang Wen Wu are all "persons" as defined by the Western and Central Pacific Fisheries Convention Implementation Act. 50 C.F.R. § 300.211.

**Respondents' Response:** Undisputed. The regulations speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

3. Respondents Benjamin Brown Maughan, Jr., Ocean Conquest LLC, and Wu Chia Pin are all "persons" as defined by the Western and Central Pacific Fisheries Convention Implementation Act and the Marine Mammal Protection Act. 50 C.F.R. § 300.211 and 16 U.S.C. § 1362(10).

**Respondents' Response:** Undisputed. The regulations speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

4. Respondents Russell Keith Bass, Jr., Ocean Encounter LLC, and Ho-Ching Chang are all "persons" as defined by the Western and Central Pacific Fisheries Convention Implementation Act and the Marine Mammal Protection Act. 50 C.F.R. § 300.211 and 16 U.S.C. § 1362(10).

**Respondents' Response:** Undisputed. The regulations speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

5. Respondents Paul Magellan, Sea Honor LLC, and Yen Hsing Tasai are all "persons" as defined by the Western and Central Pacific Fisheries Convention Implementation Act. 50 C.F.R. § 300.211.

**Respondents' Response:** Undisputed. The regulations speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

6. Respondents John Zolezzi, Pacific Ranger LLC, and Su Tien Shih are all "persons" as defined by the Western and Central Pacific Fisheries Convention Implementation Act. 50 C.F.R. § 300.211.

**Respondents' Response:** Undisputed. The regulations speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

7. Title 50 C.F.R. § 300.223 was promulgated pursuant to the Western and Central Pacific Fisheries Convention Implementation Act.

**Respondents' Response:** Undisputed. The regulations speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

8. Under 50 C.F.R. § 300.223(b)(1) it is unlawful to set a purse seine around a fish aggregating device or within one nautical mile of a fish aggregating device.

**Respondents' Response:** Undisputed. The regulations speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

9. Under 50 C.F.R. § 300.223(b)(3), it is unlawful to deploy a FAD into the water.

**Respondents' Response:** Undisputed. The regulations speak for themselves.

**Ruling: ACCEPTED AND INCORPORATED.**

11. Under 16 U.S.C. § 1372(a)(1), it is unlawful for any person subject to the jurisdiction of the United States or any vessel or conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas.

**Respondents' Response:** Disputed to the extent Agency FF No. 11 paraphrases the statute. The statute speaks for itself.

**Ruling: ACCEPTED AND INCORPORATED.**

12. The F/V Ocean Conquest is a U.S. flagged vessel subject to the jurisdiction of the United States.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

13. The F/V Ocean Encounter is a U.S. flagged vessel subject to the jurisdiction of the United States.

**Respondents' Response:** Undisputed.

**Ruling: ACCEPTED AND INCORPORATED.**

14. The Agency has established by a preponderance of the evidence that Respondents Matthew James Freitas, Sea Quest LLC and Chang Wen Wu violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on August 14, 2009, by setting a purse seine on or within one nautical mile of a fish aggregating device or by setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD.

**Respondents' Response:** Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

**Ruling: ACCEPTED AND INCORPORATED.**

15. The Agency has established by a preponderance of the evidence that Respondents Matthew James Freitas, Sea Quest LLC and Chang Wen Wu violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on September 17, 2009, by setting a purse seine on or within one nautical mile of a fish aggregating device or by setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD.

**Respondents' Response:** Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

**Ruling: ACCEPTED AND INCORPORATED.**

16. The Agency has established by a preponderance of the evidence that Respondents John Zolezzi, Pacific Ranger LLC, and Su Tien Shih violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on September 30, 2009, by setting a purse seine on or within one nautical mile of a fish aggregating device or by setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD.

**Respondents' Response:** Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

**Ruling: ACCEPTED AND INCORPORATED.**

17. The Agency has established by a preponderance of the evidence that Respondents Benjamin Brown Maughan, Jr., Ocean Conquest LLC, and Wu Chia Pin violated the Marine Mammal Protection Act at 16 U.S.C. § 1372(a)(1) on September 18, 2009, by taking a marine mammal on the high seas.

**Respondents' Response:** Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

**Ruling: ACCEPTED AND INCORPORATED.**

18. The Agency has established by a preponderance of the evidence that Respondents Benjamin Brown Maughan, Jr., Ocean Conquest LLC, and Wu Chia Pin violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on September 24, 2009, by setting a purse seine on or within one nautical mile of a fish aggregating device or by setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD.

**Respondents' Response:** Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

**Ruling: ACCEPTED AND INCORPORATED.**

19. The Agency has established by a preponderance of the evidence that Respondents Benjamin Brown Maughan, Jr., Ocean Conquest LLC, and Wu Chia Pin violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on September 25, 2009, by setting a purse seine on or within one nautical mile of a fish aggregating device or by setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD.

**Respondents' Response:** Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

**Ruling: ACCEPTED AND INCORPORATED.**

20. The Agency has established by a preponderance of the evidence that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC and Ho-Ching Chang violated the Marine Mammal Protection Act at 16 U.S.C. § 1372(a)(1) on September 17, 2009, by taking a marine mammal on the high seas.

**Respondents' Response:** Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

**Ruling: ACCEPTED AND INCORPORATED.**

21. The Agency has established by a preponderance of the evidence that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC and Ho-Ching Chang violated the Marine Mammal Protection Act at 16 U.S.C. § 1372(a)(1) on September 24, 2009, by taking a marine mammal on the high seas.

**Respondents' Response:** Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

**Ruling: ACCEPTED AND INCORPORATED.**

22. The Agency has established by a preponderance of the evidence that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC and Ho-Ching Chang violated the Marine Mammal Protection Act at 16 U.S.C. § 1372(a)(1) on September 25, 2009, at or around 0617, by taking a marine mammal on the high seas.

**Respondents' Response:** Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

**Ruling: ACCEPTED AND INCORPORATED.**

23. The Agency has established by a preponderance of the evidence that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC and Ho-Ching Chang violated the Marine Mammal Protection Act at 16 U.S.C. § 1372(a)(1) on September 25, 2009, at or around 1601, by taking a marine mammal on the high seas.

**Respondents' Response:** Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

**Ruling: ACCEPTED AND INCORPORATED.**

24. The Agency has established by a preponderance of the evidence that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC and Ho-Ching Chang violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on September 18, 2009, by setting a purse seine on or within one nautical mile of a fish aggregating device or by setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD.

**Respondents' Response:** Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

**Ruling: ACCEPTED AND INCORPORATED.**

25. The Agency has established by a preponderance of the evidence that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC and Ho-Ching Chang violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on September 20, 2009, by setting a purse seine on or within one nautical mile of a fish aggregating device or by setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD.

**Respondents' Response:** Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

**Ruling: ACCEPTED AND INCORPORATED.**

26. The Agency has established by a preponderance of the evidence that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC and Ho-Ching Chang violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on September 21, 2009, by setting a purse seine on or within one nautical mile of a fish aggregating device or by setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD.

**Respondents' Response:** Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

**Ruling: ACCEPTED AND INCORPORATED.**

27. The Agency has established by a preponderance of the evidence that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC and Ho-Ching Chang violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b)(1) and (2) on September 22, 2009, by setting a purse seine on or

within one nautical mile of a fish aggregating device or by setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD.

**Respondents' Response:** Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

**Ruling: ACCEPTED AND INCORPORATED.**

28. The Agency has established by a preponderance of the evidence that Respondents Russell Keith Bass, Jr., Ocean Encounter LLC and Ho-Ching Chang violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.P.R. § 300.223(b)(1) and (2) on September 23, 2009, by setting a purse seine on or within one nautical mile of a fish aggregating device or by setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD.

**Respondents' Response:** Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

**Ruling: ACCEPTED AND INCORPORATED.**

29. The Agency has established by a preponderance of the evidence that Respondents Paul Magellan, Sea Honor LLC and Yen Hsing Tasai violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.P.R. § 300.223(b)(3) on September 28, 2009, by deploying a FAD into the water.

**Respondents' Response:** Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

**Ruling: ACCEPTED AND INCORPORATED.**

30. The Agency has established by a preponderance of the evidence that Respondents Paul Magellan, Sea Honor LLC and Yen Hsing Tasai violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.P.R. § 300.223(b)(3) on September 30, 2009, by deploying a FAD into the water.

**Respondents' Response:** Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

**Ruling: ACCEPTED AND INCORPORATED.**

### **Respondents' Proposed Findings of Fact**

1. A goal of the Western and Central Pacific Fisheries Commission ("WCPFC" or "Commission") was to begin a three year program of reducing the catch of bigeye and yellowfin tuna in purse seine fishing. NOAA implemented regulations that imposed limits on fishing by purse seine vessels by prohibiting them from setting a net around, near (within one nautical

mile), or in association with a fish aggregating device (FAD) or deploying and servicing a FAD for the months of August and September, 2009.

**Agency Response:** The Agency agrees generally.

**Ruling: ACCEPTED AND INCORPORATED.**

2. The main tuna species caught in the ocean area subject to the Commission's conservation measures is skipjack, a species not considered to be overfished, or even in danger of being overfished. Of the total catch of tuna in 2009 (2,467,903 metric tons) for the region, skipjack harvests represented 73%, or 1,789,979 metric tons. Of the total catch, 77% was harvested by purse seine vessels, or 1,894,500 metric tons, and the remainder by other types of gear, such as longline vessels. Relatively small amounts of bigeye, usually small fish, and some yellowfin are caught in the purse seine fishery.

**Agency Response:** The Agency disagrees as the proposed finding as both compound and argumentative.

**Ruling: ACCEPTED AND INCORPORATED.**

3. Recent published literature, however, has stated that "catching of juvenile tuna around FADs does not necessarily result in overfishing of stocks." Dagorn, et al., Is it good or bad to fish with FADs? What are the real impacts of the use of drifting FADs on pelagic marine ecosystems?, FISH and FISHERIES (2012); Resp. Exh. IIIIII. The question of impact on the marine environment is a relevant inquiry in this proceeding under NOAA's Policy for Assessment of Penalties and Permit Sanctions (March 11, 2011), including but not limited to, the question of the extent of harm done to the resource (at page 8 of 56) by an alleged violation.

**Agency Response:** The Agency disagrees with the application or use of this document for any purpose as it was introduced at the end of a nine-month hearing process, without a witness, without being provided to the Agency in advance, without the opportunity for the Agency to cross-examine a witness on the information contained within, and without an opportunity for the Agency to call a rebuttal witness if it so chose.

**Ruling: ACCEPTED IN PART AND INCORPORATED, REJECTED IN PART.** To the extent this proposed finding of fact states or implies that harm to the resources is a factor to be considered in rendering an appropriate sanction for any proven violations, it is **ACCEPTED**. The document cited (Resp. Exh. IIIIII) has been reviewed but is deemed irrelevant to the fact of violation and to the extent it counters the Agency's rationale for implementing the required FAD closure, it is rejected as a collateral attack on the Agency's regulations.

4. At its December 2007 meeting, the Commission created an observer program "to, among other things, collect verified catch data, and to monitor the implementation of the conservation and management measures adopted by the Commission."

**Agency Response:** The Agency agrees that in 2007 the Commission established a regional observer program. The Western and Central Pacific Fisheries Convention requires that an observer program be established “to, among other things, collect verified catch data, and to monitor the implementation of the conservation and management measures adopted by the Commission.”

**Ruling: ACCEPTED AND INCORPORATED.**

5. Under the program, observers are recruited from the various Pacific nations whose fishing zones contain tuna resources sought by purse seine vessel from many other nations, such as the United States. Training for these observers, none of whom are from the United States, is provided by the Secretariat of the Pacific Community and the Forum Fisheries Agency.

**Agency Response:** The Agency disagrees.

**Ruling: ACCEPTED IN PART AND INCORPORATED AND REJECTED IN PART. The record supports Respondents’ contention that the Secretariat of the Pacific Community and the Forum Fisheries Agency coordinate in the training of observers. However, the record does not support the other statements in this Proposed Finding of Fact.**

6. The training course was described as rather short, about three to five weeks.

**Agency Response:** The Agency disagrees that the training course was described as rather short. The Agency agrees that the current observer training course is five weeks long.

**Ruling: ACCEPTED AND INCORPORATED with respect to the fact of the length of the training course. REJECTED as to the description of the course as being “rather short.”**

7. The primary function of the observer is to record events that occur on the vessel with respect to fishing activity, amounts and types of fish caught, significant bycatch, and related information.

**Agency Response:** The Agency disagrees. The WCPFC Conservation and Management Measure 2007-01 (Respondents’ Exhibit H at 2) states that the “The functions of observers operating under the Commission ROP shall include collecting catch data and other scientific data, monitoring the implementation of the conservation and management measures adopted by the Commission and any additional information related to the fishery that may be approved by the Commission.”

**Ruling: REJECTED. The document speaks for itself and provides the best evidence of what Measure 2007-01 states.**

8. On August 4, 2009, NOAA issued the final regulations implementing what it considered to be its FAD regulation obligations under Conservation and Management Measure (CMM)

2008-1 adopted by the Commission in December 2008 that applies to fishing by tuna purse seine vessels operating in the Pacific Ocean under the Commission's jurisdiction.

**Agency Response:** The Agency agrees that on August 4, 2009, it issued final regulations implementing WCPFC Conservation and Management Measure 2008-01 as it applied to purse seine vessels.

**RULING: ACCEPTED AND INCORPORATED.**

9. The two main purposes of Measure 2008-1, through a series of specific fishery management measures, are to (1) initiate a three-year program (2009-2011) aimed at reducing the mortality of bigeye tuna by 30%; and (2) ensure that yellowfin tuna mortality does not exceed a certain historical limit. The measures included elements that sought to limit the catch of these two species of tuna by purse seine vessels and by longline vessels.

**Agency Response:** The Agency agrees that two of the four objectives of CMM 2008-01 are to: 1) achieve, through the implementation of a package of measures, over a three-year period commencing in 2009, a minimum of 30% reduction in bigeye tuna fishing mortality from the annual average during the period 2001-2004 or 2004; and 2) ensure that there is no increase in fishing mortality for yellowfin tuna beyond the annual average during the period 2001-2004 average or 2004.

**Ruling: ACCEPTED AND INCORPORATED IN PART, REJECTED to the extent that this Proposed Finding of Fact attempts to differentiate the 4 purposes of Measure 2008-01 as being "main purposes".**

10. Each nation engaged in the Commission's management program is obligated to implement and enforce CMM 2008-1 through its own domestic laws with respect to vessels operating under its flag, including chartered vessels.

**Agency Response:** The Agency agrees that the United States is obligated to implement and enforce the conservation and management measures adopted by the WCPFC, but disagrees that the documents cited to support this contention.

**Ruling: ACCEPTED AND INCORPORATED.**

11. This case involves a U.S. flag tuna purse seine vessels. That portion of CMM 2008-1 that is relevant to this proceeding states the following:

The purse seine fishery on the high seas in the area bounded by 20°N and 20°S shall be closed to fishing on FADs [fish aggregating device] between 0000 hours on 1 August and 2400 hours on 30 September [2009]. During this period all purse seine vessels without an observer from the Regional Observer Program on board will cease fishing and return directly to port. During this period, a vessel may only engage in fishing operations if the vessel carries on board an observer from the Regional Observer program to monitor that at no time does the vessel deploy or service any FAD or associated electronic devices or fish on schools in association with

FADs.

**Agency Response:** The Agency agrees that paragraph 13 of CMM 2008-01 reads as quoted above (without the bracketed text), but notes that other paragraphs of the CMM apply as well. In addition, the Agency notes that Respondents are charged with violating U.S. laws and regulations, not CMM 2008-01.

**Ruling: ACCEPTED AND INCORPORATED in the Principles of Law section.**

12. A FAD was defined very broadly in CMM 2008-1 as "any man-made device, or natural floating object, whether anchored or not, that is capable of aggregating fish."

**Agency Response:** The Agency agrees that CMM 2008-01 defined a FAD as stated above, but submits that the characterization of "very broadly" is argumentative.

**Ruling: ACCEPTED AND INCORPORATED in the Principles of Law section.**

13. No guidance was provided, in a scientific sense, as to every possible method by which a FAD "is capable" of aggregating fish. However, in Attachment E to Measure 2008-1, the Commission's Guidelines for Preparation of FAD Management Plans contain a different definition: "Fish aggregating devices (FAD) are drifting or anchored floating or submerged objects deployed by vessels for the purpose of aggregating tuna species to purse seine or ring-net operations."

**Agency Response:** The Agency disagrees as the proposed finding is argumentative rather than factual.

**Ruling: ACCEPTED AND INCORPORATED as to the fact of Attachment E's definition. The rest is REJECTED as a Finding of Fact.**

14. The regulations issued by NOAA on August 4, 2009 contained a different definition of what is a FAD than the Commission's various definitions: "Fish aggregating device, or FAD, means any artificial or natural floating object, whether anchored or not and whether situated at the water surface or not, that is capable of aggregating fish, as well as any objects used for that purpose that are situated on board a vessel or otherwise out of the water, except that the meaning of FAD does not include a fishing vessel, provided that the fishing vessel is not used for the purpose of aggregating fish." No further guidance was given on how this "aggregation" purpose would be purposely achieved including with respect to the use of lights.

**Agency Response:** The Agency agrees that it defined FAD as stated above, but disagrees with the remainder of the proposed finding as argumentative.

**Ruling: ACCEPTED AND INCORPORATED into the Principles of Law as to what the NOAA regulations defined as a FAD. The rest is REJECTED as a Finding of Fact.**

15. During the rulemaking process, the American Tunaboat Association brought some

concerns to the attention of NOAA including with respect to the issue of "fish under the boat." In response, the agency added language about the vessel not being a FAD, and provided the following explanation:

Comment 5: During a FAD prohibition period, the following should not be prohibited: (1) in situations in which there are no FADs in the area of the fishing vessel, capturing a school of fish that has aggregated under the vessel ...

Response: Regarding activity (1), the commenter's view is consistent with the intent of the proposed rule; however NMFS will revise the final rule to clarify that the meaning of a FAD does not include the vessel itself...

**Agency Response:** The Agency disagrees with this proposed finding because the Respondents have truncated all references to ignore the caveat that FAD was defined to not include the fishing vessel provided that the fishing vessel is not used for the purpose of aggregating fish. Eliminating the full scope of the issue renders this proposed finding argumentative rather than factual.

**Ruling: ACCEPTED AND INCORPORATED as to the fact of the ATA's submitting of comments to the proposed rules regarding use of fish aggregating devices and the full text of the Agency's rulemaking comment/response.**

16. NOAA's regulations were made effective as of August 1, 2009, rather than 30 days after publication in the Federal Register. NOAA was aware that a final rule had to be issued at the time the Commission adopted CMM 2008-1 in December 2008 and therefore had at least six months to prepare to issue a final rule by July 1, 2009. NOAA provided no rationale for delaying the publication of the rule until August 4, 2009.

**Agency Response:** The Agency notes that its regulations were effective August 3, 2009, agrees that it knew that it would have to go through the rulemaking process to implement CMM 2008-01, but disagrees that it delayed publication.

**Ruling: ACCEPTED AND INCORPORATED IN PART as to the dates the Agency published the rule and made it effective as of August 3, 2009. REJECTED to the extent this proposed finding of fact states or implies the Agency unlawfully delayed in its rulemaking or otherwise failed to comply with the APA's rulemaking requirements.**

17. CMM 2008-01 was not the final word on the meaning of the conservation measure the Commission had adopted, including the definition of what constitutes a FAD. Because of "unclear rules for the application of the provisions relating to the FAD closure," the Commission adopted, in December 2009, CMM 2009-02 which contained a modification of the definition of a FAD in Measure 2008-1:

A FAD shall be interpreted as including: "any object or group of objects, of any size, that has or has not been deployed, that is living or non-living, including but not limited to buoys, floats, netting, webbing, plastics, bamboo, logs and whale sharks on or near the surface of the water that fish may associate with."

**Agency Response:** The Agency agrees that the Commission adopted CMM 2009-02 in

December 2009 and that it contained the above definition for FAD. The Agency disagrees with the remainder of this proposed finding as argumentative.

**Ruling: ACCEPTED AND INCORPORATED.**

18. Measure 2009-2 also contained the following: "5. The operator of a vessel shall not allow the vessel to be used to aggregate fish, or to move aggregated fish including using underwater lights and chumming."

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

19. On August 1, 2009, every U.S. Tuna boat which went fishing in the Commission area had to have an observer on board and could not go fishing without one.

**Agency Response:** The Agency agrees, with exception that the final rule did not publish until August 4, 2009, and was effective August 3, 2009.

**Ruling: ACCEPTED AND INCORPORATED.**

20. Under the Observer Program, an observer or his supervisor is supposed to communicate with the captain to provide him an opportunity to comment on the observer's trip report.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.**

21. With respect to the OCEAN CONQUEST and the OCEAN ENCOUNTER, NOAA seeks civil penalties for five counts of violating the Marine Mammal Protection Act (MMPA) for the unlawful taking of a marine mammal. The penalty sought is the maximum statutory allowable amount of \$11,000 for each count. 16 U.S.C. § 1372(a); 15 C.F.R. § 6.4 (2011). The agency has not identified the precise provision of the MMPA that Respondents allegedly violated.

**Agency Response:** The Agency agrees with this finding, but disagrees with the last sentence.

**RULING: ACCEPTED AND INCORPORATED IN PART with respect to the charges against the OCEAN CONQUEST and OCEAN ENCOUNTER. REJECTED with respect to the Agency's alleged failure to identify the MMPA provision violated. The issue has been fully litigated and briefed by the parties.**

22. Respondents have denied liability on the basis that the interactions with marine mammals during their fishing operations were authorized incidental takes within the meaning of section 118 of the MMPA, 16 U.S.C. § 1387. That section of the MMPA governs "the incidental taking

of marine mammals in the course of commercial fishing operations by persons using vessels of the United States."

**Agency Response:** The Agency agrees that the Respondents have denied liability on that basis and that Section 1387 (or Section 118) of the MMPA, among other provisions of the MMPA, applies to the incidental taking of marine mammals in the course of commercial fishing operations by persons using vessels of the United States, but disagrees that the Respondents are exempt from liability on this basis.

**Ruling: ACCEPTED AND INCORPORATED as to the fact and nature of Respondents' arguments regarding the MMPA. Those arguments are REJECTED for the reasons given herein.**

23. Section 102 of the MMPA (16 U.S.C. § 1372) makes it unlawful for any person or vessel subject to the jurisdiction of the United States to take any marine mammal on the high seas, except as provided in section 1387. Section 105(a)(1) (16 U.S.C. § 1375(a)(1)), with respect to civil penalties, provides for a civil penalty against any person who violates the MMPA or any regulation issued thereunder, "except as provided in Section 1387."

**Agency Response:** The Agency would cite to the specific provisions and their exact language as the more appropriate statement as to what the MMPA says.

**Ruling: ACCEPTED AND INCORPORATED as a Principle of Law.**

24. NOAA has admitted that the OCEAN CONQUEST and the OCEAN ENCOUNTER were given a registration and authorization under Section 118 of the MMPA (16 U.S.C. § 1387) to incidentally take marine mammals in 2009. NOAA has also admitted that no marine mammals were lethally taken during any of the incidents in which Respondents are alleged to have violated the MMPA. Finally, NOAA has also admitted that no threatened or endangered species of marine mammals, within the meaning of the Endangered Species Act (16 U.S.C. § 1531 et seq.) or depleted species of marine mammals under the MMPA, were involved in any of such incidents.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

25. The chief financial officer for South Pacific Tuna Corporation, Annette Schlife, testified at the hearing about the prices paid to Respondents for the fish caught on each trip at issue. Testimony of Annette Schlife ("Schliffe Test."), Tr. at 112:4-17 (August 23, 2012).

**Agency Response:** The Agency agrees generally, but notes that the cites are incorrect.

**Ruling: ACCEPTED AND INCORPORATED.**

26. Ms. Schlife analyzed the value of the fish caught (e.g., the revenue) for each of the counts. Id. at 114:22-116:2; see also Resp. Exh. T.

**Agency Response:** The Agency agrees that Ms. Schlife so testified.

**Ruling: ACCEPTED AND INCORPORATED.**

27. Ms. Schlife explained that after a trip, Respondents sell the fish to a trading company. Title to the fish passes to the trading company after a trip is completed and the fish are transferred to a carrier for shipment to the ultimate market, such as Bangkok, Thailand. The trading company then takes over all other costs of shipping the fish to final market and the vessel owner bears no further cost, except for final reconciliation with respect to the calculation of actual size, species and weight that is provided by the processing facility after delivery. There is an initial payment from the trading company to the vessel owner upon the sale of the fish at offloading from the fishing vessel. Schlife Test., Tr. at 124: 17-125:2 (August 23, 2012).

**Agency Response:** The Agency agrees that Ms. Schlife so testified, but notes that the cite is incorrect.

**Ruling: ACCEPTED AND INCORPORATED.**

28. The cannery pays Respondents 95 percent of the sales price upfront based on an estimated species breakout between yellowfin, skipjack and bigeye (if any) and an estimated sizes and weight. Id. The sales price is determined based on the prevailing market on the day of offloading and a rough estimate as to size, weight and species of fish caught by the vessel. This is considered the preliminary settlement" and is subject to a plus or minus adjustment after delivery of the fish to the processing facility.

**Agency Response:** The Agency disagrees as the proposed finding is argumentative rather than factual and notes that the reference to "id" seems to refer to the incorrect cite in finding 27, which would be the correct cite for finding 28.

**Ruling: ACCCEPTED AND INCORPORATED as an accurate statement of how the SPTC boats are paid based on the record evidence.**

29. After the fish is taken to the processing facility, that facility determines the actual size, weight and species of the fish for final payment reconciliation through actual inspection and weighing. It could take approximately 45-days from the time the fish is loaded into the carrier for the cannery to determine the actual sizing. Id. at 125: 17-21. As noted, at the time of offloading, the vessel only has a rough estimate as to actual size, weight, and species of the harvested fish.

**Agency Response:** The Agency disagrees as the proposed finding is argumentative rather than factual.

**Ruling: ACCCEPTED AND INCORPORATED as an accurate statement of how the SPTC boats are paid based on the record evidence.**

30. Respondents have an [REDACTED], which sells the fish into the Bangkok market. Id. at 130:6-15; 131:8-17.

**Agency Response:** The Agency agrees that Ms. Schlife so testified.

**Ruling: ACCEPTED AND INCORPORATED.**

31. After the fish arrives at the processing facility, Respondents receive a final settlement. It can be about three to four months by the time the fish is processed and Respondents get all of their revenue for the fish sold on a particular trip. Id. at 126:1-12.

**Agency Response:** The Agency agrees that Ms. Schlife so testified.

**Ruling: ACCEPTED AND INCORPORATED.**

32. In order to calculate the value of the fish allegedly caught during a particular Count in the NOVAs, Ms. Schlife took the revenue that the owner of the vessel received for the total trip, after final settlement. She divided it by the total number of tons that were actually caught on the entire trip. She then got a dollar amount per ton based on actual revenue, or value, received for the fish sold. Because it is impossible to know the actual amount of fish caught on a particular day and a particular set, she next took the amount from the estimates written in the logbooks for the sets at issue and multiplied it by the per ton amount to get an estimate of the value of fish caught in each alleged Count. Id. at 128:5-23.

**Agency Response:** The Agency disagrees as the proposed finding is argumentative rather than factual.

**Ruling: ACCEPTED AND INCORPORATED as to the fact of how Ms. Schlife calculated Respondents proposed values of the fish. REJECTED to the extent any such values are not consistent with the values calculated in this Decision and Order.**

33. Ms. Schlife summarized her calculation in Resp. Exh. T. As her calculations show, NOAA's penalty assessments, for which NOAA failed to provide any basis, are grossly disproportionate to the value of the fish caught by Respondents for each count. Moreover, the largest amount received is for skipjack tuna, with much lesser amounts for juvenile yellowfin and bigeye, the two species being protected by the FAD regulations.

**Agency Response:** The Agency agrees that Ms. Schlife summarized her calculations, but disagree as to the remainder.

**Ruling: ACCEPTED AND INCORPORATED as to the fact of Ms. Schlife's alleged values being represented in Resp. Exh. T. The remainder is REJECTED as argument.**

34. NOAA is seeking total penalties against the SEA QUEST in the amount of \$253,750, which is more than three times the value of the fish caught. In particular, NOAA is seeking

penalties for Count 1 in the amount of \$117,500 where the value of the fish was only [REDACTED] and for Count 2 in the amount of \$136,250 where the value of the fish was only [REDACTED]. Compare Resp. Exh. U and Resp. Exh. T.

**Agency Response:** The Agency agrees that it has proposed civil penalties against the Respondents in the F/V Sea Quest case totaling \$253,750, but disagrees with the other commentary.

**Ruling: ACCEPTED AND INCORPORATED as to the fact of the amounts of the proposed civil penalty. The issue of the proper civil penalty and the value of the fish associated with unlawful sets are fully discussed in this Decision and Order.**

35. NOAA is seeking total penalties against the SEA HONOR in the amount of \$160,000 or \$80,000 for each count. Here, no sets were made and no fish were caught. Thus the value of the fish is zero. Compare Resp. Exh. HH and Resp. Exh. T.

**Agency Response:** The Agency agrees that it has proposed civil penalties against the Respondents in the F/V Sea Honor case totaling \$160,000, but disagrees with the other commentary.

**Ruling: ACCEPTED AND INCORPORATED as to the fact of the amounts of the proposed civil penalty and the fact that the F/V SEA HONOR was not alleged to have made a set on the FADs during the 2009 FAD closure period that are at issue in the two charges against the F/V SEA HONOR. The issue of the proper civil penalty for the F/V SEA HONOR's activities during the 2009 FAD closure is fully discussed in this Decision and Order.**

36. NOAA is seeking total penalties against the PACIFIC RANGER in the amount of \$117,000 for a single violation where the value of the fish was only [REDACTED]. Compare Resp. Exh. RR and Resp. Exh. T. NOAA's penalty assessment against the PACIFIC RANGER is approximately seven times more than the value of the fish.

**Agency Response:** The Agency agrees that it has proposed civil penalties against the Respondents in the F/V Pacific Ranger case but notes that they total \$117,500, not \$117,000 as cited by the Respondents, and disagrees with the other commentary.

**Ruling: ACCEPTED AND INCORPORATED as to the fact of the amounts of the proposed civil penalty. The issue of the proper civil penalty and the value of the fish associated with unlawful sets are fully discussed in this Decision and Order.**

37. NOAA is seeking total penalties against the OCEAN CONQUEST in the amount of \$267,750, which is more than two and a halftimes the value of the fish. NOAA is seeking the maximum penalty amount of \$11,000 under the MMPA for Count 1 where any "taking" of a whale was "incidental," no whale was harmed and no fish were caught. It is asking for penalties for Count 2 in the amount of \$116,750 where the value of the fish was only [REDACTED] and for

Count 3 in the amount of \$140,000 where the value of the fish was only [REDACTED] Compare Resp. Exh. ZZ and Resp. Exh. T.

**Agency Response:** The Agency agrees that it has proposed civil penalties against the Respondents in the F/V Ocean Conquest case totaling \$267,750, but disagrees with the other commentary.

**Ruling: ACCEPTED AND INCORPORATED as to the fact of the amounts of the proposed civil penalty. The issue of the proper civil penalty and the value of the fish associated with unlawful sets are fully discussed in this Decision and Order.**

38. NOAA is asking for total penalties from the OCEAN ENCOUNTER in the amount of \$657,750. It is seeking the maximum penalty under the MMPA in the amount of \$11,000 each for Counts 1-4, where any "taking" of a whale was "incidental" and no whale was harmed. In addition, no fish were caught for Counts 1 and 2. NOAA is seeking \$136,250 for Count 5 where only [REDACTED] worth of fish was caught; \$140,000 for Count 6 where only [REDACTED] worth of fish was caught; \$140,000 for Count 7 where only [REDACTED] worth of fish was caught; \$102,500 for Count 8 where only [REDACTED] worth of fish was caught and \$95,000 for Count 9 where only [REDACTED] worth of fish was caught. In total, NOAA is seeking, without basis, more than three times the value of the fish caught by the OCEAN ENCOUNTER. Compare Resp. Exh. SSS and Resp. Exh. T.

**Agency Response:** The Agency agrees that it has proposed civil penalties against the Respondents in the F/V Ocean Encounter case totaling \$657,750, but disagrees with the other commentary.

**Ruling: ACCEPTED AND INCORPORATED as to the fact of the amounts of the proposed civil penalty. The issue of the proper civil penalty and the value of the fish associated with unlawful sets are fully discussed in this Decision and Order.**

39. When a vessel drifts in the evening in a heavy school fish area, it may naturally collect fish underneath it. See e.g., Testimony of Robert Virissimo ("Virissimo Test."), Tr. at 68:6-69:4 (August 24, 2012). In the morning, if fish had collected under the vessel, the vessel would put a workboat in the water to mark the fish, pull away from the workboat, and set on the fish. Virissimo Test., Tr. at 68:6-69:4 (August 24, 2012).

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED. To the extent Mr. Virissimo claimed that any of the alleged unlawful sets were merely the result of fish naturally aggregating under the SPTC vessels without the purposeful use of lights and/or use of submerged lights' workboats to hold the fish in place while a set was made – such testimony is REJECTED as NOT CREDIBLE.**

40. Fish-under-the-boat is a rare event and lights do not necessarily attract any fish that collect under a vessel. See e.g., Testimony of James Freitas ("Freitas Test."), Tr. at 45: 19-46:

12; 52:25-53:2 (August 24, 2012). Any lighting that is used in a fish-under-the-boat set is basically for safety to keep the workboat lit while setting since these sets are usually done in the early morning when it is dark. Id. at 46:13-47:19.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.** To the extent the cited testimonies claimed that any of the alleged unlawful sets were merely the result of fish naturally aggregating under the SPTC vessels without the purposeful use of lights and/or use of submerged lights on the vessels' workboats to hold the fish in place while a set was made – such testimony is REJECTED as NOT CREDIBLE.

41. In contrast, a FAD is a stationary, man-made item, such as a raft with netting, or a log, that drifts in the water collecting bait, which attracts the fish. See e.g., Virissimo Test., Tr. at 70:18-72:4 (August 24, 2012); Freitas Test., Tr. at 52:3-16 (August 24, 2012).

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.** The operative Agency definition of a FAD is broader than stated and includes the vessel when purposefully used to aggregate fish.

42. A man-made FAD must be left in the water for at least a month to collect any fish. Freitas Test., Tr. at 52: 17-24 (August 24, 2012).

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.**

43. A man-made FAD will also usually have a GPS buoy on it for tracking. Id.

**Agency Response:** The Agency agrees that man-made FADs will often have a GPS buoy attached to them.

**Ruling: ACCEPTED AND INCORPORATED.**

44. A vessel could not be a FAD because it moves all day long and has no time to collect bait or anything else. Id. Regardless of any lights used by the vessel, a vessel is not a FAD. Id. The agency presented no scientific evidence establishing a causation nexus between lights used on a tuna vessel and the accumulation of fish under the vessel.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.**

45. To set on a FAD, the vessel would pull up on a FAD; it would never drift with the FAD or tie it up alongside the vessel. Rather, the crew would watch the FAD all night long and in the

morning, the vessel would get close to it, pull up alongside it, and use its depth finder to mark the fish. If fish were there, the crew would drop a workboat to tie up to the FAD, the vessel would pull away from the FAD and set around the fish. Virissimo Test., Tr. at 69:5-22 (August 24, 2012). The agency presented no evidence to establish that any of the Counts in this case involved this kind of practice.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.** To the extent the cited testimonies claimed that any of the alleged unlawful sets were merely the result of fish naturally aggregating under the SPTC vessels without the purposeful use of lights and/or use of submerged lights on the vessels' workboats to hold the fish in place while a set was made – such testimony is **REJECTED as NOT CREDIBLE**. Furthermore, Mr. Virissimo was speaking generally about FAD fishing – not the specific conduct at issue for the vessels. Mr. Virissimo was not on the vessels at the time of the alleged unlawful sets and cannot accurately speak as to what occurred on those dates.

46. On September 29, 2010, NOAA issued a NOVA against Sea Quest LLC, Matthew James Freitas, captain of the F/V SEA QUEST, and Chang Wen Wu (collectively, the "SEA QUEST Respondents") alleging two violations related to setting a purse seine net near or in association with a fish aggregating device ("FAD") under 50 CFR § 300.222(w).

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

47. The observer on the SEA QUEST for the trip was Kun Iohp. Testimony of Kun Iohp ("Iohp Test."), Tr. at 26:2-4 (February 1, 2012).

**Agency Response:** The Agency agrees that Kun Iohp was the observer for two trips on the F/V Sea Quest during the period of the violations.

**Ruling: ACCEPTED AND INCORPORATED.**

48. This was the observer's first trip as an observer and first trip on a tuna boat. Id. at 49:14-19.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

49. Captain Freitas served as captain of the SEA QUEST from the beginning of July 2009 through October 2009. Testimony of James Freitas ("Freitas Test."), Tr. at 43 at 4-6 (August 24, 2012).

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

50. Captain Freitas had overall responsibility for everything on the vessel, including safety and ensuring that the people onboard abided by the rules as well as inspecting gear, taking set positions and noting fishing dates and times. Id. at 43:7-44:4; see also Resp. Exh. V at p. 2.

**Agency Response:** The Agency disagrees.

**Ruling: ACCEPTED AND INCORPORATED in PART to the extent this proposed finding of fact states that Captain Freitas had the responsibilities as the captain of the vessel, but to the extent it states or implies that Captain Freitas was in charge of day-to-day conduct of fishing operations, it is REJECTED.**

51. Captain Freitas was aware of the FAD closure period and believed that it was not advisable to use lights put below the surface of the water lights and that the vessel should stay at least one mile away from any FAD. But he did not believe the regulations forbade use of regular lights above water. He also believed that the regulations allowed setting on fish that had aggregated naturally under the vessel because these were considered school fish and not FAD attracted fish. He told the NOAA investigator that Gordon Yamasaki from NOAA said such a scenario was allowed. Resp. Exh. V. at p. 5; Freitas Test., Tr. at 53: 11-54: 1 (August 24, 2012).

**Agency Response:** The Agency disagrees as the proposed finding is argumentative rather than factual.

**Ruling: ACCEPTED AND INCORPORATED to the extent this proposed finding of fact reflects Captain Freitas' claimed understanding of the FAD regulations. REJECTED as not credible to the extent this proposed finding of fact attempts to excuse Respondents' unlawful fishing activities. Record evidence indicates that Mr. Yamasaki had email exchanges with SPTC personnel that contradict Captain Freitas claimed discussion regarding the setting on fish that had aggregated under the boat.**

52. The fishing master was informed that he was not allowed to use drop lights below the surface of the water. Resp. Exh. V at p. 5.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED as not credible. Captain Freitas claimed that the vessel owner's San Diego office sent its Taiwan office a memorandum informing all fishing masters that they were not allowed to use drop lights. Respondents did not produce this alleged memorandum and the communications from Mr. Virissimo to the SPTC captains counter this supposed directive about what was allowed during the FAD closure period.**

53. During the FAD closure, the vessel only used regular lights (e.g., boom or mast lights) and did not use drop lights. Resp. Exh. V at p. 5; see also Freitas Test., Tr. at 47:25- 48:4; 48:23-49:1 (August 24, 2012).

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED. Captain Freitas' testimony is found not credible.**

54. For any sets where the workboat used its above water lights to assist in catching fish in the morning, Captain Freitas marked these sets with a school association code and an "8" for fish under the boat. Resp. Exh. V at p. 5-6.

**Agency Response:** The Agency disagrees.

**Ruling: ACCEPTED AND INCORPORATED IN PART to the extent that Captain Freitas recorded the sets in this manner; REJECTED as stating or implying that the sets were actually conducted without the use of fish aggregating lights.**

55. These codes reflected that the vessel was stopped and that the fish had gathered under the boat; there were no rafts or FADs involved. Id. at p. 6.

**Agency Response:** The Agency disagrees.

**Ruling: ACCEPTED AND INCORPORATED IN PART to the extent that Captain Freitas recorded the sets in this manner; REJECTED as stating or implying that the sets were actually conducted without the use of fish aggregating lights.**

56. Because the vessel did not use drop lights, Captain Freitas believed that the observer mistakenly considered the above-water boom lights or workboat's "Y" lights as fish aggregating lights. Id.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED. Captain Freitas' testimony is found not credible.**

57. Captain Freitas told the NOAA investigator that at no time during the FAD-closure period, did the vessel set on, deploy or service any FADs. Id.; see also Freitas Test, Tr. at 55:9-20 (August 24, 2012).

**Agency Response:** The Agency agrees that Mr. Freitas so testified.

**Ruling: ACCEPTED AND INCORPORATED as to the nature of Captain Freitas' testimony; REJECTED as not credible.**

58. Under **Count 1**, NOAA alleged that the SEA QUEST Respondents used the SEA QUEST to aggregate fish and then set on those fish on August 14, 2009 in violation of law.

**Agency Response:** The Agency agrees.

**Ruling: ACCPETED AND INCORPORATED.**

59. The set was not a FAD set; it was fish under the boat. See Proposed Findings of Fact Nos. 41-45 above.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.**

60. The observer assumed that the lights used in the set could attract tuna because they shone in the water; however, the lights used were not placed in the water. Iohp Test., Tr. at 49:20-50:10 (February 1, 2012). Moreover, the agency presented no scientific evidence to establish that lights would be successful in causing tuna to aggregate under the vessel overnight.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.** The record demonstrates the lights were directed down into the ocean and were used in efforts to aggregate fish under the vessel overnight. Respondents admitted that they used lights for the purpose of aggregating fish and holding them in place as discussed in this Decision and Order.

61. Approximately [REDACTED] were caught in this set based on the vessel logsheet. Agency Exh. 34; see also, Resp. Exhs. T and BBBB.

**Agency Response:** The Agency agrees for Count 1 on August 14, 2009.

**Ruling: ACCEPTED AND INCORPORATED.**

62. The total value of the fish caught for Count 1 was [REDACTED] Resp. Exh. T; see also Resp. Exh. BB.

**Agency Response:** The Agency agrees that the value of the fish is at a minimum [REDACTED]

**Ruling: ACCEPTED AND INCORPORATED.**

63. No yellowfin or bigeye was caught in this set. See Agency Exh. 34; see also, Resp. Exhs. T and BBBB.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED** due to Agency counsel's stipulation here. But for Agency counsel's agreement to Respondents' proposed finding of fact, the Court would have found the observer's records indicating that the catch consisted of at least some bigeye and yellowfin tuna credible. The amount of any such tuna would have

been determined based on the amount he recorded and the actual amounts of such tuna for the trip as a whole.

64. Under Count 2, NOAA alleged that the SEA QUEST Respondents used the SEA QUEST to aggregate fish and then set on those fish on September 17, 2009 in violation of law.

**Agency Response:** The Agency agrees.

**Ruling:** ACCEPTED AND INCORPORATED.

65. The set was not a FAD set; it was fish under the boat. See Proposed Findings of Fact Nos. 41-45 above.

**Agency Response:** The Agency disagrees.

**Ruling:** REJECTED.

66. The observer assumed that the lights used in the set could attract tuna because they shone in the water; however, the lights used were not placed in the water. Iohp Test., Tr. at 49:20-50:10 (February 1, 2012).

**Agency Response:** The Agency disagrees.

**Ruling:** REJECTED. The record demonstrates the lights were directed down into the ocean and were used in efforts to aggregate fish under the vessel overnight.

67. Approximately [REDACTED] and [REDACTED] were caught in this set based on the vessel logsheet. Agency Exh. 35; see also Resp. Exhs. T and BBBB.

**Agency Response:** The Agency agrees for count 2 on September 17, 2009.

**Ruling:** ACCEPTED AND INCORPORATED.

68. The total value of the fish caught for Count 2 was [REDACTED] and [REDACTED]. Resp. Exh. T; see also, Resp. Exh. GG.

**Agency Response:** The Agency agrees that the value of the fish is at a minimum \$30,622.50.

**Ruling:** ACCEPTED AND INCORPORATED.

69. No bigeye was caught in this set. See Agency Exh. 35; see also Resp. Exhs. T and BBBB.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED** due to Agency counsel's stipulation here. But for Agency counsel's agreement to Respondents' proposed finding of fact, the Court would have found the observer's records indicating that the catch consisted of at least some bigeye tuna credible. The amount of any such tuna would have been determined based on the amount he recorded and the actual amounts of such tuna for the trip as a whole.

70. On September 29, 2010, NOAA issued a NOVA against the Sea Honor LLC, Paul Magellan, captain of the FN SEA HONOR, and Yen Hsing Tasai (collectively, "SEA HONOR Respondents") alleging two violations related to setting a purse seine net near or in association with a FAD under 50 CFR § 300.222(w).

**Agency Response:** The Agency disagrees. The Respondents in this case were charged with two counts of deploying FADs.

**Ruling: ACCEPTED AND INCORPORATED IN PART** with respect to the date of the NOVA and the Respondents names therein. Respondents were charged with deploying FADs on two separate occasions during the FAD closure period.

71. The observer on the SEA HONOR was John Charles Belei. Testimony of John Charles Belei ("Beleri Test."), Tr. at 226:14-18 (February 2, 2012).

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

72. This was the only time he served as an observer on a U.S. purse seine vessel. Id.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

73. The observer received only one month of observer training in 2008 before serving as an observer on the SEA HONOR the next year in September 2009. Id. at 225:22- 226:10 (February 2, 2012).

**Agency Response:** The Agency agrees that Mr. Belei received one month of observer training, but disagrees with how this information is characterized.

**Ruling: ACCEPTED AND INCORPORATED IN PART; REJECTED** as to Respondents' characterization of "only" as argumentative.

74. The observer admitted that the vessel did not set on any FADs. Id. at 237:9-14 (February 2, 2012).

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

75. Captain Magellan served on the SEA HONOR from mid-September 2009 through January 2010. Agency Exh. 30.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

76. Captain Magellan was in charge of the vessel and the crew and their safety. He would also intervene in any fishing activities if they might violate treaty regulations or laws. Testimony of Paul Magellan ("Magellan Test."), Tr. at 33:22-34:2 (October 29, 2012); Agency Exh. 30 at p. 2.

**Agency Response:** The Agency disagrees with the characterization of Mr. Magellan's testimony.

**Ruling: ACCEPTED IN PART AND INCORPORATED; REJECTED IN PART.** Captain Magellan's cited testimony and statement to the NOAA Special Agent generally supports a finding that Captain Magellan considered himself in charge of the vessel and responsible for the crew and safe operations. Captain Magellan also stated that he was "also in charge of the fishing aspect of it, but only on the law side; not of fishing itself." Tr. at 34:1-2 (Oct. 29, 2012). Captain Magellan did not say that he would intervene in any fishing activities if they violate laws or regulations.

77. Captain Magellan was aware of the FAD closure period. Magellan Test., Tr. at 34:10-23 (October 29, 2012).

**Agency Response:** The Agency agrees that Mr. Magellan so testified.

**Ruling: ACCEPTED AND INCORPORATED.**

78. Captain Magellan did not witness the vessel deploy a FAD on either of the charge dates. Magellan Test., Tr. at 35:8-10 (October 29, 2012); see also, Agency Exh. 30 at p. 3.

**Agency Response:** The Agency agrees that Mr. Magellan so testified.

**Ruling: ACCEPTED AND INCORPORATED as to the fact of Captain Magellan's denial; REJECTED as not credible.**

79. Under Count 1, NOAA alleged that the SEA HONOR Respondents purposefully deployed a FAD during the FAD closure on September 28, 2009 in violation of law.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

80. No set was made on a FAD with respect to Count 1. Belei Test., Tr. at 237:9-11 (February 2, 2012).

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

81. No fish were caught with respect to Count 1. See e.g., Resp. Exh. T and BBBBBB.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

82. Under Count 2, NOAA alleged that the SEA HONOR Respondents purposefully deployed a FAD during the FAD closure on September 30, 2009 in violation of law.

**Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

83. No set was made on a FAD with respect to Count 2. Belei Test., Tr. At 237:12-14 (February 2, 2012).

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

84. No fish were caught with respect to Count 2. See, Resp. Exh. T and BBBBBB.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

85. On September 29, 2010, NOAA issued a NOVA against the Pacific Ranger LLC, John Zolezzi, captain of the F/V PACIFIC RANGER, and Su Tien Shih (collectively, the "PACIFIC RANGER Respondents") alleging one violation related to setting a purse seine net near or in association with a FAD under 50 CFR §300.222(w).

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

86. Under Count 1, NOAA alleged that the PACIFIC RANGER Respondents deployed a workboat with submerged lights to attract fish away from the vessel in order to set on the fish which had aggregated under the vessel on September 30, 2009 in violation of law.

**Agency Response:** The Agency agrees.

**Ruling:** ACCEPTED AND INCORPORATED.

87. The observer on the Pacific Ranger was Auto'o Siliomea during the charge period. Testimony of Auto'o Siliomea ("Siliomea Test."), Tr. at 53:16-21 (February 1, 2012).

**Agency Response:** The Agency agrees.

**Ruling:** ACCEPTED AND INCORPORATED.

88. The set at issue occurred at 5:50 a.m. Id. at 60:22-61:3.

**Agency Response:** The Agency agrees.

**Ruling:** ACCEPTED AND INCORPORATED.

89. The observer admitted that it was still dark outside during the set at this time. Id. at 61:4-8.

**Agency Response:** The Agency agrees.

**Ruling:** ACCEPTED AND INCORPORATED.

90. The observer claimed that the incident related to the FAD closure occurred when the vessel allegedly set on a log next to the workboat. Id. at 53:24-54:7; 54:25-55:7.

**Agency Response:** The Agency disagrees.

**Ruling:** ACCEPTED IN PART; REJECTED IN PART. The observer alleged both that the F/V Pacific Ranger used workboats with lights submerged to hold the fish in place while the set was made and that he spotted a log in the net. The Court finds the violation PROVED on the basis of the use of lights and not on the basis of the log seen in the net during the set. The observer did not see the log before the set was made and did not describe the log with any degree of specificity. See Tr. at 55:8-10; 62:17-25 (Feb. 1, 2012).

91. The observer, however, could not describe the size of the log and did not know how big it was. Id. at 54:62:17-25.

**Agency Response:** The Agency disagrees.

**Ruling:** ACCEPTED AND INCORPORATED.

92. The observer recorded the set under the school association code, "3," which stands for "drifted log, debris, or dead animal." He testified that this was an accurate report of what he saw that day. Id. at 57:8-22.

**Agency Response:** The Agency agrees.

**Ruling:** ACCEPTED AND INCORPORATED.

93. Captain Zolezzi testified that the main vessel was not used as a FAD. It was used only to make the set. Testimony of John Zolezzi ("Zolezzi Test."), Tr. at 21: 7-18 (October 29, 2012).

**Agency Response:** The Agency disagrees.

**Ruling:** The fact of Captain Zolezzi's denial of the violation is ACCEPTED AND INCORPORATED but is REJECTED as not credible.

94. He testified that the workboat could not be a FAD because unlike a FAD, it would not be left in the water for weeks and weeks. Id. at 21:19-23.

**Agency Response:** The Agency disagrees.

**Ruling:** The fact of Captain Zolezzi's denial of the violation is ACCEPTED AND INCORPORATED but his testimony about the work boat not being a FAD is REJECTED as not credible.

95. During the set, when the fishing master went to put on the underwater light on the workboat, Captain Zolezzi told him that he could not use it and told him to turn it off. Id. at 7:21-9:3.

**Agency Response:** The Agency disagrees.

**Ruling:** The fact of Captain Zolezzi's denial of the violation is ACCEPTED AND INCORPORATED but is REJECTED as not credible, along with his account of how long the light was on.

96. The underwater light was then turned off. Id. at 8:4-5.

**Agency Response:** The Agency disagrees.

**Ruling:** The fact of Captain Zolezzi's denial of the violation is ACCEPTED AND INCORPORATED but is REJECTED as not credible, along with his account of how long the light was on.

97. After the skiff was let go, Captain Zolezzi saw that the underwater light was turned on. He told the fishing master to turn it off. Id. at 9:21-10:6.

**Agency Response:** The Agency disagrees.

**Ruling:** The fact of Captain Zolezzi's denial of the violation is **ACCEPTED AND INCORPORATED** but is **REJECTED** as not credible, along with his account of how long the light was on.

98. At that time, Captain Zolezzi estimated that the underwater light was on only for a minute or two or as long as it took him to write the position and walk over and go back. Id. at 10:7-10.

**Agency Response:** The Agency disagrees.

**Ruling:** The fact of Captain Zolezzi's denial of the violation is **ACCEPTED AND INCORPORATED** but is **REJECTED** as not credible, along with his account of how long the light was on.

99. Approximately [REDACTED] tons of [REDACTED] were caught in this set based on the vessel logsheet. Agency Exh. 41; see also Siliomea Test., Tr. at 57:23-58:1 (February 1, 2012); Resp. Exhs. T and BBBB.

**Agency Response:** The Agency agrees.

**Ruling:** **ACCEPTED AND INCORPORATED.**

100. The total value of the fish caught was [REDACTED] Resp. Exh. T; see also, Resp. Exh. xx.

**Agency Response:** The Agency disagrees. The value of the catch was between [REDACTED] and [REDACTED] Agency Exhibit 65.

**Ruling:** **ACCEPTED AND INCORPORATED.**

101. No yellowfin or bigeye were caught in this set. See Agency Exh. 41; see also Resp. Exhs. T and BBBB.

**Agency Response:** The Agency agrees.

**Ruling:** **ACCEPTED AND INCORPORATED.**

102. On September 29, 2010, NOAA issued a NOVA against the Ocean Conquest LLC, Benjamin Maughan, and Wu Chi a Pin (collectively, the "OCEAN CONQUEST Respondents") alleging one violation related to setting on a whale and two violations related to setting a purse seine net near or in association with a FAD under 50 CFR § 300.222(w).

**Agency Response:** The Agency agrees.

**Ruling:** **ACCEPTED AND INCORPORATED.**

103. The observer on the OCEAN CONQUEST was Anthony Lioliomola. Testimony of Anthony Lioliomola ("Lioliomola Test."), Tr. at 66:13-15 (February 1, 2012).

**Agency Response:** The Agency agrees.

**Ruling:** **ACCEPTED AND INCORPORATED.**

104. Captain Ben Maughan was captain of the OCEAN CONQUEST at the time of the alleged violations. Testimony of Ben Maughan ("Maughan Test."), Tr. at 57:8-10 (August 23, 2012).

**Agency Response:** The Agency agrees.

**Ruling:** **ACCEPTED AND INCORPORATED.**

105. While on the vessel, Captain Maughan was responsible for the safety of the vessel and crew and watching that the laws and regulations were obeyed. Id. at 57:11-17.

**Agency Response:** The Agency disagrees.

**Ruling:** **ACCEPTED IN PART AND INCORPORATED; REJECTED to the extent this proposed finding of fact states or implies that Captain Maughan directly supervised or order the particular fishing activities ordered by the fishing master.**

106. Under Count 1, NOAA alleged that the OCEAN CONQUEST Respondents knowingly set on a whale on September 18, 2009 in violation of law.

**Agency Response:** The Agency agrees.

**Ruling:** **ACCEPTED AND INCORPORATED.**

107. The observer recorded that the fishing master said he did not see the whale before the set. Lioliomola Test., Tr. at 92:9-16 (February 1, 2012).

**Agency Response:** The Agency disagrees.

**Ruling:** **ACCEPTED AND INCORPORATED as to the fact that the fishing master told the observer that he did not see the whale prior to the set, but REJECTED to the extent this proposed finding of fact states or implies that the fishing master in fact did not see the whale prior to the set. The fishing master's denial, as reported to the observer, is found not credible.**

108. The whale escaped from the net and they lost the fish from the set. Id. at 92:17-24.

**Agency Response:** The Agency disagrees.

**Ruling: ACCEPTED AND INCORPORATED in PART; REJECTED in PART.**  
The record evidence indicates that the whale did escape from the net; but it also indicates that “about 2 metric ton of skipjack stayed in the net at the end of the set.” Tr. at 92:17-21 (Feb. 1, 2012).

109. Captain Maughan testified that the crew has no control over whether whales come into the net. Maughan Test., Tr. at 61: 12-13 (August 23, 2012).

**Agency Response:** The Agency disagrees.

**Ruling: ACCEPTED AND INCORPORATED with respect to the fact of Captain Maughan’s denial; REJECTED as not credible.**

110. No fish were caught in the set associated with Count 1. See Resp. Exhs. T and BBBBBB.

**Agency Response:** The Agency disagrees.

**Ruling: The record evidence indicates that “about 2 metric ton of skipjack stayed in the net at the end of the set.” Tr. at 92:17-21 (Feb. 1, 2012).**

111. There was no whale mortality in connection with Count I.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

112. Under Count 2, NOAA alleged that the OCEAN CONQUEST Respondents used the OCEAN CONQUEST to attract fish and then set on those fish that had aggregated under the vessel on September 24, 2009 in violation of law.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

113. This was a fish-under-the-boat set; it was not a FAD set.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.**

114. The vessel cannot be a FAD. Even if lights are used, they do not necessarily attract or hold the fish. If they did, there would be fish under the boat every night. Maughan Test., Tr. at 79:13-25; 88:3-10 (August 23, 2012).

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.**

115. Approximately [REDACTED] tons of [REDACTED] and [REDACTED] tons of [REDACTED] were caught in the set related to Count 2 based on the vessel logsheet. See Resp. Exhs. T and BBBB BB.

**Agency Response:** The Agency disagrees, but only slightly. The observer records 46 tons of Skipjack and 3 tons of Yellowfin caught.

**Ruling: ACCEPTED AND INCORPORATED to the extent this proposed finding of fact states that the vessel logsheet recorded the set results as stated. The composition and amount of the catch is fully analyzed in this Decision and Order.**

116. The total value of the fish caught related to Count 2 was [REDACTED] ([REDACTED] worth of [REDACTED] and [REDACTED] worth of [REDACTED]). Resp. Exh. T; see also, Resp. Exh. LLL.

**Agency Response:** The Agency disagrees. The value of the catch was between [REDACTED] and [REDACTED] Agency Exhibit 65.

**Ruling: ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. REJECTED to the extent that the value of the fish caught in this set is inconsistent with the findings in this Decision and Order.**

117. No bigeye were caught in this set underlying to Count 2. See Resp. Exhs. T and BBBB BB.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

118. Under Count 3, NOAA alleged that the OCEAN CONQUEST Respondents used the OCEAN CONQUEST to attract fish and then set on those fish that had aggregated under the vessel on September 25, 2009 in violation of law.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

119. Respondents did not use the OCEAN CONQUEST to attract fish. Rather, the observer claimed that there were fish under another nearby vessel, the FONG KUO. Lioliomola Test., Tr. at 85:12-86:20 (February 1, 2012).

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED to the extent this proposed finding of fact states or implies that the alleged violation did not occur.**

120. Approximately [REDACTED] tons of [REDACTED] and [REDACTED] tons of [REDACTED] were caught in this set related to Count 3 based on the vessel logsheet. See Resp. Exhs. T and BBBBBB.

**Agency Response:** The Agency disagrees.

**Ruling: ACCEPTED AND INCORPORATED to the extent this proposed finding of fact states that the vessel logsheet recorded the set results as stated. The composition and amount of the catch is fully analyzed in this Decision and Order.**

121. The total value of the fish caught related to Count 3 was [REDACTED] ([REDACTED] worth of [REDACTED] and [REDACTED] worth of [REDACTED] Resp. Exh. T; see also, Resp. Exh. LLL.

**Agency Response:** The Agency disagrees. The value of the catch was between \$126,116 and \$193,196. Agency Exhibit 65.

**Ruling: ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. REJECTED to the extent that the value of the fish caught in this set is inconsistent with the findings in this Decision and Order.**

122. No bigeye were caught in this set underlying to Count 3. See Resp. Exhs. T and BBBBBB.

**Agency Response:** The Agency disagrees.

**Ruling: ACCEPTED AND INCORPORATED to the extent this proposed finding of fact states that the vessel logsheet recorded the set results as stated. The composition and amount of the catch is fully analyzed in this Decision and Order.**

123. On September 29, NOAA issued a NOVA against the Ocean Encounter LLC, Russell Bass, and Ho-Ching Chang (collectively, the "OCEAN ENCOUNTER Respondents") alleging four violations related to setting on a whale and five violations related to setting a purse seine net near or in association with a FAD under 50 CFR §300.222(w).

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

124. The observer on the trip aboard the OCEAN ENCOUNTER was Chris Nare. Testimony of Chris Nare ("Nare Test."), Tr. at 115:13-18 (February 2, 2012).

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

125. He testified that the trip on the OCEAN ENCOUNTER was his first time as an observer and he had never been on a purse seine vessel before. Id. at 180:2-5; 208:12-13.

**Agency Response:** The Agency disagrees.

**Ruling: ACCEPTED AND INCORPORATED.**

126. Captain Bass told the NOAA investigator that Mr. Nare was inexperienced; it was the observer's first time away from home, first time on a ship. The observer had "no clue" as to how to complete his forms, make proper log entries, identify species, measure tuna or observe or assess anything objectively. Agency Exh. 44 at p. 4; Agency Exh. 45 at question 16.

**Agency Response:** The Agency agrees that Mr. Bass made those comments to the NOAA Special Agent, but notes that Mr. Bass did not testify at the hearing.

**Ruling: ACCEPTED AND INCORPORATED IN PART to the fact of Mr. Bass's statements to the NOAA Special Agent; REJECTED to the extent this proposed finding states or implies that the observer's documents/testimony is lacking in credibility.**

127. Under Count 1, NOAA alleged that the OCEAN ENCOUNTER Respondents knowingly set on a whale on September 17, 2009 in violation of law.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

128. The observer said that a whale was caught in the center of a net set around a school of fish. Nare Test., Tr. at 116:11-117:10 (February 2, 2012).

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

129. The observer said that the crew opened the bow end of the net to free the whale and the whale escaped unharmed. Id.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

130. The observer said that after they opened the net to let the whale out, no fish were caught in the set. Id. at 120:17-121:3.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

131. No fish were caught in the set underlying Count 1. Agency Exh. 48.

**Agency Response:** The Agency agrees.

**Ruling:** ACCEPTED AND INCORPORATED.

132. Under Count 2, NOAA alleged that the OCEAN ENCOUNTER Respondents knowingly set on a whale on September 24, 2009 in violation of law.

**Agency Response:** The Agency agrees.

**Ruling:** ACCEPTED AND INCORPORATED.

133. The vessel did not set on the whale; it set on a school associated with a whale. Nare Test., Tr. at 129:8-11 (February 2, 2012).

**Agency Response:** The Agency disagrees.

**Ruling:** REJECTED. The observer clearly indicated that the vessel made a set on the school of tuna and the whale was associated with it; the whale escaped the encirclement before the net was closed and pursed. See Tr. at 129:10-25 (Feb. 2, 2012).

134. The whale escaped with the tuna before the vessel could complete the set. Id. at 129:12-25.

**Agency Response:** The Agency agrees.

**Ruling:** ACCEPTED AND INCORPORATED.

135. There were no workboats involved; they did not try to drive the whale out of the net. Id. at 130: 1-4.

**Agency Response:** The Agency agrees.

**Ruling:** ACCEPTED AND INCORPORATED.

136. The set was unsuccessful; no fish were caught in the set underlying Count 2. Id. at 130:5-10; see also Agency Exh. 48.

**Agency Response:** The Agency agrees.

**Ruling:** ACCEPTED AND INCORPORATED.

137. Under Counts 3 and 4, NOAA alleged that the OCEAN ENCOUNTER Respondents knowingly set on a whale on two occasions on September 25, 2009 in violation of law.

**Agency Response:** The Agency agrees.

**Ruling:** ACCEPTED AND INCORPORATED.

138. The observer testified that the whales escaped on their own from the net in both sets. Nare Test., Tr. at 144:5-9; 144:25-145:16.

**Agency Response:** The Agency agrees.

**Ruling:** ACCEPTED AND INCORPORATED.

139. Approximately [redacted] tons of [redacted] and [redacted] tons of [redacted] were caught in the set at 6:17 a.m. associated with Count 3. Agency Exh. 48; see also Resp. Exh. T and BBBBBB. The value of the fish caught in this set was [redacted] ([redacted] worth of [redacted] and [redacted] worth of [redacted] Resp. Exh. T and BBBB.

**Agency Response:** The Agency disagrees.

**Ruling:** ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. REJECTED to the extent that the value of the fish caught in this set is inconsistent with the findings in this Decision and Order.

140. Approximately [redacted] tons of [redacted] and [redacted] ton of [redacted] were caught in the set at 16:01 associated with Count 4. Agency Exh. 48; see also Resp. Exh. T and BBBBBB. The value of the fish caught in this set was [redacted] ([redacted] worth of [redacted] and [redacted] worth of [redacted] Resp. Exh. T and BBBB.

**Agency Response:** The Agency disagrees.

**Ruling:** ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. REJECTED to the extent that the value of the fish caught in this set is inconsistent with the findings in this Decision and Order.

141. No bigeye were caught in either set underlying Count 3 and Count 4. See Agency Exh. 48; see also Resp. Exhs. T and BBBBBB.

**Agency Response:** The Agency disagrees.

**Ruling:** ACCEPTED AND INCORPORATED. Given that Count 3 and Count 4 are MMPA violations and the statutory maximum is imposed for these violations under the MMPA for the reasons provided in this Decision and Order, the composition of the catch is not deemed relevant for the calculation of the civil penalty.

142. Under Count 5, NOAA alleged that the OCEAN ENCOUNTER Respondents used auxiliary boats with submerged lights to attract fish away from the vessel in order to set on fish which had aggregated under the OCEAN ENCOUNTER on September 18, 2009 in violation of law.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

143. The vessel is not a FAD. FADs are usually constructed with logs and have netting hanging down up to 50 meters. They are marked and have buoys attached. Agency Exh. 44 at p. 2.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.**

144. The fish had naturally collected under the vessel as it drifted at night. No method was used to collect them and the vessel did not have any special lights on the vessel or in the water. The workboats only had normal lights on during the set. They did not use green or any special lights. Id. at p. 2, 5.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.**

145. The set alleged in Count 5 was not a FAD set; it was fish under the boat.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.**

146. Approximately [REDACTED] tons of [REDACTED] were caught in the set associated with Count 5 based on the vessel logsheet. Agency Exh. 48; see also Resp. Exhs. T and BBBB.

**Agency Response:** The Agency disagrees. The observer's reports indicate that approximately 45 mt of Skipjack, 23 mt of Yellowfin and 22 mt of Bigeye were caught on this set. Agency Exhibit 22.

**Ruling: ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. The composition and amount of the catch is fully analyzed in this Decision and Order.**

147. The total value of the fish caught in the set related to Count 5 is [REDACTED] Resp. Exh. T; see also Resp. Exh. BBBB.

**Agency Response:** The Agency disagrees. The value of the catch was between \$58,382 and \$99,909. Agency Exhibit 65.

**Ruling: ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. REJECTED to the extent that the value of the fish caught in this set is inconsistent with the findings in this Decision and Order.**

148. No yellowfin or bigeye were caught in the set associated with Count 5. See Agency Exh. 48; see also Resp. Exhs. T and BBBB.

**Agency Response:** The Agency disagrees.

**Ruling: ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. The composition and amount of the catch is fully analyzed in this Decision and Order.**

149. Under Count 6, NOAA alleged that the OCEAN ENCOUNTER Respondents used workboats with submerged lights to attract fish away from the vessel in order to set on fish which had aggregated under the OCEAN ENCOUNTER on September 20, 2009 in violation of law.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

150. The vessel is not a FAD. FADs are usually constructed with logs and have netting hanging down up to 50 meters. They are marked and have buoys attached. Agency Exh. 44 at p. 2.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.**

151. The fish had naturally collected under the vessel as it drifted at night. No method was used to collect them and the vessel did not have any special lights on the vessel or in the water. The auxiliary boats only had normal lights on during the set. They did not use green or any special lights. Id. at p. 2, 5.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.**

152. The set alleged in Count 6 was not a FAD set; it was fish under the boat.

**Agency Response:** The Agency disagrees.

**Ruling:** REJECTED.

153. Approximately [redacted] tons of [redacted] and [redacted] ton of [redacted] were caught in the set associated with Count 6 based on the vessel logsheet. Agency Exh. 48; see also Resp. Exhs. T and BBBB.

**Agency Response:** The Agency disagrees. The observer's report documents that 179 mt of Skipjack, 25 mt of Yellowfin and 51 mt of Bigeye were caught on this set. Agency Exhibit 22.

**Ruling:** ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. The composition and amount of the catch is fully analyzed in this Decision and Order.

154. The total value of the fish caught in the set related to Count 6 is [redacted] [redacted] worth of [redacted] and [redacted] worth of [redacted]. Resp. Exh. T; see also Resp. Exh. BBBB.

**Agency Response:** The Agency disagrees. The value of the catch was between [redacted] and [redacted].

**Ruling:** ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. REJECTED to the extent that the value of the fish caught in this set is inconsistent with the findings in this Decision and Order.

155. No bigeye were caught in the set associated with Count 6. See Agency Exh. 48; see also Resp. Exhs. T and BBBB.

**Agency Response:** The Agency disagrees.

**Ruling:** ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. The composition and amount of the catch is fully analyzed in this Decision and Order.

156. Under Count 7, NOAA alleged that the OCEAN ENCOUNTER Respondents used auxiliary boats with submerged lights to attract fish away from the vessel in order to set on fish which had aggregated under the OCEAN ENCOUNTER on September 21, 2009 in violation of law.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

157. The vessel is not a FAD. FADs are usually constructed with logs and have netting hanging down up to 50 meters. They are marked and have buoys attached. Agency Exh. 44 at p. 2.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.**

158. The fish had naturally collected under the vessel as it drifted at night. No method was used to collect them and the vessel did not have any special lights on the vessel or in the water. The auxiliary boats only had normal lights on during the set. They did not use green or any special lights. Id. at p. 2, 5.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.**

159. The set alleged in Count 7 was not a FAD set; it was fish under the boat.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.**

160. Approximately [REDACTED] tons of [REDACTED] were caught in the set associated with Count 7 based on the vessel logsheet. Agency Exh. 48; see also Resp. Exhs. T and BBBBBB.

**Agency Response:** The Agency disagrees. The observer's report documents that 140 mt of Skipjack, 20 mt of Yellowfin and 40 mt of Bigeye were caught. Agency Exhibit 22.

**Ruling: ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. The composition and amount of the catch is fully analyzed in this Decision and Order.**

161. The total value of the fish caught in the set related to Count 7 is [REDACTED] Resp. Exh. T; see also Resp. Exh. BBBB.

**Agency Response:** The Agency disagrees. The value of the catch is between [REDACTED] and [REDACTED] Agency Exhibit 65.

**Ruling: ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. REJECTED to the extent that the value of the fish caught in this set is inconsistent with the findings in this Decision and Order.**

162. No yellowfin or bigeye were caught in the set associated with Count 7. See Agency Exh. 48; see also Resp. Exhs. T and BBBBBB.

**Agency Response:** The Agency disagrees.

**Ruling: ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. The composition and amount of the catch is fully analyzed in this Decision and Order.**

163. Under Count 8, NOAA alleged that the OCEAN ENCOUNTER Respondents used auxiliary boats with submerged lights to attract fish away from the vessel in order to set on fish which had aggregated under the OCEAN ENCOUNTER on September 22, 2009 in violation of law.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

164. The vessel is not a FAD. FADs are usually constructed with logs and have netting hanging down up to 50 meters. They are marked and have buoys attached. Agency Exh. 44 at p. 2.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.**

165. The fish had naturally collected under the vessel as it drifted at night. No method was used to collect them and the vessel did not have any special lights on the vessel or in the water. The auxiliary boats only had normal lights on during the set. They did not use green or any special lights. Id. at p. 2, 5.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.**

166. The set alleged in Count 8 was not a FAD set; it was fish under the boat.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.**

167. Approximately [REDACTED] tons of [REDACTED] were caught in the set associated with Count 8 based on the vessel logsheet. Agency Exh. 48; see also Resp. Exhs. T and BBBBBB.

**Agency Response:** The Agency disagrees. The observer's report documents that 14 mt of Skipjack and 6 mt of Yellowfin and 10 mt of Bigeye were caught on this set. Agency Exhibit 22.

**Ruling: ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. The composition and amount of the catch is fully analyzed in this Decision and Order.**

168. The total value of the fish caught in the set related to Count 8 is [REDACTED] Resp. Exh. T; see also Resp. Exh. BBBB.

**Agency Response:** The Agency disagrees. The value of the catch is between [REDACTED] and [REDACTED] Agency Exhibit 65.

**Ruling: ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. REJECTED to the extent that the value of the fish caught in this set is inconsistent with the findings in this Decision and Order.**

169. No yellowfin or bigeye were caught in the set associated with Count 8. See Agency Exh. 48; see also Resp. Exhs. T and BBBBBB.

**Agency Response:** The Agency disagrees.

**Ruling: ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. The composition and amount of the catch is fully analyzed in this Decision and Order.**

170. Under Count 9, NOAA alleged that the OCEAN ENCOUNTER Respondents used auxiliary boats with submerged lights to attract fish away from the vessel in order to set on fish which had aggregated under the OCEAN ENCOUNTER on September 23, 2009 in violation of law.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

171. The vessel is not a FAD. FADs are usually constructed with logs and have netting hanging down up to 50 meters. They are marked and have buoys attached. Agency Exh. 44 at p. 2.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED.**

172. The fish had naturally collected under the vessel as it drifted at night. No method was used to collect them and the vessel did not have any special lights on the vessel or in the water. The auxiliary boats only had normal lights on during the set. They did not use green or any special lights. Id. at p. 2, 5.

**Agency Response:** The Agency disagrees.

**Ruling:** REJECTED.

173. The set alleged in Count 9 was not a FAD set; it was fish under the boat.

**Agency Response:** The Agency disagrees.

**Ruling:** REJECTED.

174. Approximately [REDACTED] tons of [REDACTED] were caught in the set associated with Count 9 based on the vessel logsheet. Agency Exh. 48; see also Resp. Exhs. T and BBBB.

**Agency Response:** The Agency disagrees.

**Ruling:** ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. The composition and amount of the catch is fully analyzed in this Decision and Order.

175. The total value of the fish caught in the set related to Count 9 is [REDACTED] Resp. Exh. T; see also Resp. Exh. BBBE.

**Agency Response:** The Agency disagrees. The value of the catch is between [REDACTED] and [REDACTED] Agency Exhibit 65.

**Ruling:** ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. REJECTED to the extent that the value of the fish caught in this set is inconsistent with the findings in this Decision and Order.

176. No yellowfin or bigeye tuna was caught in the set associated with Count 9. See Agency Exh. 48; see also Resp. Exhs. T and BBBB.

**Agency Response:** The Agency disagrees.

**Ruling:** ACCEPTED AND INCORPORATED in PART to the extent Respondents' calculations comport with: 1) the receipts proffered and 2) the amount of fish the vessel's log indicated was caught. The composition and amount of the catch is fully analyzed in this Decision and Order.

## PROPOSED CONCLUSIONS OF LAW

1. The MMPA specifically authorizes the incidental taking of marine mammals if a commercial fishing vessel obtains a registration and authorization under Section 118 of the Act, 16 U.S.C. § 1387. NOAA has admitted that each of Respondents' vessels in this case had been issued the appropriate registration and authorization under this provision of law. Therefore, each vessel is authorized to incidentally take marine mammals during fishing operations.

**Agency Response:** The Agency agrees that section 1387 of the MMPA authorizes incidental taking of marine mammals by commercial fishing vessels and that Respondents' vessels are authorized to incidentally take marine mammals during fishing operations.

**Ruling: ACCEPTED AND INCORPORATED.**

2. The incidental take exceptions of Section 118 of the MMPA do not apply where the interaction is with a marine mammal that is listed as endangered or threatened under the Endangered Species Act or as depleted under the MMPA. If a marine mammal is so listed, then only the "incidental, but not intentional" take of such marine mammals is allowed. 16 U.S.C. § 1387(a)(2) and § 1371(a)(5)(E). However, those provisions do not apply to the circumstances of this case.

**Agency Response:** The Agency disagrees with Respondents' characterization, but agrees that in the case of the incidental taking of marine mammals from species or stocks designated under this chapter as depleted on the basis of their listing as threatened species or endangered species under the Endangered Species Act of 1973, both section 1387 and section 1371(a)(5)(E) of the MMPA apply. The Agency further agrees that this situation is not applicable to these cases.

**Ruling: ACCEPTED AND INCORPORATED in PART with respect to the ESA intersection with the MMPA and REJECTED in PART as discussed in this Decision and Order to the extent this proposed conclusion of law states or implies that Respondents were allowed to intentional set on marine mammals under the MMPA.**

3. Under Section 118(a)(5), Congress has specified that, in the circumstances of this case where a vessel has been issued a registration and authorization and listed species are not involved, only the "the lethal take of any marine mammal in the course of commercial fishing operations is prohibited." 16 U.S.C. § 1387(a)(5).

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

4. Based on the plain meaning of the words of the statute, Congress intended the words "incidental" to include intentional acts in authorizing incidental takes under Section 118, unless

otherwise stated as in the case of listed species of marine mammals, in which case only "incidental, but not intentional" takes are allowed.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

5. Therefore, under the facts presented in these cases, no civil penalty violation of the MMPA was committed. Respondents' vessels had the proper authorization to incidentally take marine mammals, no lethal injury occurred to any marine mammal that was incidentally taken during their fishing operations, and no listed species of marine mammal was involved.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

6. Under the Administrative Procedure Act (APA), publication of an agency final regulation "shall not be made less than 30 days before its effective date." 5 U.S.C. § 553(d).

**Agency Response:** The Agency disagrees, as the Respondents are quoting a fragment that changes the full meaning of the APA requirements, as the APA also provides for exceptions for that general rule.

**Ruling: REJECTED to the extent this proposed conclusion states or implies that the APA does not contain exceptions to the 30 day notice period for the promulgation of administrative rules.**

7. NOAA published its final FAD regulations on August 4, 2009. Agency Ex. 8. The Federal Register Notice said that the regulation was being made effective as of August 1, 2009 with respect to those provisions that prohibited setting on, near or in association with FADs or deploying or servicing FADs. Id. at 38544. The agency claimed that "there was good cause to waive the 30-day delay in effective date" for the provisions under 5 U.S.C. § 553(d)(3). Id. at 38552.

**Agency Response:** The Agency agrees, except the regulations were effective on August 3, 2009.

**Ruling: ACCEPTED AND INCORPORATED.**

8. NOAA, however, lacked good cause because the sole reason for waiver of the 30-day delay in effective date was the agency's own slow rulemaking process.

**Agency Response:** The Agency disagrees. Further, this matter was raised on interlocutory review to the NOAA Administrator who issued an Order on November 15, 2012 and held that NOAA had properly shown good cause to waive the 30-day cooling off period when it issued its final regulations on August 4, 2009.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

9. Thus, because of this violation of the APA, Count 1 of the NOVA against the SEA QUEST is unenforceable as a matter of law because the alleged violation occurred on August 14, 2009, within 30 days of the publication of the FAD regulations.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

10. The civil penalty provisions of the Magnuson-Stevens Act, 16 U.S.C. § 1858(a), incorporate the formal adjudicatory hearing requirements of the Administrative Procedure Act (APA). Pursuant to 5 U.S.C. § 556(d), NOAA, as the "proponent of a rule or order," bears the burden of proof in this proceeding with respect to proving a violation of a statute or regulation as well as the appropriateness of any penalty. *Rice v. Nat'l Trans. Safety Bd.*, 745 F.2d 1037, 1039 (6<sup>th</sup> Cir. 1984) (FAA has burden of proof in prosecuting violation of its rules). The Supreme Court has ruled that the burden of proof under the APA means the "burden of persuasion" not the burden of production, meaning that "if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Director, Office of Worker's Comp. Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994).

**Agency Response:** The Agency disagrees with this proposed finding as argument rather than conclusion of law.

**Ruling: ACCEPTED AND INCORPORATED.**

11. In this formal adjudicatory hearing, the standard of proof is a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91 (1981). To prevail, therefore, NOAA must establish that it is more likely than not that Respondents violated the agency's regulations with respect to the FAD fishing.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

12. Under NOAA's regulations, all evidence that is relevant, material, reliable and probative is admissible at the hearing.

**Agency Response:** The Agency agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

13. The trier of fact may consider any matter than [sic] has a tendency to prove or disprove the truthfulness of a witness' testimony at trial. The trier of fact may consider factors for

evaluating a witness' credibility:

- a. the opportunity and ability of the witness to see or hear or know the things testified to;
- b. the witness' memory;
- c. the witness' manner while testifying;
- d. the witness' interest in the outcome of the case and any bias or prejudice;
- e. whether any other evidence contradicted the witness' testimony;
- f. the reasonableness of the witness' testimony in light of all the evidence; and
- g. other factors that bear on believability.

**Agency Response:** The Agency disagrees with this proposed finding as argument rather than conclusion of law.

**Ruling: ACCEPTED AND INCORPORATED.**

14. NOAA failed to prove by a preponderance of the evidence that SEA QUEST Respondents used the SEA QUEST to aggregate fish and then set on those fish on August 14, 2009 and September 17, 2009 as alleged in Counts 1 and 2 of the NOVA.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

15. NOAA did not show by a preponderance of the evidence that fish aggregating lights were used. The observer was inexperienced as it was his first trip on a tuna boat and first time as an observer. See Proposed Findings of Fact No. 48, above. He incorrectly assumed that the lights used in the sets purposefully aggregated fish because they shone in the water. However, the captain testified that the lights used were not submerged or placed in the water. See Proposed Findings of Fact Nos. 53 - 56, above.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

16. The vessel is not and cannot be a FAD. See Proposed Findings of Fact Nos. 41 - 45, above.

**Agency Response:** The Agency disagrees as the regulations state clearly in their definition of a "fish aggregating device" that "[t]he meaning of FAD does not include a fishing vessel, provided that the fishing vessel is not used for the purpose of aggregating fish." 50 C.F.R. § 300.211. This shows that there are circumstances under which the vessel is considered a FAD.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

17. Moreover, the FAD regulations permitted fish under the boat sets. See Proposed Finding of Fact No. 15, above.

**Agency Response:** The Agency disagrees. Agency regulations neither explicitly prohibit nor explicitly permit sets made on fish under a vessel. The regulations prohibit setting a purse seine around a FAD or within one nautical mile of a FAD and prohibit setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD, such as by setting the purse seine in an area from which a FAD has been moved or removed within the previous eight hours, or setting the purse seine in an area in which a FAD has been inspected or handled within the previous eight hours, or setting the purse seine in an area into which fish were drawn by a vessel from the vicinity of a FAD.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

18. Thus, the sets were permissible fish-under-the boat sets, which did not violate the FAD regulations because no fish aggregating lights were used.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

19. NOAA failed to prove by a preponderance of the evidence that the SEA HONOR Respondents deployed any FADS on September 28, 2009 and September 30, 2009 as alleged in Counts 1 and 2 of the NOVA.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

20. NOAA did not show by a preponderance of the evidence that FADs were deployed. The observer was inexperienced and had received little training in understanding what a FAD was. In addition, the trip was the only time he had served as an observer on a US purse seine vessel. The observer admitted that the vessel did not set on any FADs. See Proposed Findings of Fact Nos. 72-74, above.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

21. Because of the FAD closure, the vessel was unable to set on FADs and therefore fished mostly on school fish. Agency Exh. 30 at p. 2. The captain of the SEA HONOR understood the restrictions during the FAD closure. See Proposed Finding of Fact No. 77, above. During this time, vessels were not allowed to deploy or set on any FADs. If FADs were retrieved, they could not be returned to the water. If floating objects were observed, they could not deploy a radio buoy or anything to it. They were not allowed to make a set within one mile of a floating object. Nor were they allowed to drift with a FAD and take any fish away from it. Agency Exh. 30 at p. 2. It was the captain's responsibility to intervene if these rules were going to be violated. Id.; See

also Proposed Finding of Fact No. 76, above. The captain therefore did not remember or believe that any FADs were deployed. See Proposed Finding of Fact No. 78, above.

**Agency Response:** The Agency disagrees with this proposed finding as argument rather than conclusion of law.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

22. NOAA failed to prove by a preponderance of the evidence that the PACIFIC RANGER Respondents deployed an auxiliary boat with submerged lights to attract fish away from the vessel to set on fish that had aggregated under the vessel on September 30, 2009 as alleged in Count 1 of the NOVA.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

23. NOAA alleged that the vessel deployed a boat with submerged lights to in to attract fish in violation of the FAD regulations. However, NOAA presented contradictory evidence as to what happened and failed to show that the vessel deployed a boat with submerged lights in violation of the FAD regulations.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

24. The observer testified that the violation stemmed from setting on a log, which was not alleged by NOAA, and not deploying a boat with submerged lights. The observer even recorded the set as a set on a log and not as a set involving submerged lights. See Proposed Findings of Fact No. 92, above.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

25. Even if any lights were used, their use was de minimis. The captain testified that as soon as he saw any lights, he told the fishing master to turn them off and they were immediately turned off. See Proposed Findings of Fact Nos. 95 - 98, above.

**Agency Response:** The Agency disagrees with this proposed finding as argument rather than conclusion of law.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

26. NOAA's claim that the vessel set near a whale in Count 1 in violation of the MMPA fails as a matter of law. See Proposed Conclusions of Law Nos. 1-5, above.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

27. NOAA failed to prove by a preponderance of evidence that the OCEAN CONQUEST Respondents used the OCEAN CONQUEST to attract fish and then set on the fish that had aggregated under the vessel on September 24, 2009 and September 25, 2009 as alleged in Counts 2 and 3 of the NOVA.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

28. First, the vessel is not and cannot be a FAD. The use of lights would not turn the vessel into a FAD. See Proposed Findings of Fact Nos. 39 - 45, above. Moreover, the FAD regulations permitted fish under the boat sets. See Proposed Finding of Fact No. 15, above. Thus, NOAA failed to prove Counts 2 and 3.

**Agency Response:** The Agency disagrees. The Agency regulations state clearly in the definition of a "fish aggregating device" that "[t]he meaning of FAD does not include a fishing vessel, provided that the fishing vessel is not used for the purpose of aggregating fish." 50 C.F.R. § 300.211. This shows that there are circumstances under which the vessel is considered a FAD. In addition, Agency regulations neither explicitly prohibit nor explicitly permit sets made on fish under a vessel. The regulations prohibit setting a purse seine around a FAD or within one nautical mile of a FAD and prohibit setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD, such as by setting the purse seine in an area from which a FAD has been moved or removed within the previous eight hours, or setting the purse seine in an area in which a FAD has been inspected or handled within the previous eight hours, or setting the purse seine in an area into which fish were drawn by a vessel from the vicinity of a FAD.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

29. Second, as to Count 3, NOAA failed to present evidence that Respondents used the OCEAN CONQUEST to attract fish. NOAA specifically alleged in Count 3 that Respondents used "the fishing vessel" (i.e., the OCEAN CONQUEST) to attract fish. However, the observer contradicted this allegation and testified that the vessel set around fish that had aggregated under a nearby but unrelated vessel, the FONG KUO. See Proposed Finding of Fact No. 119, above. NOAA did not allege that the OCEAN CONQUEST Respondents violated the FAD regulations because they set on fish that had collected under a different vessel. And, NOAA presented no evidence at the hearing that the OCEAN CONQUEST Respondents set on fish that had collected under the OCEAN CONQUEST on September 25, 2009 as alleged in Count 3. Thus, NOAA failed to prove Count 3.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

30. NOAA's claims that the vessel set near a whale in Counts 1-4 in violation of the MMPA fail as a matter of law. See Proposed Conclusions of Law Nos. 1-5, above.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

31. NOAA also failed to prove by a preponderance of the evidence that the OCEAN ENCOUNTER Respondents used auxiliary boats with submerged lights to attract fish away from the vessel in order to set on them as alleged in Counts 5-9 of the NOVA.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

32. The vessel is not and cannot be a FAD. These were fish-under-the-boat sets. Moreover, the use of lights would not turn the vessel into a FAD. See Proposed Finding of Fact Nos. 39-45; 143-145; 150-152; 157-159; 164-166; 171-173, above.

**Agency Response:** The Agency disagrees. The Agency regulations state clearly in the definition of a "fish aggregating device" that "[t]he meaning of FAD does not include a fishing vessel, provided that the fishing vessel is not used for the purpose of aggregating fish." 50 C.F.R. § 300.211. This shows that there are circumstances under which the vessel is considered a FAD.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

33. In addition, the FAD regulations permitted fish under the boat sets. See Proposed Finding of Fact No. 15, above. Thus, NOAA failed to prove Counts 5-9.

**Agency Response:** The Agency disagrees. Agency regulations neither explicitly prohibit nor explicitly permit sets made on fish under a vessel. The regulations prohibit setting a purse seine around a FAD or within one nautical mile of a FAD and prohibit setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD, such as by setting the purse seine in an area from which a FAD has been moved or removed within the previous eight hours, or setting the purse seine in an area in which a FAD has been inspected or handled within the previous eight hours, or setting the purse seine in an area into which fish were drawn by a vessel from the vicinity of a FAD.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

34. Due process requires that the agency give fair notice of what is prohibited before a sanction can be imposed. *U.S. v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 980 (9th Cir. 2008). NOAA's regulations failed to clearly advise Respondents as to what constitutes a FAD, how the fishing vessel itself could become a FAD by particular purposeful

activities and, therefore, what constitutes illegal conduct for purposes of civil penalty enforcement. See Proposed Findings of Fact Nos. 14 - 15, above.

**Agency Response:** The Agency disagrees with this proposed finding as argument rather than conclusion of law.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

35. The practice of setting on fish that accumulate under the vessel was specifically approved in the agency's comments in the Federal Register notice that contained the final, published regulations. See Proposed Findings of Fact Nos. 12 -14, 17, above. Capturing fish that is found under the vessel in the morning requires the use of lights for safety reasons. The agency did not specify how the use of lights could make this particular fishing activity unlawful. The uncertainty of this practice was pointed out by the Commission when it adopted CMM 2009-02. See Resp. FF No. 15. Therefore, NOAA's FAD regulations are unconstitutional on due process grounds and cannot be enforced against Respondents in this case.

**Agency Response:** The Agency disagrees with this proposed finding as argument rather than conclusion of law.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

36. Because NOAA failed to present sufficient, credible evidence that Respondents violated NOAA's FAD regulations, no penalties should be assessed.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

37. The agency incorrectly asserts that the penalty for any degree of illegal activity should represent the value of the fish caught in that activity. This approach fails to assess the severity of the action in light of the underlying purpose of the rule.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

38. Here, the purpose of the FAD regulations was to protect juvenile Bigeye and yellowfin tuna.

**Agency Response:** The Agency generally agrees.

**Ruling: ACCEPTED AND INCORPORATED.**

39. The evidence indicates, however, that each of the vessels caught no Bigeye or and little to no yellowfin for each of the charged sets. See Proposed Findings of Fact Nos. 63, 69, 101, 117,

and 122, above; see also Resp. Exh. BBBB. In fact, the SEA HONOR made no sets associated with the two Counts against it by NOAA and as a result, caught no fish of any species. See Proposed Findings of Fact Nos. 81 and 84, above.

**Agency Response:** The Agency disagrees, although it agrees that the F/V Sea Honor was charged with deploying FADs rather than setting on FADs and therefore there is no catch associated with those counts. The Agency would note that its proposed penalty assessment takes that fact into consideration for those counts.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

40. The impact on the yellowfin stock in the Pacific of catching a total of 10 tons of yellow fin by the SEA QUEST, zero tons by the SEA HONOR and PACIFIC RANGER, 33 tons by the OCEAN CONQUEST, and seven tons by the OCEAN ENCOUNTER is also inconsequential, as a matter of conservation concern. See Proposed Findings of Fact Nos. 63, 67, 81, 84, 101, 110, 115, 120, 131, 136, 139, 140, 148, 153, 162, 169, and 176, above.

**Agency Response:** The Agency disagrees.

**Ruling: ACCEPTED IN PART AND INCORPORATED as to the relatively small amounts of bigeye/yellowfin caught associated with the unlawful sets; REJECTED as to the specific amount of such species caught. Notably, the penalty calculation was determined considering all the applicable factors, of which, harm to the resource is one.**

41. The fishing activity at issue in connection with the charges in this case had no impact, at all, on the bigeye tuna population as none of the vessels caught any bigeye in connection with the charges. See Proposed Findings of Fact Nos. 63, 69, 81, 84, 101, 110, 117, 122, 131, 136, 141, 148, 155, 162, 169, and 176, above.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order.**

42. NOAA is seeking disproportionately high penalties without basis or any reasonable relation to the value of the fish caught. NOAA's demand for nearly \$1.5 million in total penalties bears no relation to the less than \$400,000 worth of fish caught by all Respondents. See Proposed Findings of Fact Nos. 33-38.

**Agency Response:** The Agency disagrees.

**Ruling: REJECTED for the reasons given in this Decision and Order. While Agency counsel's suggested penalties were not adopted for the most part, the Court will not find that the penalties assessed by Agency counsel bore "no relation" to the value of the fish caught.**

43. It is unreasonable for NOAA to seek large penalties for the first year of a new regulatory program, which applied an unclear definition of a FAD, relied on international observers not trained to U.S. specifications, and was subject to language barriers.

**Agency Response:** The Agency disagrees with this proposed finding as argument rather than conclusion of law.

**Ruling: REJECTED for the reasons given in this Decision and Order. The Court made an independent, de novo determination of the appropriate penalties for Respondents' proven violations.**

44. The Commission itself was concerned that CCM 2008-01 was not clear enough and adopted CCM 2009-02. NOAA, however, pursued these enforcement cases regardless of this acknowledged lack of clarity.

**Agency Response:** The Agency disagrees.

**Ruling: ACCEPTED IN PART AND INCORPORATED as to the fact of CMM 2009-02 being passed in part to clarify certain provisions of CMM 2008-01; REJECTED as to the characterization of NOAA counsel's pursuit of the cases.**

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.