

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

In the Matter of:

**ANTHONY BLACK, AMERICAN TRIUMPH
LLC, YEN MING YUAN**

Respondents.

Docket Number:

PI0904340

INITIAL DECISION AND ORDER

Issued:

August 22, 2013

Issued By:

**Hon. Parlen L. McKenna
Presiding**

APPEARENCES:

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I. Preliminary Statement

The National Oceanic and Atmospheric Administration's (NOAA or Agency) filed an administrative enforcement action against Respondents Anthony Black, American Triumph, LLC (American Triumph), and Yen Ming Yuan for alleged violations of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFCIA or Act), 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). The Agency alleged in its Notice of Violation and Assessment (NOVA) eight violations associated with Respondents' tuna purse seine fishing activities during a 2009 Fish Aggregating Device (FAD) closure period.

The Agency sought a total civil penalty of \$872,500 for these alleged violations. After thoroughly reviewing the record evidence and arguments of the parties, I find seven of the eight violations are **PROVED** and a sanction of **\$562,068.27** is appropriate.

II. Procedural History

On September 29, 2010, the Agency issued its NOVA and served it upon Respondents. Subsequently, Respondents filed a Request for Hearing and Response to the NOVA. On December 2, 2010, the Agency filed its initial Preliminary Position on Issues and Procedures (PPIP);¹ and on January 7, 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 period for implementation. On December 9,

¹ Agency counsel filed amendments to the PPIP on three occasions: March 4, 2011, April 10, 2012, and June 15, 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).

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 Respondent's 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).² Despite the Administrator's ruling, Respondents continued to make these arguments in their Post Hearing Memorandum. See Post Hearing Memorandum at 30-31. Regardless thereof, 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 Respondent's counsel raised these issues again, they are noted and reserved for appeal with an Article III court of competent jurisdiction.

The hearing commenced and took place on three separate occasions: January 31, 2012; July 9-11, 2012; and August 27-28, 2012. In total, the Agency offered seven (7) witnesses and twenty (20) exhibits in support of its case. Respondents offered four (4) witnesses and twenty six (26) exhibits in rebuttal. The parties' witnesses and exhibits entered into evidence are identified in Attachment A.

² This Interlocutory Order applied equally to similar issues in the companion consolidated case of In re Mathew Frietas, et al. (Docket No. PI0904337). Both this case and the consolidated Freitas case 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 the Freitas case was maintained.

On November 19, 2012, 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 January 4, 2013.

I reviewed the entire record of this proceeding, including the transcript, evidence, pleadings and other submissions, and the case is ripe for decision. The 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 & 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).³ 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

³ 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 WCPFC Convention, including recommendations and decisions adopted by the Commission).

person who violates Chapter 88 is subject to the same penalties as provided for in the Magnuson-Stevens Act. Id.⁴

In December 2008, the Western and Central Pacific Fisheries Commission (WCPFC or 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. 1.⁵

In 2009, the FAD closure period lasted from August 1 through September 30. Agency Exh. 6 at 4.⁶ 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. The regulations went into effect August 3,

⁴ 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).

⁵ 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.

⁶ 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.”).

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 crew aboard fishing vessels of the United States within the Convention Area⁷:

- (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.

⁷ 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.

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.

C. The Charges against Respondents

The Agency charged Respondents with eight violations during the FAD closure period in 2009: 1) one instance of servicing a FAD⁸; 2) four instances of making a set within one nautical mile of FAD; and 3) three instances of making set on a FAD. The Agency charged that each of these activities constituted separate violations of the regulations at 50 C.F.R. § 300.233(b).

Given the statutory and regulatory provisions, to prevail on the charges, the Agency needed to demonstrate: 1) all Respondents are “persons” subject to enforcement actions as defined by the Act; 2) the alleged unlawful activities occurred in the Convention area during the FAD closure period; and 3) Respondents “serviced” a FAD for Count 1 or made a set on or within 1 nautical mile (nm) of a FAD for Counts 2-8.

IV. Findings of Fact⁹

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. 6.

⁸ During the hearing on January 31, 2012, Agency counsel amended the allegations in Charge 1 from unlawful “deploying of a fish aggregating device” to “deploying a beacon on a fish aggregating device.” Tr. at 7:2-8:1 (January 31, 2012). Respondents did not object to the amendment but wanted the Agency to issue a new NOVA with the altered language. *Id.* at 7:20-24 (January 31, 2012). The change was accepted by the Court. *Id.* at 7:25-8:2 (January 31, 2012). The need for a new NOVA, given the agreed upon change on the record during open court, is not necessary for the Agency to proceed with its amendment to Charge 1. Agency regulations provide that a party may amend a pleading within 20 days of the hearing by leave of the judge and “shall be freely given when justice so requires.” 15 C.F.R. § 904.207(a). Nothing precluded the Agency from making the change to Charge 1 during the hearing, particularly given Respondent’s lack of substantive objection. Respondents were not prejudiced by this amendment and were able to fully defend Charge 1 as amended.

⁹ 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]”.

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 81:21-82:15 (July 9, 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 204:14-22 (July 10, 2012).¹⁰

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 205:16-21 (July 10, 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 FAD prohibition. Tr. at 82:16-20 (July 9, 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 93:23-25 (July 9, 2012); 211:17-18; 213:14-214:13; 237:5-16 (July 10, 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 83:18-23; 93:10-12; 94:1-5 (July 9, 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 51:20-52:2 (July 9, 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 95:10-13 (July 9, 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.

¹⁰ “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 204:14-22 (July 10, 2012).

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 42:24-43:21 (July 9, 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 49:15-18 (July 9, 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 49:19-24 (July 9, 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 57:18-58:8 (July 9, 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 111:19-112:25 (July 9, 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 116:10-121:21 (July 9, 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’ Exh. 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. 6.

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); Tr. at 27:18-23 (August 27, 2012).

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.

The F/V American Triumph and Key Individuals Associated with the Vessel

37. At the time of the charged violations, the F/V American Triumph was a U.S.-flagged purse seine vessel owned by American Triumph Fishing, LLC. Agency Exh. 10.

38. At the time of the charged violations, the captain of the F/V American Triumph was Respondent Captain Anthony Black. Agency Exh. 11.

39. Captain Black first received a license in 1965 and has continued his involvement in the fishing industry ever since. Tr. at 116:3-9 (August 27, 2012).

40. Captain Black holds an unlimited mariner's license in addition to being a trained fishing master. Id. at 118:19-21.

41. American Triumph pays Captain Black a daily rate for his services and his compensation is not tied to how much fish the vessel catches. Tr. at 119:4-6; 18-20 (August 27, 2012).

42. Captain Black was aware of the FAD closure in 2009 and spoke with the fishing master about it. Tr. at 120:13-24 (August 27, 2012).

43. Captain Black denied that the F/V American Triumph set on any FADs during the closed period or committed any other unlawful activity. Tr. at 120:25-121:2 (August 27, 2012); Agency Exh. 13.

44. Captain Black claimed that as a general rule he went over each set with the observer and told him how much fish were caught, the size of the fish caught, and any particulars concerning the set. Tr. at 121:24-125:18 (August 27, 2012).

45. Respondent Yen Ming Yuan was the fishing master on the F/V American Triumph at the time of the charged violations. Agency Exh. 3 at PS-1, page 2; Tr. at 158:11-159:3 (July 10, 2012); Agency Exh. 11.

46. On the vessel, the fishing master is in charge of the overall fishing operations including locating fish and directing how and when the sets were made. Id. at 118:22-119:4; 183:23-184:10 (August 27, 2012).

47. Mr. Larry Da Rosa is the fleet manager for Tradition Mariner LLC and manages four vessels, including the F/V American Triumph. Tr. at 168:15-20 (August 27, 2012).

48. In 2009, when the FAD closure was first announced, Mr. Da Rosa instructed the company's captains, including Captain Black, about the FAD closure. Tr. at 181:20-182:15 (August 27, 2012)

49. Mr. Da Rosa instructed captains not to go near the FADs during the FAD closure. Id.

50. During the relevant time period, Mr. Indra "Cucu" Cahyana was the interpreter aboard the F/V American Triumph. Tr. at 66:1-68:8 (August 27, 2012).

51. Mr. Cahyana had experience as a fisherman before he became an interpreter and worked as a crewmember on various fishing vessels. Tr. at 67:12-20 (August 27, 2012).

52. As the ship's interpreter, Mr. Cahyana's responsibility was to translate between the captain, fishing master, and the chief engineer. He would also translate to the crew if the captain or fishing master asked him to do so. Id. at 68:9-15 (August 27, 2012).

53. Mr. Cahyana saw his role as transmitting messages from the captain to the fishing master or the chief engineer. Id. at 68:16-25 (August 27, 2012).

54. Mr. Cahyana denied that the F/V American Triumph set on any FADs during the closed period or committed any other unlawful activity. Resp. Exh. AAAAAA; Tr. at 66:1, et seq. (August 27, 2012).

55. At the time of the charged violations, the F/V American Triumph carried an observer on board the vessel, Mr. Jason Morikawa, a native of the Marshall Islands. See Agency Exh. 11; Tr. at 15:12-14 (January 31, 2012).

56. Mr. Morikawa had made previous trips on board the F/V American Triumph as an observer, but this was his first trip on board the vessel during the newly implemented FAD closure period. Tr. at 20:17-21:1; 81:3-84:2 (January 31, 2012); Tr. at 121:10-15 (August 27, 2012); Agency Exh. 4.

57. Mr. Morikawa was a trained Pacific Islands Forum Fisheries Agency (FFA) observer. See Tr. at 13-15 generally (January 31, 2012).

58. Mr. Morikawa's training included instructions on filling out the observer workbook and diary and identifying fish species. Tr. at 14:6-15:4; 105:3-16 (January 31, 2012).

59. Training for FFA observers also included information about purse seine fishing. See Tr. at 120:1-121:2; 124:22-125:11 (July 9, 2012).

60. Mr. Morikawa began working as a fisheries observer in 2006. Tr. at 14:2-3; 135:16-18 (January 31, 2012).

61. Prior to his deployment on the F/V American Triumph, Mr. Morikawa received training regarding the 2009 prohibition against FAD fishing from the Marshall Island Marine Resource Authority, including instructions about the FAD closure and that vessels were not allowed to fish on floating objects. Tr. at 21:3-22:1 (January 31, 2012).

62. Mr. Morikawa was not instructed about restrictions related to the deployment of FADs; or about the U.S. regulations implementing the FAD closure called for by CMM 2008-01. Tr. at 22:8-14 (January 31, 2012).

63. The FFA instructed Mr. Morikawa that if he observed anything illegal, he was to keep it "secret" from the captain. Tr. at 22:23-23:6 (January 31, 2012).

64. Mr. Morikawa never discussed with Captain Black any of his allegations about the deployment of FADs, the use of FADs, or his being subject to bribery efforts by the fishing master. Tr. at 71:21-72:4 (January 31, 2012); see also Tr. at 122:19-123:8 (August 27, 2012).

65. While Mr. Morikawa was aboard the F/V American Triumph, he maintained observer reports – including his Trip Diary, Purse Seine Trip Report and Purse Seine Observer Workbook, which documented the events as he observed them while on board the F/V American Triumph. See Tr. at 15:18-21 (January 31, 2012).

66. Mr. Morikawa filled out his Trip Report (Agency Exh. 2) prior to getting into port at the end of the trip. Tr. at 17:21-18:4; 126:15-24 (January 31, 2012).

67. Mr. Morikawa filled out his trip diary, the daily logs and set reports in his observer workbook every day while on the trip. Tr. at 16:10-16; 18:17-24; 19:11-20:4 (January 31, 2012); 8:9-9:18 (August 28, 2012).

68. Mr. Morikawa saw his primary job as an observer to make reports of his observations by keeping a diary and filling out the observer workbook. Tr. at 22:15-22 (January 31, 2012).

69. Mr. Morikawa generally positioned himself on the main, navigational bridge with the translator during fishing operations, while the fishing master was on the flying bridge – located above the main bridge. Mr. Morikawa would then go outside on the deck to complete his observations as to the fishing results. Tr. at 32:24-33:9; 87:24-88:2; 94:12-18 (January 31, 2012); Tr. at 70:11-16; 71:10-12 (August 27, 2012).

70. From his position on the main bridge, Mr. Morikawa could not observe what the fishing master was doing on the flying bridge above him.. Tr. at 96:4-13 (January 31, 2012).

71. Mr. Morikawa recorded his observations of the fishing results by estimating the catch. He would make this estimate by multiplying the number of brails taken from the net (with each brail holding approximately 5 metric tons). Tr. at 50: 14-24 (January 31, 2012); see also Agency Exh. 2 at 18 (calculation of tonnage and composition was “eye-estimated” and sampled); 24 (collected fish for sampling).

The Alleged Bribery Incident with the Fishing Master

72. At the end of the trip, Mr. Morikawa told officials in the Marshall Islands that the fishing master gave him money on three different occasions for a total of \$440 as a bribe to alter his reports about setting on FADs. Tr. at 56:11-13; 59:22-60:21; 62:23-63:7; 64:17-65:18; 66:7-11 (January 31, 2012); Agency Exh. 4 (question 22 and 23) (stating that the translator was present during one incident); see also Agency Exh. 2 at 33.

73. The translator, Mr. Cahyana denied ever seeing the fishing master give Jason Morikawa money. Tr. at 75:20-23 (August 27, 2012).

74. However, Mr. Cahyana was not surprised when he heard that the fishing master gave Mr. Morikawa money because he “always give money to anybody” and that most of the time the fishing master gave him money after a trip. Tr. at 76:4-12 (August 27, 2012).

75. On August 15, 2009, the fishing master offered Mr. Morikawa money so he would not report that the vessel made sets on FADs. Mr. Morikawa refused to take the money. But when the fishing master kept offering it to him, he accepted it with the intention of using it as evidence of the fishing master's efforts to bribe him. Tr. at 55:2-14 (January 31, 2012); Agency Exh. 1 at 7-8.

76. Because the fishing master did not speak fluent English, it was difficult for Mr. Morikawa to communicate with the fishing master; however, the fishing master used a combination of words and gestures and indicated to Mr. Morikawa that he should take the money by holding the money and pushing it at Mr. Morikawa repeatedly saying "No limu." Mr. Morikawa understood "limu" to mean "raft", so the intent was for Mr. Morikawa to accept the money and not report the FAD set. Tr. at 56:11-59:19 (January 31, 2012); Agency Exh. 1 at 7-8.

77. Mr. Morikawa nevertheless recorded the set as he observed and did not alter his records. Tr. at 59:20-21; 60:1-3 (January 31, 2012).

78. On September 1, 2009, the fishing master approached Mr. Morikawa and gave him \$140 with the words, "Let go", which Mr. Morikawa interpreted again as not to report the FAD set made that morning. Tr. at 60:15-62:19 (January 31, 2012); Agency Exh. 1 at 39.

79. On September 5, 2009, the fishing master gave Mr. Morikawa more money despite the fact that Mr. Morikawa attempted to refuse it. Tr. at 63:17-25 (January 31, 2012); Agency Exh. 1 at 46-47.

80. Within an hour, Mr. Morikawa recorded his encounters with the fishing master in his trip diary. Tr. at 107:17-108:2 (January 31, 2012); Agency Exh. 1 at 39.

81. Mr. Morikawa knew he should not take the money from the fishing master but accepted it because the fishing master kept insisting he take it despite his refusals. Tr. at 105:17-24 (January 31, 2012).

82. Mr. Morikawa eventually accepted the money so that he could report the fishing master's efforts to bribe him not to report the FAD sets. Tr. at 107:2-9 (January 31, 2012).

83. Mr. Morikawa kept all the money (totaling \$440) the fishing master gave him and turned it over to his observer coordinator (named Mannasseh) at the end of his trip. Tr. at 64:2-65:2 (January 31, 2012); see also Tr. at 133:17-134:2 (January 31, 2012).

84. When he gave the money to Mannasseh and told him that the fishing master tried to bribe him to alter his observer reports, Mannasseh took Mr. Morikawa to meet with a legal advisor for the fishery. Subsequently, charges were leveled against the boat and the fishing master for interference with an observer. Tr. at 65:3-66:2 (January 31, 2012).

85. Shortly after the F/V American Triumph returned to the Marshall Islands to offload its catch, Captain Black was summoned by a government official – Mr. Glenn Joseph – to discuss bribery allegations related to that trip. Tr. at 124:24-126:25 (August 27, 2012).

86. Captain Black was aware that the fishing master gave cash to members of the crew but was not aware that he had given any to Mr. Morikawa. Tr. at 133:9-11; 153:3-155:13 (August 27, 2012).

87. After the company was informed of the charges, Mr. Da Rosa communicated with Mr. Joseph via telephone and learned of the bribery allegations related to the F/V American Triumph. Tr. at 169:7-23 (August 27, 2012).

88. Mr. Joseph told Mr. Da Rosa that American Triumph had two options for resolving the matter. The company could have the vessel released expeditiously by handling the matter "in-house" or through the judicial system which might have the vessel in port for eight to twelve months. Tr. at 169:23-170:7 (August 27, 2012).

89. As a result of Mr. Da Rosa's negotiations, the vessel was allowed to leave port on the promise that something would be worked out through the payment of a fine. Tr. at 171:6 through 173:3 (August 27, 2012).

90. Mr. Da Rosa eventually negotiated a \$200,000 settlement of the allegations with the Marshall Islands by which the company paid \$150,000 and the fish master paid \$50,000. Tr. at 172:2-15 (August 27, 2012); Tr. at 66:2-11 (January 31, 2012).

91. As a result of that settlement and payment of a fine, Mr. Morikawa received a reward of \$2,000. Tr. at 66:7-11 (January 31, 2012).

92. Mr. Cahyana never spoke with Mr. Morikawa about whether he knew he would get a reward as an observer for reporting violations. Tr. at 76:13-22 (August 27, 2012).

93. Captain Black claimed he had a conversation with Mr. Morikawa about an incident with a Korean boat where bribery charges were leveled and a reward was given. Tr. at 123:19-124:18 (August 27, 2012).

94. However, Captain Black could not recall the details of the alleged conversation with Mr. Morikawa about the rewards and bribery charges for the Korean vessel (e.g., who paid the fine, how much of a fine, etc.). Tr. at 150:16-153:12 (August 27, 2012).

95. Mr. Morikawa denied that he had a conversation with Captain Black concerning a reward and the Korean vessel. Tr. at 6:16-7:6 (August 28, 2012).

96. Mr. Morikawa provided answers to written questions from NOAA Special Agent (SA) Painter about his trip on the F/V American Triumph. Agency Exhs. 4, 5.

97. Mr. Morikawa clarified his answer to SA Painter's question (#25) concerning the attempted bribery stating initially he did not know why the fishing master gave him the money but within five minutes realized what the fishing master was doing. Tr. at 98:21-101:6 (January 31, 2012).

98. It is more likely than not that Mr. Morikawa did not know that he might receive such a reward for reporting this conduct prior to his trip on the F/V American Triumph and only found

out about the reward at the end of the trip when he reported what the fishing master had done and Mannessah told him he might get a reward. Tr. at 66:12-23 (January 31, 2012); 7:17-25 (August 28, 2012).

99. Mr. Morikawa stated he did not feel harassed while on the vessel. Tr. at 72:10-23 (January 31, 2012).

100. Mr. Morikawa characterized his trip as: "This was a complete trip. It was a great trip and I hope next trip all written report section will be fill out." Agency Exh. 2 at 38; Tr. at 130:22-24 (January 31, 2012).

101. Mr. Morikawa explained that he meant "safe" trip by his use of the word "great" and denied his characterization had anything to do with him getting a reward. Tr. at 131:8-15; 133:9-12 (January 31, 2012).

Special Agent Painter's Investigation

102. SA Painter interviewed both Mr. Morikawa and Captain Black by written questions via electronic mail and had a brief phone conversation with Captain Black about the alleged violations. Tr. at 138:25-139:25; 142:24-144:8; 159:22-160:4; 186:7-16 (July 10, 2012). See also Agency Exhs. 4, 5, 13.

103. SA Painter also spoke with Mr. Da Rosa, the American Triumph's vessel manager. Tr. at 141:10-11 (July 10, 2012).

104. Mr. Da Rosa provided SA Painter with a copy of the settlement agreement reached between American Triumph and the Marshall Islands Government, which states American Triumph settled the allegations of interference with a fisheries observer for \$200,000. Tr. at 141:16-142:2 (July 10, 2012).

105. SA Painter contacted the Marshall Islands government about the reward program. In interviewing Mr. Morikawa, SA Painter was told Mr. Morikawa was unaware of the program until after he returned from the FAD closure trip aboard the F/V American Triumph and turned in the money the fishing master had given him. Tr. at 145:12-20 (July 10, 2012).

106. SA Painter never contacted Mr. Cahyana during the investigation, but did have his written statement. Tr. at 73:5-25 (August 27, 2012).

107. The Regional Purse Seine Logsheet produced by American Triumph (Agency Exh. 12) generally confirms the location of the F/V American Triumph's sets and the amount of fish caught as depicted in the observer's account. Tr. at 162:20-169:7 (July 10, 2012).

Count 1 – August 28, 2009

108. On August 28, 2009, the F/V American Triumph spotted a floating raft constructed of cork, nets, and pieces of bamboo, plastic and ropes marked with a beacon belonging to another boat, the F/V Koo's #108. Tr. at 23:7-25:2 (January 31, 2012).

109. At the time the F/V American Triumph investigated the raft/beacon of the F/V Koo's #108, Mr. Morikawa did not know the number of the beacon and only determined the number after it was brought on board. Tr. at 27:3-12 (January 31, 2012).

110. Mr. Morikawa recorded these events in his Purse Seine Observer Workbook. Agency Exh. 3 (entries on line 4 of PS-2, Daily Log, page 19 of 30, dated August 28, 2009, 07:10) These entries indicate the F/V American Triumph swapped out the F/V Koo's beacon and deployed its own beacon # 39. Id. at 23-24.

111. Mr. Morikawa also recorded the details related to these events in his Trip Diary entries for August 28, 2009. Agency Exh. 1 at 32.

112. Mr. Morikawa speculated that the F/V American Triumph wanted to replace the beacon on the FAD so that it could monitor the FAD and presumably catch any fish aggregating under it. Tr. at 26:4-11 (January 31, 2012).

113. Captain Black claimed he directed the F/V American Triumph's translator to tell the fishing master to cease any such attempt and either pull the raft out of the water and retain it or let it go without alteration. Tr. 142:8-143:10 (August 27, 2012).

114. Mr. Cahanya testimony supported Captain Black assertions. Tr. at 77:18-80:1 (August 27, 2012).

115. At all times during the events of August 28, 2009, the F/V American Triumph was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 162:12-19 (July 10, 2012); Agency Exh. 9.

Count 2 – August 18, 2009

116. On the morning of August 18, 2009, while the F/V American Triumph investigated a free school of tuna, Mr. Morikawa spotted a raft with a buoy attached approximately 100 meters from the F/V American Triumph. Tr. at 27:18-28:9 (January 31, 2012).

117. The buoys attached to the F/V American Triumph's FADs were radio buoys with antennas – not satellite buoys. Tr. at 88:6-89:19 (January 31, 2012).

118. Mr. Morikawa referred to the "fish tracker" or "track finder" as the device the F/V American Triumph used to track its radio buoys attached to its FADs. This device is different than what he termed the sonar or depth finder, which would show whether fish were around or under the boat. Tr. at 89:20-91:25 (January 31, 2012).

119. The track finder, a radio directional device records the direction a particular signal is coming from, but does not give distances. Tr. at 96:14-97:17 (January 31, 2012).

120. However, the strength of the signal gives some indication of relative distance. Tr. at 90:9-19 (August 27, 2012).

121. When Mr. Morikawa saw the FAD, he pointed it out to the ship's translator but did not know whether the captain or the fishing master saw the raft. Tr. at 28:10-21 (January 31, 2012).

122. After the F/V American Triumph investigated the free school, the vessel made a set. Tr. at 28:21-29:3 (January 31, 2012).

123. Mr. Morikawa recorded these events in his Purse Seine Observer Workbook for August 18, 2009. Agency Exhibit 3 at PS-2, page 8 of 30.

124. Mr. Morikawa recorded details related to these events in his Trip Diary entries for August 18, 2009. Agency Exhibit 1 at 12.

125. The F/V American Triumph was located at 02°34.116'S/178°07.762'E when Mr. Morikawa sighted the raft at 10:58 and at 02°34.348'S/178°07.856'E when the set began at 11:09. Agency Exh. 3 at PS-2 Form, page 8 of 30; Agency Exh. 12 (for the set location).

126. At all times during the events of August 18, 2009 described above, the F/V American Triumph was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 162:12-19 (July 10, 2012); Agency Exh. 9.

127. Mr. Morikawa estimated 5 metric tons (mt) of fish were caught for the set in question, with the entire catch consisting of skipjack tuna. Tr. at 50:14-16; 51:22-25 (January 31, 2012).

128. The F/V American Triumph's Purse-Seine Logsheet estimated 5 mt of skipjack tuna caught for this set. Agency Exh. 12.

Count 3 – August 22, 2009

129. At approximately 14:33 on August 22, 2009, while the F/V American Triumph was investigating a free school of tuna, Mr. Morikawa spotted a raft approximately 50 meters from the F/V American Triumph. Tr. at 31:4-5 (January 31, 2012).

130. Mr. Morikawa could not say whether any crewmember, the captain, the translator, or the fishing master saw the raft. Tr. at 31:6-8; 33:13-22 (January 31, 2012).

131. The F/V American Triumph then made a set at 14:36. Tr. at 31:9-12 (January 31, 2012).

132. Mr. Morikawa recorded these events in his Purse Seine Observer Workbook for August 22, 2009 in entries at 14:33 and 14:36. Agency Exh. 3 at PS-2, page 12 of 30.

133. Mr. Morikawa recorded details related to these events in his Trip Diary entries for 22 August 2009. Agency Exh. 1 at 20.

134. The F/V American Triumph was located at 03°05.074'S/179°18.776'W when Mr. Morikawa sighted the raft at 14:33 and at 03°04.016'S/179°18.695'W when the set began at 14:36. Agency Exh. 3 at PS-2 Form, page 12 of 30; Agency Exh. 12 (for the set location).¹¹

135. At all times during the events of August 22, 2009 described above, the F/V American Triumph was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 162:12-19 (July 10, 2012); Agency Exh. 9.

136. Mr. Morikawa estimated 110 mt of fish were caught for the set in question, consisting of 10 mt of yellowfin and 100 mt of skipjack. Tr. at 52:21-53:9 (January 31, 2012).

137. The F/V American Triumph's Purse-Seine Logsheet estimated 100 mt of skipjack and 10 mt of yellowfin tuna caught for this set. Agency Exh. 12.

Count 4 – August 24, 2009

138. At approximately 09:28 on August 24, 2009, while the F/V American Triumph investigated a free school of tuna, Mr. Morikawa spotted a raft approximately 70 meters from the F/V American Triumph. Tr. at 34:4-14 (January 31, 2012).

139. The F/V American Triumph then made a set at 09:31. *Id.*; Agency Exh. 3 at Form PS-2 page 14 of 30; Agency Exh. 12

140. Mr. Morikawa recorded these events in his Purse Seine Observer Workbook for August 24, 2009 in entries at 09:28 and 09:31. Agency Exh. 3 at PS-2, page 14 of 30.

141. Mr. Morikawa recorded details related to these events in his Trip Diary entries for August 24, 2009. Agency Exh. 1 at 24.

142. The F/V American Triumph was located at 03°17.384'S/179°13.423'W when Mr. Morikawa sighted the raft at 09:28 and at 03°17.383'S/179°13.563'W when the set began at 11:09. Agency Exh. 3 at PS-2 Form, page 14 of 30; Agency Exh. 12 (for the set location).¹²

143. At all times during the events of August 24, 2009 described above, the F/V American Triumph was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 162:12-19 (July 10, 2012); Agency Exh. 9.

¹¹ The F/V American Triumph's Purse-Seine Logsheet gives a slightly different position for the set location - at 03°04.012'S/179°18.695'W - but this difference of .004' does not alter the analysis of the distance between Mr. Morikawa's sighting of the raft and the set's commencement.

¹² The F/V American Triumph's Purse-Seine Logsheet gives a slightly different position for the set location - at 03°17.385'S/179°13.565'W - but this difference does not alter the analysis of the distance between Mr. Morikawa's sighting of the raft and the set's commencement.

144. No fish were caught during this set. Tr. at 35:7-13; 52:8-10 (January 31, 2012); Agency Exh. 3 at Form PS-2, page 14 of 30; Agency Exh. 12.

Count 5 – September 4, 2009

145. At approximately 05:10 on September 4, 2009, while the F/V American Triumph was investigating its own raft with beacon number 42, the vessel determined that there were tuna under the raft. Tr. at 35:17-22 (January 31, 2012).

146. Mr. Morikawa knew the beacon was the F/V American Triumph's #42 because once the vessel activates on the track finder, he could correlate the radio signal frequency to a list of buoy numbers on the bridge. Tr. at 35:23-36:11 (January 31, 2012).

147. Approximately two minutes later, the F/V American Triumph lowered an auxiliary workboat into the water, which deployed submerged green and yellow lights, which Mr. Morikawa described as "aggregating lights", while it stayed near the raft. Tr. at 36:14-37:24 (January 31, 2012).

148. The F/V American Triumph then made a set, but managed to exclude the raft from the net before it was fully pursed. Id. at 37.

149. Mr. Morikawa recorded details related to these events in his Purse Seine Observer Workbook for September 4, 2009, in entries at 05:10 and 05:32. Agency Exh. 3 at PS-2, page 26 of 30.

150. Mr. Morikawa recorded details related to these events in his Trip Diary entries for September 4, 2009. Agency Exh. 1 at 43 – 44.

151. At all times during the events of September 4, 2009 described above, the F/V American Triumph was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 162:12-19 (July 10, 2012); Agency Exh. 9.

152. Mr. Morikawa estimated that 100 metric tons of fish were caught for the set in question, consisting of 90 tons of skipjack, 5 tons of yellowfin and 5 tons of bigeye tuna. Tr. at 53:10-18 (January 31, 2012).

153. This total tonnage estimate corresponds with Captain Black's estimate contained in the vessel's purse seine logsheet. Agency Exh. 12.

154. However, given the payment invoices (which I find to be the best evidence) for the entire trip showing no bigeye caught and only 20 tons of yellowfin, neither Mr. Morikawa's nor Captain Black's estimates of 5 tons of bigeye are accepted as accurate. See Resp. Exh. DDDDD.

155. This determination is supported by the fact that yellowfin and bigeye tuna look similar and are difficult to differentiate. This difficulty is particularly true with juveniles, which are most likely associated with FADs. See I.R. Pedrosa-Garasmio, R.P. Babaran, M.D. Santos, "Discrimination of Juvenile Yellowfin (*Thunnus albacares*) and Bigeye (*T. obesus*) Tunas using Mitochondrial DNA Control Region and Liver Morphology", PLoS ONE 7:4 (2012) (available

at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0035604>) (noting “identification of . . . juveniles, especially at sizes less than 40 cm, is very difficult, often leading to misidentification and miscalculation of their catch estimates.”).¹³

Count 6 – August 15, 2009

156. At approximately 04:30 on August 15, 2009, Mr. Morikawa went to the bridge of the F/V American Triumph and at 04:59 spotted a buoy which was attached to a raft. Tr. at 39:16-40:11 (January 31, 2012).

157. Mr. Morikawa first saw the raft as the F/V American Triumph circled the raft slowly and used its electronic equipment to see that fish were under the raft. Tr. at 116:17-40 (January 31, 2012).

158. The F/V American Triumph then deployed submerged green and yellow aggregating lights of the same type used by the workboat on September 4, 2009. Id. at 40-41.

159. Aggregating lights were used by the main vessel during set times – not while drifting at night. Tr. at 84:3-86:15 (January 31, 2012).

160. The F/V American Triumph next lowered an auxiliary workboat into the water. Id. at 41.

161. Once the workboat deployed its submerged green and yellow aggregating lights, the F/V American Triumph pulled up its aggregating lights and moved away from the workboat, the raft and the beacon. Id. at 41-42.

162. The F/V American Triumph then set on the raft at 05:32. Id. at 42.

163. As the F/V American Triumph made the set and pursed the net, one of the workboats pulled the raft out of the net. Tr. at 40:8 (January 31, 2012).

164. Mr. Morikawa had a conversation with Captain Black after he arrived back on the bridge. Captain Black used the bridge to take the position and time of the set. Based upon information from the fishing master, Captain Black told Mr. Morikawa that the set was made on a free school of unassociated fish and not on a raft. Tr. at 44:6-45:13 (January 31, 2012).

165. Mr. Morikawa told Captain Black that this was not possible because one could not see a free school at this time because it was still dark. Tr. at 44:6-45:13 (January 31, 2012).

166. The raft was floating near the vessel, which Mr. Morikawa could see because of the lights near the F/V American Triumph’s tower. Tr. at 115:4-12 (January 31, 2012).

¹³ The Court is taking official notice of this fact pursuant to 15 C.F.R. § 904.251. Any party that disagrees with this finding of fact may file a petition for reconsideration of this finding within 20 days of service of this Initial Decision and Order stating reasons why such finding is erroneous. See 15 C.F.R. § 904.272.

167. Mr. Morikawa recorded details related to these events in his Purse Seine Observer Workbook for August 15, 2009, in entries at 04:30, 04:59 and 05:32. Agency Exh. 3 at Form PS-2, page 5 of 30.

168. Mr. Morikawa recorded details related to these events in his Trip Diary entries for August 15, 2009. Agency Exh. 1 at 6.

169. At all times during the events of August 15, 2009 described above, the F/V American Triumph was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 162:12-19 (July 10, 2012); Agency Exh. 9.

170. Mr. Morikawa estimated that the vessel caught 200 mt of tuna, consisting of 198 mt of skipjack and 2 mt of bigeye. Tr. at 53:19-54:4 (January 31, 2012).

171. This total tonnage estimate corresponds with Captain Black's estimate contained in the vessel's purse seine logsheet. Agency Exh. 12.

172. However, given the payment invoices (which I find to be the best evidence) for the entire trip showing no bigeye caught, neither Mr. Morikawa's nor Captain Black's estimates of 2 tons of bigeye are accepted as accurate. See Resp. Exh. DDDDD.

Count 7 – August 17, 2009

173. At approximately 04:30 on August 17, 2009, Mr. Morikawa went to the bridge of the F/V American Triumph and saw that the vessel was searching for a raft. Mr. Morikawa came to this conclusion based on the fact that the track finder that is used to find locator buoys was activated. Tr. at 45:20-25 (January 31, 2012).

174. At 04:58 Mr. Morikawa saw a buoy and a raft. Id. at 46.

175. Mr. Morikawa next saw the F/V American Triumph deploy submerged aggregating lights and then lower an auxiliary workboat into the water. Id. at 46.

176. Once the workboat deployed its own submerged aggregating lights into the water, the F/V American Triumph retrieved its submerged aggregating lights and moved away from the workboat so that it could make a set. Id.

177. The F/V American Triumph then set on the raft at 05:33, and Mr. Morikawa estimated that the vessel caught 3 mt of bigeye tuna and 22 mt of skipjack. Id. at 47-48; Agency Exh. 3 at 7 of 40.

178. This total tonnage estimate corresponds with Captain Black's estimate contained in the vessel's purse seine logsheet. Agency Exh. 12.

179. However, given the payment invoices (which I find to be the best evidence) for the entire trip showing no bigeye caught, neither Mr. Morikawa's nor Captain Black's estimates of 3 tons of bigeye are accepted as accurate. See Resp. Exh. DDDDD.

180. Mr. Morikawa recorded details related to these events in his Purse Seine Observer Workbook for August 17, 2009, in entries at 04:30, 04:58 and 05:33. Agency Exh. 3 at PS-2, page 7 of 30.

181. Mr. Morikawa recorded details related to these events in his Trip Diary entries for August 17, 2009. Agency Exh. 1 at 10.

182. At all times during the events of August 17, 2009 described above, the F/V American Triumph was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 162:12-19 (July 10, 2012); Agency Exh. 9.

Count 8 – August 31, 2009

183. At approximately 14:34 on August 31, 2009, the F/V American Triumph was investigating a free school of tuna that was feeding on bait fish near a raft. Tr. at 48:19-49:2 (January 31, 2012).

184. Mr. Morikawa was on the bridge during this incident with the translator and pointed the raft out to him. Tr. at 49:3-10 (January 31, 2012).

185. The F/V American Triumph maneuvered near the raft to separate the tuna from the raft. Id.

186. Mr. Morikawa later saw a school of tuna approximately 50 meters from the raft and the F/V American Triumph then made at set near the raft at 15:03. Id.

187. Mr. Morikawa recorded details related to these events in his Purse Seine Observer Workbook for August 31, 2009, in entries at 14:34 and 15:03. Agency Exh. 3 at PS-2, page 22 of 30.

188. Mr. Morikawa recorded details related to these events in his Trip Diary entries for August 17, 2009. Agency Exh. 1 at 37.

189. At all times during the events of August 31, 2009 described above, the F/V American Triumph was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 C.F.R. § 300.211. Tr. at 162:12-19 (July 10, 2012); Agency Exh. 9.

190. Mr. Morikawa estimated that the F/V American Triumph caught 138 metric tons of skipjack tuna and 5 metric tons of bigeye tuna. Tr. at 54:17-55:1 (January 31, 2012).

191. The vessel's logsheet estimated that 140 metric tons of skipjack and 3 metric tons of bigeye tuna were caught in this set. Agency Exh. 12.

192. However, given the payment invoices (which I find to be the best evidence) for the entire trip showing no bigeye caught, neither Mr. Morikawa's estimate of 5 metric tons of bigeye tuna nor Captain Black's estimate of 3 metric tons of bigeye tuna are accepted as accurate. See Resp. Exh. DDDDD.

V. Analysis

As the parties recognized in their post-hearing briefs, this case rests almost exclusively upon determining witness credibility. The Agency's case depends upon the testimony and records compiled by Mr. Morikawa, the international observer on board the American Triumph. Respondents attempted to impeach Mr. Morikawa's testimony by presenting the testimony of two witnesses from the American Triumph – Captain Black and Mr. Cahyana, the American Triumph's master and translator, respectively. Both Captain Black and Mr. Cahyana denied that any of Mr. Morikawa's alleged unlawful activities occurred.

The testimonies of these witnesses are contradictory and irreconcilable. In this instance, both sides of the story cannot be equally true. To make credibility determinations at issue, I considered the totality of the circumstances, including: 1) my observations of each witness' demeanor, candor, and responsiveness; 2) the plausibility of a particular witness' account; 3) the consistency between any of the witness' written accounts (and the timing of such accounts) and oral statements; 4) the internal consistency of each such statement; 5) the consistency of such statements with any other record evidence; and 6) any demonstrated inaccuracies in such statements.¹⁴

A. Explanation of Credibility Determinations

Given the centrality of the credibility determinations in this case, I will begin the Analysis by explaining my credibility findings regarding Mr. Morikawa, Captain Black and Mr. Cahyana.

¹⁴ See also Ninth Circuit Model Jury Instructions, 1.11 Credibility of Witnesses, which provides that the following factors may be taken into account: (1) the opportunity and ability of the witness to see or hear or know the things testified to; (2) the witness's memory; (3) the witness's manner while testifying; (4) the witness's interest in the outcome of the case and any bias or prejudice; (5) whether other evidence contradicted the witness's testimony; (6) the reasonableness of the witness's testimony in light of all the evidence; and (7) any other factors that bear on believability. The Jury Instructions also note that the "weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it."

1. Mr. Jason Morikawa

Mr. Morikawa was a trained FFA observer who hails from the Marshall Islands. Agency Exh. 11; Tr. at 13-15 (January 31, 2012). Mr. Morikawa had made at least one previous trip as an observer aboard the F/V American Triumph, but this was his first during a FAD closure period. Tr. at 20:17-21:1; 81:3-84:2 (January 31, 2012); Tr. at 121:10-15 (August 27, 2012); Agency Exh. 4. As a trained observer, Mr. Morikawa was instructed to keep contemporaneous notes of his observations of the activities on board the fishing vessel, which were used to fill out the particular observer forms he was required to keep. Tr. at 14:6-15:4; 105:3-16 (January 31, 2012). I find that Mr. Morikawa filled out these forms on the day of the events in question and completed his trip report shortly before returning to port as he asserted. See Tr. at 15:18-21; 17:21-18:4; 126:15-24 (January 31, 2012).

Respondents attempted to discredit Mr. Morikawa in several ways. See Respondents' Post Hearing Brief at 25-30. Most significantly, Respondents claimed Mr. Morikawa fabricated the alleged violations to obtain a monetary reward for reporting such unlawful activity. Respondents asserted Mr. Morikawa knew rewards were available prior to making the trip. See Respondents' Post Hearing Memorandum at 3-4. Respondents largely base this allegation upon the testimony of Captain Black and Mr. Morikawa's supposed inconsistent answers to questions posed by SA Painter via electronic mail.

Captain Black's testimony was non-specific and did not adequately demonstrate Mr. Morikawa knew about such rewards by a preponderance of the evidence. See Tr. at 123:19-124:18; 150:16-153:12 (August 27, 2012). While Mr. Morikawa did receive \$2,000 from the Marshall Islands' government, this reward was only given in relation to the interference/bribery of an observer in connection with the money the fishing master gave Mr. Morikawa to not report

FAD sets. Tr. at 66:7-11 (January 31, 2012). Mr. Morikawa did not receive any reward for reporting unlawful FAD activities. He only received a reward based on the fact that he reported the fishing master's efforts to influence his reporting of such activities – not for the unlawful FAD sets themselves. See, e.g., Tr. at 174:13-18 (August 27, 2012) (Mr. Da Rosa discussing his interaction with the Marshall Islands official, who “didn’t bring up the FAD sets It was specifically about interfering with the duties of a - - an observer, which I took as the bribe, supposedly a[n] illegal bribe.”).

As for Mr. Morikawa's alleged inconsistent statements provided to SA Painter in his written answers, Mr. Morikawa answers and how they changed are reasonably explained. See Tr. at 36:17-39:18 (August 28, 2012); Agency Exh. 4, 5; Resp. Exh. JJ. Mr. Morikawa's affirmative answer to SA Painter's question about whether he knew prior to his trip if he would receive a reward is understandable as Mr. Morikawa apparently misunderstood the question and was answering about his then-present knowledge (i.e., after the trip where the bribery occurred), which was subsequently corrected in his final statement collected by SA Painter. Id. Furthermore, read in their proper context, Mr. Morikawa's complete answer to Questions No. 1 and No. 2 on Resp. Exh. JJ leads me to conclude that he was merely confirming that everything he wrote down in his observer reports and logs/diary was accurate. See Resp. Exh. JJ at 4 (stating: “No one” gave him instructions to document violations so he could receive a reward).

Respondents also made much of the observers' code of conduct. Respondents would have me believe that Mr. Morikawa was under an affirmative duty to inform Captain Black about the violations he observed and something was improper about keeping his observations “secret.” Respondents' Post Hearing Memorandum at 9-12. Respondents claim they should have been provided the opportunity to discuss Mr. Morikawa's report and seemingly address any concerns

as the alleged unlawful activities took place. Id. at 10-11. While the code of conduct includes a provision regarding the opportunity to comment, it is the observer provider – not the observer individually – who is under this obligation. Resp. Exh. H.

Any assertion that an independent observer who records possible unlawful activities while at sea must report these activities to the captain simply ignores the observer's role. The observer has no law enforcement or arresting powers and cannot order the cessation of any activities he observes. Rather, the observer's role is to simply observe and make a report following the trip on which he is designated as an observer. The applicable enforcement agencies take the observer's information, perform an investigation, and determine what charges, if any, should be brought.

Respondents also cite Mr. Morikawa's alleged use of betel nut¹⁵ as a basis to discredit his testimony generally. Respondents' Post Hearing Memorandum at 11. Respondents alleged that observers were not allowed to make use of betel nut while on the boat. Id. However, Mr. Morikawa denied he used betel nut while on the boat and Respondents could only offer the testimony of Mr. Cahyana as support for the alleged betel nut use. See Tr. at 30:5-31:6; 44:17-25 (August 28, 2012). Mr. Cahyana's testimony simply is not credible on this point given Mr. Morikawa's denial and my finding of his general credibility. Indeed, even assuming that Mr. Cahyana's assertion concerning betel nut use was true, Respondents failed to demonstrate that such use more likely than not leads to the conclusion that all of his documentary exhibits and testimony are not credible. That line of attack on Mr. Morikawa's credibility is hereby rejected.

¹⁵ "Betel nut" generally refers to a mixture of areca-nut and betel-leaf (along with other varied components), which is a traditional item consumed as a stimulant throughout much of South and Southeast Asia and the Pacific Islands. See "Betel-Quid and Areca-Nut Chewing", IARC, France (2005) (available at <http://monographs.iarc.fr/ENG/Monographs/vol85/mono85-6.pdf>).

I find Mr. Morikawa's testimony to be credible and supported by contemporaneous documents he generated that are consistent with his testimony. Unquestionably, the fishing master attempted to bribe Mr. Morikawa not to report his observations of unlawful activity. Mr. Morikawa accepted the money with the express intent of keeping it as evidence to support his observations, as documented in his trip diary. Tr. at 55:2-14; 56:11-59:19; 60:15-62:19; 63:17-25; 107:2-9 (January 31, 2012); Agency Exh. 1 at 7-8, 39. Mr. Morikawa did in fact turn over the money given him to his observer coordinator following the trip. Tr. at 64:2-65:2; 65:3-66:2 (January 31, 2012); see also Tr. at 133:17-134:2 (January 31, 2012). Respondents failed to adequately demonstrate that Mr. Morikawa knew he could receive a reward for reporting fishery violations prior to this incident and this line of attack on Mr. Morikawa's credibility is rejected.

If Mr. Morikawa's only motivation was money as Respondents claim, he surely would have been more likely to pocket the money (i.e., \$440) and not report the incident at all. This is especially true given that there was no guarantee the Marshall Islands would bring any kind of action resulting in a fine where he might have been entitled to some undetermined reward. It simply strains all credulity to believe that Mr. Morikawa was so devious and calculating that he fabricated the highly detailed accounts of the violations in hopes of obtaining this uncertain reward.

2. Captain Anthony Black

Captain Black's primary role was the safe operation of the vessel, not to oversee or direct the fishing operations. Captain Black and the fishing master had different operational duties, which many times mandated that they be stationed at different places on the vessel. Tr. at 118:22-119:4; 183:23-184:10 (August 27, 2012). In addition, because the fishing master had to deploy the nets when fish were located, variances in sleeping schedules between the two could

occur. Thus, it is clear Captain Black might not have observed some/most of the illegal actions of the fishing master. This was not always the case however. Captain Black's own testimony indicates that on at least one occasion he had to direct the fishing crew to douse aggregating lights and claimed that he directed the fishing master not to do anything prohibited with a FAD (i.e., change the beacon). See Tr. at 147:13-148:12 (August 27, 2012) (use of submersible lights); 142:15-143:10 (August 27, 2012) (alleged grappling and releasing the FAD from the F/V Koos).

Indeed, Mr. Morikawa's accounts indicated several instances that the Captain was not always on the bridge during the first part of the sets, particularly early in the morning. See e.g., Agency Exh. 1 at 30, 32, 44. Captain Black denied he was asleep during the early morning sets. See Tr. at 138:6-17 (August 27, 2012). However, Captain Black stated in that denial that he wrote every set into the logsheet, which is not really the question. Id.; see also Agency Exh. 12. I do not doubt Captain Black filled out the logsheet (reflected in Agency Exh. 12), but the source of such information more likely than not came from other members of the crew, including the fish master. See Agency Exh. 2 at 26 (catch data collected by the vessel's Chief Engineer using estimates and Captain Black entered the catch for every set and boat position). Mr. Morikawa's claims that Captain Black was not always on the bridge for at least the beginning of these sets is accepted as credible and therefore negatively impacts Captain Black's denials about what occurred during these sets. Furthermore, as a named Respondent, Captain Black would have an ongoing incentive to minimize and/or fail to recall those instances where the vessel did engage in such activities.

I found Captain Black's testimony to be generally forthright, but clearly slanted in his employer's favor. Thus, based on all the record evidence, I accept Mr. Morikawa's testimony

over that of Captain Black. This ruling is based upon the finding that Mr. Morikawa's testimony and contemporaneous documents were more credible than Captain Black's testimony.

3. Mr. "Cucu" Cahyana

Mr. Cahyana was able to provide detailed accounts of each of the violations and the particulars surrounding those violations, but could not do so for any other days or sets made by the vessel. Tr. at 109:12-114:12 (August 27, 2012). Mr. Cahyana did not keep any records himself and did not review the ship's bridge log prior to testifying. Tr. at 109:12-25 (August 27, 2012). One might anticipate he would have been prepared as a witness to address the charges and not necessarily be responsible for recalling the entire trip. But without the benefit of his having actually kept contemporaneous notes (as contrasted with Mr. Morikawa), his selective ability to recall detailed specifics of the alleged violations is dubious at best. Thus, the question arises as to why these supposedly innocuous, normal fishing activities became so memorable.

Furthermore, Mr. Cahyana's duties on board the vessel were to serve as an interpreter, not as a dedicated observer of fishing activities. Tr. at 68:9-25 (August 27, 2012). Additionally, Mr. Cahyana is a current employee of American Triumph and just entered into a new contract to provide interpreter services on the vessel. See Tr. at 102:7-105:2 (August 27, 2012).

Maintaining good relationships with his employer could have very well colored his testimony.

Mr. Morikawa's credible, contemporaneous account indicates that Mr. Cahyana even wanted to keep certain unlawful fishing activities from the Captain. Agency Exh. 1 at 44 ("This morning, I pointed out the raft to the translator, and he told me: Don't tell the Captain about that.").

Therefore, Mr. Cahyana's denials are not credible and are rejected.

B. Count 1 – August 28, 2009

The Agency alleged Respondents deployed or serviced a beacon on a FAD from the F/V American Triumph. NOAA counsel sought a penalty in the amount of \$87,500 for this alleged violation. For its evidence, the Agency relied upon Mr. Morikawa's testimony and the documents he generated – specifically his Trip Diary and his Purse Seine Observer Workbook. See Tr. 25:2-22 (January 31, 2012); Agency Exh. 1 at 32 (“[a]t 0701 investigated beacon # and has tunas around it. Then retrieved it at 0706 and deployed own #39 at 0710”) and Agency Exh. 3 at PS-2, page 19 of 30 (same).

Mr. Morikawa claimed the F/V American Triumph spotted a FAD that belonged to another fishing vessel (i.e., the F/V KOOS), which had a beacon attached to it, and that Respondents pulled the FAD up and exchanged the radio buoy for one of their own. Tr. at 25:2-22 (January 31, 2012).¹⁶ Mr. Morikawa did not know the beacon number at the time, but claimed he could find it when the crew brought the beacon/FAD on board the American Triumph. Id. at 27:3-12; see also Tr. at 21:12-23:7 (August 28, 2012) (describing generally the process of identifying radio beacon frequencies attached to FADs). Mr. Morikawa asserted Respondents did not make a set on the FAD, but merely changed the radio beacon. Id. at 145:20-146:2.

Mr. Morikawa's trip diary indicated the fishing master subsequently came to the bridge to check on the buoy they switched out on the FAD. The fishing master then asked about Captain Black and was informed that Captain Black was still sleeping. Agency Exh. 1 at 32.¹⁷

¹⁶ These radio buoys are approximately two feet around with a glass-type dome attached. Tr. at 88:22-89:19 (January 31, 2012).

¹⁷ Captain Black denied that he was asleep during any early morning sets. See Tr. at 138:6-9 (August 27, 2012). However, the record indicates that no set was made during the period in question for Charge 1. Technically therefore, it could be true that Captain Black was not asleep during some part of one or more of the early morning sets, but still been asleep during part of one or more FAD deployment(s).

Furthermore, Mr. Morikawa's diary indicated that he told the translator that he will "not stop them from do[ing] illegal, but I will report what they do illegal" after the fishing master left. Id. Finally, Mr. Morikawa's diary stated that after dinner that day, he saw the fishing master "calling" the deployed buoy. Id.

Captain Black testified he discovered that the vessel had changed speed before he had arrived on the bridge. When he got on the bridge (where Mr. Morikawa and the translator were positioned), he learned the crew had thrown a grappling hook onto a raft. Tr. at 142:8-22 (August 27, 2012). As the crew started to heave the raft onto the F/V American Triumph, Captain Black testified he told the translator to "go up and tell the fish master he can do two things with that. He can either pull it in and take it out or – release it." Tr. at 142:23-143:2 (August 27, 2012); see also Tr. at 42:11-21 (August 28, 2012). The translator then allegedly came back to Captain Black and said the fishing master wanted to know if he could just change the radio buoy, to which Captain Black replied that he could only either pull the buoy on board or let it go. Id. at 143:3-8. Captain Black then claimed that the raft was let go without doing anything to the radio beacon. Id. at 143:8-10. See also Agency Exh. 13 at 3 (Captain Black's written statement is consistent with his testimony at hearing).

The translator testified Respondents never deployed a beacon on that FAD. Tr. at 78:4-7 (August 27, 2012). He further recalled that the crew were searching for fish early in the morning and found a FAD, which they brought to the fishing master's attention. Id. at 78:12-19 (August 27, 2012). After hooking the FAD up to the F/V American Triumph, the fishing master wanted to change the beacon, but Captain Black directed the translator to tell the fishing master that he was not allowed to do that and he could either take the FAD and put it on the boat or let it go. Id. at 78:21-79:2; 79:16-21 (August 27, 2012). The translator maintained the fishing master let the

FAD go without changing the buoy as alleged by Mr. Morikawa. Id. at 79:3-7 (August 27, 2012). Notably, the translator did not include in his testimony a return trip from the fishing master to Captain Black on the bridge.

Under 50 C.F.R. § 300.233(b)(4), the regulations prohibit any 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. However, the regulations further provide 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 the FAD may be removed from the water for cleaning provided that it is not returned to the water. Id. Clearly, the regulations prohibit exchanging a radio beacon on a FAD and re-deploying that FAD in the water during the closure period.

The record unambiguously confirms the F/V American Triumph’s fishing master intended to exchange the FAD’s radio beacon and took, at a minimum, steps toward engaging in this prohibited conduct. The central question is whether Respondents in fact exchanged the buoy or merely returned the FAD to the water at Captain Black’s explicit direction. In the Agency’s favor, Mr. Morikawa’s testimony is detailed and supported by contemporaneously generated documents.¹⁸ Furthermore, Mr. Morikawa’s diary presents a highly detailed depiction of this event, containing specificity and more details than were elicited by either party during the hearing. To discredit this document, one would have to assume that Mr. Morikawa simply fabricated these details with an eye toward bolstering the alleged illegal activities in hopes of receiving some reward for reporting them. The question becomes why would Mr. Morikawa include such readily controvertible details in his account had they not been true and accurate?

¹⁸ I find Respondents’ assertions that Mr. Morikawa might have fabricated the content of both his diary and workbook ex post facto incredible.

The risks of being caught in a lie increases exponentially because of such “over-inclusion” and “fabrication”.

For Respondents, the testimony of two percipient witnesses confirms part of Mr. Morikawa’s claims (i.e., the FAD was hooked up and there was at least some intent to exchange the radio beacon) but disputes the actual replacement of a radio beacon on the FAD. If Mr. Morikawa’s is to be believed, Captain Black and the translator must be deemed either incorrect in their recollections or simply fabricating the exchange with the fishing master and the resultant replacement of the unaltered FAD in the water.

On balance, I find it more credible that Respondents replaced a radio beacon on the FAD as alleged. While generally consistent, Captain Black’s and the translator’s accounts differ in at least one respect – i.e., the multiple exchanges on the bridge in Captain Black’s version versus the seemingly single exchange in the translator’s. Both Captain Black and the translator have an interest in the outcome of these proceedings. Captain Black is named as a respondent individually and the translator still works for American Triumph.

I have no doubt the greatest fault for Respondents’ violations resides with the fishing master, as he was primarily responsible for actual fishing operations. Captain Black and American Triumph personnel directed the fishing master not to engage in what they understood to be prohibited conduct but as Respondents’ counsel acknowledged, it is a bit of the “Wild West” out there and the fishing master might have just decided to replace a beacon on a FAD despite explicit directions to the contrary. Tr. at 80:7-14 (August 27, 2012).

The one aspect of Mr. Morikawa’s account that is somewhat troubling is the asserted timing. Mr. Morikawa indicated in both his testimony and his written documents that the FAD was spotted at approximately 7:01 am; the FAD was hooked on and retrieved at 7:06 am; and the

beacon was then replaced and the FAD redeployed at approximately 7:10 am. Under this asserted timeline, Respondents presumably would have had to hook onto the FAD, cut loose the existing beacon, secure the new beacon, and redeploy the FAD within four minutes. Therefore it is more likely than not that Mr. Morikawa was mistaken as to the exact time intervals. However, taken as a whole, I find Mr. Morikawa's account of the activities related to Count 1 more credible than Respondents'. Count 1 is therefore found **PROVED**.

C. Count 2 – August 18, 2009

The Agency alleged the vessel set its net within 100 meters of a FAD on August 18, 2009 in violation of applicable law. NOAA counsel sought a penalty in the amount of \$83,750 for this alleged violation.

The record demonstrates that on the morning of August 18, 2009, while the F/V American Triumph was investigating a free school of tuna, Mr. Morikawa spotted a FAD consisting of a raft and a buoy approximately 100 meters from the F/V American Triumph. Tr. at 27:18-28:9 (January 31, 2012); Agency Exh. 1 at 12; Agency Exh. 3 at PS-2, page 8 of 30. The F/V American Triumph shortly thereafter made a set on the fish, resulting in the estimated catch of five metric tons of skipjack tuna. Id.; Tr. at 28:21-29:3; 50:14-16; 51:22-25 (January 31, 2012); Agency Exh. 12.¹⁹ Mr. Morikawa recorded these events in his trip diary (see Agency Exh. 1 at 12) and stated that he showed the translator the raft. Tr. at 28:10-21 (January 31, 2012). Most importantly, Mr. Morikawa testified that Mr. Cahyana certainly saw the FAD and as a result thereof, tried to talk Mr. Morikawa into not telling Captain Black. Tr. at 12:13-14:22 (August 28, 2012). In addition, Mr. Cahyana also tried to get Mr. Morikawa to go to the other side of the vessel (which would have put both of them out of sight of the FAD). Id.

¹⁹ The ship's Purse-Seine Logsheet indicates an estimate of five metric tons of skipjack tuna caught. See Agency Exh. 12 at 1.

Respondents contend they did not make such a set on a FAD. See Respondents' Post Hearing Memorandum at 18-19. First, Respondents point out Mr. Morikawa coded the set in a contradictory manner. Id. Specifically, Respondents state that Mr. Morikawa's log indicated that the school associated with the set was a "free school" (i.e., code "2" – "Feeding on Baitfish") – not the codes for possible association with a FAD (i.e., codes "3, 4, or 5"). Id.; see also Agency Exh. 3 at p. 8 of 30. Under Respondents' theory, Mr. Morikawa should have coded the set as being on a FAD if in fact there was a FAD as he alleged.

Respondents also rely on the testimony of Mr. Cahyana in an attempt to refute Mr. Morikawa's version of events. Mr. Cahyana testified that Mr. Morikawa told him he saw a raft, but after he asked Mr. Morikawa where it was, he could not find it again, so Mr. Cahyana went to the mast to use the bigger binoculars and could not find it. See Tr. t 83:1-17 (August 27, 2012). Mr. Cahyana then stated he asked the crew and no one said they saw anything because "if you find some beacons, or some raft, the crew always talk to the fishing master" Id. at 17-23; see also id. at 84:14-85:15. Respondents state that no other witness saw the raft and therefore Mr. Morikawa's account should be disregarded. Respondents' Post Hearing Memorandum at 19.

The balance of the evidence favors the Agency's position. Mr. Morikawa's account is more credible than Mr. Cahyana's and Captain Black's. The contemporaneous documents compiled by Mr. Morikawa indicate the set was made within 1 nm of the raft. Contrary to Respondent's contention, a violation does not require a set upon a FAD, but only that a set occur within 1 nm of such a FAD. See 50 C.F.R. § 300.233(b)(1). Given that the evidence demonstrates a FAD was within 100 meters of the vessel at 10:58 and the set was made at 11:09, the set would have been made within approximately .25 nm based on the reported

longitude/latitude of the vessel at the time of Mr. Morikawa's sighting the raft and the commencement of the set.²⁰ Furthermore, Mr. Morikawa did not claim the boat made a set on the raft but only that the set was made near the raft. See Agency Exh. 3 at p. 8 of 30 (noting in response to whether he "observe[d] any events to record on form Gen-3 today?" – circled "Yes" and noting "set near raft"). Even if one accepted Mr. Cahyana's testimony as credible (which for the reasons given above, I do not), at best it only indicates he did not personally see the raft and that he did not hear from anyone else on the boat that they saw a raft. Making the set within such close proximity to a FAD while the FAD closure was in effect is precisely the kind of fishing activity Agency regulations prohibit. Count 2 is therefore found **PROVED**.

D. Count 3 – August 22, 2009

The Agency alleged the vessel set its net within 50 meters of a FAD on August 22, 2009 in violation of applicable law. NOAA counsel sought a penalty in the amount of \$140,000 for this alleged violation.

Credible record evidence indicates that at approximately 14:33 on August 22, 2009, while the F/V American Triumph was investigating a free school of tuna, Mr. Morikawa spotted a raft approximately 50 meters from the F/V American Triumph. Tr. at 31:4-5 (January 31, 2012); Agency Exh. 1 at 20; Agency Exh. 3 at Form PS-2, page 12 of 30. The vessel then made a set at approximately 14:36. Tr. at 31:9-12 (January 31, 2012); Agency Exh. 1 at 20; Agency Exh. 3 at Form PS-2, page 12 of 30; Agency Exh. 12. Mr. Morikawa could not say if any other member(s) of the F/V American Triumph saw the raft. Tr. at 31:6-8; 33:13-22 (January 31, 2012). Mr. Morikawa recorded these events in his workbook and his trip diary and estimated that the set

²⁰ See <http://www.marine waypoints.com/learn/greatcircle.shtml> (used to make calculation based on the F/V American Triumph's longitude/latitude reported in Agency Exh. 3 for the time raft sighted and set made).

resulted in a total of 110 metric tons of tuna caught (10 tons of yellowfin and 100 tons of skipjack). Agency Exh. 3 at Form PS-2, page 12 of 30; Agency Exh. 1 at 20.²¹

Respondents again insist they did not make a set on or near a FAD. Respondents' Post Hearing Memorandum at 19-20. Respondents claim the translator did not see a raft and pointed to Captain Black's denial (both in his written statement and his testimony at the hearing) that the F/V American Triumph set on or near a FAD on that date. Id. at 20.

Respondents also assert Mr. Morikawa's testimony is contradicted by his log entries. Id. at 19. Specifically, Respondents point out Mr. Morikawa's diary entry indicated that he saw a raft that "has fish underneath." Agency Exh. 1 at 20. But he recorded the school association as "2" – not any of the FAD association numbers (i.e., not 3, 4, or 5).

Mr. Morikawa's account is more credible than Mr. Cahyana's and Captain Black's with respect to the existence of the FAD. While Mr. Morikawa claimed the set occurred within 50 meters of the FAD (see Agency Exh. 1 at 20), the contemporaneous documents compiled by Mr. Morikawa indicate the set was not commenced within the violation threshold of 1 nm. Specifically, the longitude and latitude positions Mr. Morikawa entered for his spotting of the raft at 14:33 (03°05.074'S and 179°18.776'W) was 50 meters from the F/V American Triumph. At that time the raft was clearly within 1 nm of the F/V American Triumph.

However, a violation could not occur until a set commenced/occurred within 1 nm of the FAD. Using Mr. Morikawa's coordinates for the beginning of the set at 14:36 (03°04.016'S and

²¹ The ship's Purse-Seine Logsheet indicates an estimate of 100 metric tons of skipjack tuna and 10 metric tons of yellowfin caught. See Agency Exh. 12 at 2.

179°18.695'W) the distance measures out at 1.06 nm between the two points.²² Even assuming the vessel was moving toward the FAD and thus effectively closed the distance of 50 meters during this period before making the set, 50 meters equals only .0267 nm. Therefore, the vessel would have been 1.0333 nm from the FAD when it began its set under that hypothetical.

The record does not contain dispositive evidence as to the position of the vessel in relation to the FAD after the set began until the vessel's helicopter returned and the "chain" was up. See Agency Exh. 3 at Form PS-2, at page 12 of 30. Mr. Morikawa's diary indicates that the helicopter returned at that time because the net was closed and they could therefore save fuel. Agency Exh. 1 at 20. The vessel's recorded position at 14:53 (03°04.916'S and 179°18.932'W) evidences that the F/V American Triumph moved closer to the location at which Mr. Morikawa sighted the FAD, i.e., approximately .22 nm from that position. See Agency Exh. 3 at Form PS-2, at page 12 of 30.

However, Mr. Morikawa's entries are not related to the set activities per se but more toward the helicopter's landing on the vessel. It is thus possible that the net was closed at some point prior to the recorded observation of the helicopter's return.²³ No record evidence definitively establishes when the net was closed or where the vessel was at that time.

Additionally, it is unknown whether the FAD remained at the initially spotted position throughout the vessel's set activities or drifted away from that point. No record evidence establishes whether this particular FAD was anchored in position or might have drifted with the

²² See <http://www.marine waypoints.com/learn/greatcircle.shtml> (used to make calculation based on the F/V American Triumph's longitude/latitude reported in Agency Exh. 3 for the time raft sighted and set made). The vessel's purse seine log notes the location of the set as 03°04.012'S and 179°18.695'W, which only differs from Mr. Morikawa's record by .004' latitude. Agency Exh. 12 at 2. This difference does not alter the calculation of 1.06 nm.

²³ Indeed, the Form PS-2 contains an activity code 1 for "Set" – which is taken to mean the commencement of the set and no code exists for entering the time/position of the vessel at the end of the set. Form PS-2 in contrast has distinct codes for the helicopter's departure from the vessel and its return (i.e, H1 & H2 respectively).

current or otherwise been moving from the position first sighted. Therefore, it is not possible to determine the position of the FAD relative to the vessel throughout the time the vessel was conducting purse seine activities.

The regulations do not specify what precise activities constitute “set[ting] a purse seine” under 50 C.F.R. § 300.233(b). The regulations define “purse seine” as: “a floated and weighted encircling net that is closed by means of a drawstring threaded through rings attached to the bottom of the net.” 50 C.F.R. § 300.211. This definition leads me to conclude that the prohibition of setting a purse seine within 1 nm of a FAD should be construed to encompass the entire process of letting the net out and cinching it closed.²⁴ This reading would conform to the purposes of CMM 2008-01 and the regulations to prohibit the taking of fish that were aggregating on or within 1 nm of a FAD. Once the net is pursed, no fish could be taken; so assuming the closing of the net occurred outside 1 nm of the FAD, no such protected fish would be caught.

Alternatively, the regulations could be more broadly interpreted to prohibit any and all fishing activities (including the brailing and stowage of the fish once the purse seine net is closed). However, even under this latter reading of the prohibitions (Section 300.233(b)), no preponderant record evidence establishes the exact position of the vessel relative to the FAD during any such activities. The only available objective record evidence definitively indicates: 1) the position where the FAD was sighted; 2) the position where the set began; and 3) the position where the helicopter returned to the vessel (at which point the purse seine net had been closed).

While a violation does not require a set upon a FAD, the record must establish by a preponderance of the evidence that the set occurred within 1 nm of a FAD. Neither the Agency

²⁴ Contrast the regulations prohibition of making a “set” within 1 nm of a FAD versus the broad definition of “fishing” contained at 50 C.F.R. § 300.211.

nor Respondents raised the distance issues in this Count. Nevertheless, the Court reviewed the record evidence and determined that an essential element of the violation (i.e., the required distance between the set and the FAD) was not proven by a preponderance of the evidence. Respondents certainly began the set at 1.06 nm of the FAD--a virtual hair's breadth of 1 nm and the vessel then moved back toward the FAD's sighted position (as recorded by Mr. Morikawa). However, without this critical information, I cannot devine these coordinates/distances to conclude that Respondent's conducted a set within 1 nm of a FAD.

The analysis of this Count was extremely close between a finding of proved versus not proved. However, this is a serious charge with significant financial consequences for Respondents if the violation is found proven. Ultimately, the Agency bore the burden to prove the set occurred within 1 nm of the FAD but failed to do so. The record evidence is not sufficient to prove that Respondents committed the violation. Therefore, Count 3 is found **NOT PROVED**.

E. Count 4 – August 24, 2009

The Agency alleged the vessel set its net within 75 meters of a FAD on August 24, 2009 in violation of applicable law. NOAA counsel sought a penalty in the amount of \$80,000 for this alleged violation.

Credible record evidence indicates that at approximately 09:28 on August 24, 2009, while the F/V American Triumph was investigating a free school of tuna, Mr. Morikawa spotted a raft approximately 70 meters from the F/V American Triumph. Tr. at 34:4-14 (January 31, 2012). The F/V American Triumph shortly thereafter made a set at 09:31. Id.; Agency Exh. 3 at Form PS-2 page 14 of 30; Agency Exh. 12. Mr. Morikawa recorded these events in his workbook and his trip diary and no fish were caught during this set. Id.

Respondents again take issue with Mr. Morikawa's account of this incident by stating that he used association code 2 in his log instead of any of the FAD codes (i.e., 3, 4 or 5) and highlight Mr. Cahyana's testimony stating that he did not see a raft and repeating Captain Black's denial of the same. See Respondents' Post Hearing Memorandum at 20-21. Respondents also point to Mr. Cahyana's testimony indicating that it is not possible for there to be a raft if it was a free school associated with baitfish. Id. at 21.

As discussed above, Respondents' reliance on the supposed inconsistency with Mr. Morikawa's coding of 2 versus a FAD set code is not persuasive. Furthermore, Respondents' reliance on Mr. Cahyana's opinion on the impossibility of bait fish and raft/FAD association is misplaced. There are at least two problems with Respondent's reliance on Mr. Cahyana's testimony. First, Mr. Cahyana's testimony is better read as stating that tuna feed on small bait fish (ca. 3 inches) away from the raft and that "[o]n the raft, we have wahoo, we have mahi mahi, we have reject fish . . . [approxiamtely five to seven inches]." Tr. at 88:9-18 (August 27, 2012). Mr. Cahyana also stated that fishing on bait fish is not FAD fishing but is "school fishing". Tr. at 89:5-23 (August 27, 2012). Read in this fashion, Mr. Cahyana's testimony does not contradict Mr. Morikawa's; rather, it supports it. Mr. Morikawa never stated the F/V American Triumph set on the FAD. As indicated above, he testified that the vessel set near a FAD on fish not associated with that FAD at the time.

Second, Respondents are proffering Mr. Cahyana's testimony as some kind of expert opinion on tuna behavior, stating that it is impossible for there to have been an association of fish like Mr. Morikawa allegedly described (i.e., feeding on bait fish in association with the raft).²⁵ Mr. Cahyana was not proffered as any such expert but rather was described as having practical

²⁵ For the reasons given immediately preceding, I do not read Mr. Morikawa's testimony as indicating such was the case.

experience with fishing. Respondents offered nothing other than Mr. Cahyana's testimony on the alleged impossibility of tuna feeding on bait fish in association with a raft/FAD. Without more, Mr. Cahyana's opinion on this subject is not sufficiently supported by any indicia of reliability or corroborating statements or evidence.

The record establishes Respondents made a set during the FAD closure period within 1 nm of a FAD as alleged (specifically approximately .14 nm).²⁶ Count 4 is therefore found **PROVED**.

F. Count 5 – September 4, 2009

The Agency alleged the vessel set its net within 50 meters of a FAD on September 4, 2009 in violation of applicable law. NOAA counsel sought a penalty in the amount of \$102,500.

Credible record evidence indicates that at approximately 05:10 on September 4, 2009, while the F/V American Triumph was investigating its own beacon number 42 and an associated raft, the vessel determined that there were tuna around it. Tr. at 35:17-36:11 (January 31, 2012). Approximately two minutes later, the F/V American Triumph lowered an auxiliary workboat into the water, which deployed submerged green and yellow lights, described as "aggregating lights", while it stayed near the raft, and the vessel then made a set. Tr. at 36:14-37:24 (January 31, 2012).

The F/V American Triumph and the auxiliary workboat managed to exclude the raft from the net before it was fully pursed. Id. at 37. Mr. Morikawa recorded these events in his workbook and his trip diary and estimated that the set resulted in a total of 100 metric tons of

²⁶ See <http://www.marinevaypoints.com/learn/greatcircle.shtml> (used to make calculation based on the F/V American Triumph's longitude/latitude reported in Agency Exh. 3 for the time raft sighted and set made).

fish for the set in question, consisting of 90 tons of skipjack, 5 tons of yellowfin and 5 tons of bigeye tuna. Agency Exh. 3 at PS-2, page 26 of 30; Agency Exh. 1 at 43 – 44.²⁷

Indeed, Mr. Morikawa's diary details this incident by specifying he woke up at 04:50 and heard his roommates talking about making a set and so he investigated on the bridge and saw that the crew was tracking a buoy. Agency Exh. 1 at 43. The vessel then made a set with the assistance of workboats which used aggregating lights. Id. Mr. Morikawa's diary also claimed that at 06:25, he went up to the bridge and saw Captain Black who just awoke. Id. Captain Black claimed the vessel did not use aggregating lights and had only made a set on fish gathered under the boat. Id. at 44. Mr. Morikawa then asserted that he pointed out the raft to the translator who said not to tell the Captain. Id.

Respondents contend it is not credible the F/V American Triumph investigated and located a FAD early in the morning, in the dark, using its track finder. See Respondents' Post Hearing Memorandum at 25.²⁸ However, the record evidence indicates both: 1) the vessel (and Mr. Morikawa) could determine the direction of a specific buoy by its frequency using the track finder and 2) the strength of the signal received gave a relative indication of the distance (i.e., the closer the buoy-the stronger the signal). See Tr. at 89:20-91:25; 96:14-97:17 (January 31, 2012). Respondents' alleged difficulty in tracking/locating the ships' radio buoys in the early morning hours is therefore not credible.

Respondents' efforts to cast doubt on Mr. Morikawa's account by pointing out Captain Black's denial are not compelling. While Captain Black claimed he was on the bridge for every set (see Tr. at 138:6-17 (August 27, 2012)), Mr. Morikawa claimed Captain Black had only

²⁷ The ship's Purse-Seine Logsheet indicates an estimate of 90 tons of skipjack, 5 tons of yellowfin and 5 tons of bigeye tuna. See Agency Exh. 12 at 3.

²⁸ Respondents addressed the allegations related to Charge 5 in their discussion of Charge 8, apparently addressing Charge 8 allegations in their discussion of Charge 5 in their briefs.

recently woken up as the set was underway and told him there was no such FAD related set and the translator said not to tell the Captain about the FAD. See Agency Exh. 1 at 43-44. On balance, I find Mr. Morikawa's account more credible than Captain Black's.²⁹

The record established that the F/V American Triumph made a set during the FAD closure period within 1 nm of a raft/FAD as alleged (specifically within .0573 nm).³⁰ Count 5 is therefore found **PROVED**.

G. Count 6 – August 15, 2009

The Agency alleged the vessel set its net on a raft in order to capture the fish that had aggregated in association with the raft in violation of applicable law on August 15, 2009. NOAA counsel sought a penalty in the amount of \$140,000 for this alleged violation.

Credible record evidence indicates that at approximately 04:30 on August 15, 2009, Mr. Morikawa went to the bridge of the F/V American Triumph and at 04:59 he spotted a buoy, which was attached to a raft. Tr. at 39:16-40:11 (January 31, 2012). Mr. Morikawa saw the raft as the F/V American Triumph circled the raft, which used its sonar/depth finder to investigate whether the raft had any fish associated with it. Tr. at 116:17-40 (January 31, 2012). The vessel then deployed aggregating lights in the water and used some auxiliary boats that used its own aggregating lights as the F/V American Triumph moved away from the workboat, the raft and the beacon. Id. at 40-41; 84:3-86:15.

Eventually, the F/V American Triumph made a set on the raft, which was pulled out of the net as it was pursed. Id. at 40:8; 42. Mr. Morikawa also related a conversation with Captain

²⁹ Indications of Captain Black's failure to be on the bridge at all times early in the morning when the crew was conducting some operations are from his own testimony. See Tr. at 142:16-21 (August 27, 2012) ("We - - we were on the bridge - - and we hooked up to a - - or before I went on the bridge, found out that we had changed speed or something. I went out to check it out and there was a - - they'd thrown a grappling hook onto a - - a - - line that goes between the raft and the boat.") (discussing incident that occurred at 07:06 on August 28, 2009) (emphasis added).

³⁰ See <http://www.marinewaypoints.com/learn/greatcircle.shtml> (used to make calculation based on the F/V American Triumph's longitude/latitude reported in Agency Exh. 3 for the time raft sighted and set made).

Black later that morning in which the Captain stated the fishing master had told him it was a set on free school unassociated with a FAD, which Mr. Morikawa said was not possible. Tr. at 44:6-45:13 (January 31, 2012).³¹

Mr. Morikawa recorded these events in his workbook and his trip diary. Agency Exh. 1 at 6; Agency Exh. 3 at Form PS-2, page 5 of 30. Also, in his trip diary, Mr. Morikawa claimed the fishing master later came to him and offered him \$200 to not report the set. Agency Exh. 1 at 8. Mr. Morikawa estimated the set resulted in a total of 200 metric tons of fish caught, consisting of 198 tons of skipjack and 2 tons of bigeye tuna. Tr. at 53:19-54:4 (January 31, 2012).³²

Respondents attempt to discredit Mr. Morikawa's account by pointing out: 1) that Mr. Morikawa admitted it was still dark at the time of the alleged set and 2) that he was not sure where the buoy was, which could have been up to 10 miles away. Respondents' Post Hearing Memorandum at 22. Furthermore, Respondents claimed that Mr. Morikawa admitted during his testimony that the F/V American Triumph did not deploy lights in the water. Id. at 22-23.

Respondents also point toward Captain Black's "detailed" denial, which included a claim that this was simply a set made on fish under the boat. Id. at 23. Respondents also cite to Mr. Cahyana's denial of seeing a raft or setting on the FAD. Id.

Respondents' attempts to discredit Mr. Morikawa's account must be rejected. First, the claim that Mr. Morikawa could not see the FAD because it was dark, relies on: 1) the claim that the vessel would be unable to find one of its beacons in the dark (which is not supported by the record given the radio beacons used on the rafts and the track finder could determine direction

³¹ Mr. Morikawa's diary entry contains many explicit details concerning this conversation, including the fact that Captain Black allegedly said that he was going to contact the manager named "Larry". Agency Exh. 1 at 7 (presumably referring to Mr. Larry Da Rosa).

³² The ship's Purse-Seine Logsheet indicates an estimate of 198 metric tons of skipjack tuna and 2 metric tons of bigeye caught. See Agency Exh. 12 at 1.

and relative distance based on strength of signal); 2) neglects to account for the fact that Mr. Morikawa's depiction is he initially went on the bridge and saw that the vessel was searching for one of its buoys and then it was not for another 29 minutes that he actually saw the buoy; and 3) disregards Mr. Morikawa explanation that he could see buoys in these early morning hours due to the lights coming from the F/V American Triumph's tower and working lights. See Tr. at 115:4-12 (January 31, 2012).

Second, Respondents attempt to point out an inconsistency between Mr. Morikawa's written account and testimony concerning the F/V American Triumph's use of submerged lights is selective and fails to account for Mr. Morikawa's actual testimony. See Tr. at 113:7-114:6 (January 31, 2012) (Court reporter questioning whether Mr. Morikawa said "not deploy in the water" and Mr. Morikawa clarifying through questioning that the F/V American Triumph did deploy lights in the water).

The record evidence indicates that the F/V American Triumph more likely than not made a set on a FAD during the FAD closure period as alleged. Count 6 is therefore found **PROVED**.

H. Count 7 – August 17, 2009

The Agency alleged the vessel set its net on a raft in order to capture the fish that had aggregated in association with the raft in violation of applicable law on August 17, 2009. NOAA counsel sought a penalty in the amount of \$98,750 for this alleged violation.

Credible record evidence indicates that at approximately 04:30 on August 17, 2009, Mr. Morikawa went to the bridge of the F/V American Triumph and saw that vessel was searching for a raft because the track finder that is used to find locator buoys was on. Tr. at 45:20-25 (January 31, 2012). At 04:58, Mr. Morikawa spotted the buoy and the raft after which the F/V American Triumph deployed fish aggregating lights in the water; lowered a workboat into the

water, which deployed its own aggregating lights. Id. at 46. After retrieving its own submerged aggregating lights and moving away from the workboat, the F/V American Triumph then made at set at approximately 05:33. Id. at 47-48.

Mr. Morikawa recorded these events in his workbook and his trip diary and estimated that the vessel caught 3 metric tons of bigeye tuna and 22 metric tons of skipjack. Agency Exh. 3 at 7 of 40.³³

Respondents take issue with Mr. Morikawa's account and point out that Captain Black denied that this was a set on a FAD, maintaining that this was a simple set upon fish that had gathered under the boat overnight. Respondents' Post Hearing Memorandum at 24.

Respondents also highlight the translator's denial. Id.

On balance, I find Mr. Morikawa's account more credible than Captain Black's and Mr. Cahyana's. The record establishes that the F/V American Triumph made a set during the FAD closure period on a raft/FAD as alleged. Count 7 is therefore found **PROVED**.

I. Count 8 – August 31, 2009

The Agency alleged the vessel set its net on a raft in order to capture the fish that had aggregated in association with the raft in violation of law on September 4, 2009. NOAA counsel sought a penalty in the amount of \$140,000 for this alleged violation.

Credible record evidence indicates that at approximately 14:34 on August 31, 2009, the F/V American Triumph was investigating a free school of tuna that was feeding on bait fish near a raft. Tr. at 48:19-49:2 (January 31, 2012). The F/V American Triumph then maneuvered near the raft to separate the tuna from the raft and Mr. Morikawa saw a school of tuna near the raft. Tr. at 49:3-10 (January 31, 2012). The F/V American Triumph made a set and Mr. Morikawa

³³ The ship's Purse-Seine Logsheet indicates an estimate of 22 metric tons of skipjack tuna and 3 metric tons of bigeye caught. See Agency Exh. 12 at 1.

recorded these events in his workbook and his trip diary and estimated that the vessel caught 138 metric tons of skipjack tuna and 5 metric tons of bigeye tuna. Agency Exh. 3 at PS-2, page 22 of 30; Agency Exh. 1 at 37.³⁴

Respondents again take issue with Mr. Morikawa's account of this incident by stating he used association code 2 in his log instead of any of the FAD codes (i.e., 3, 4 or 5) and highlight Mr. Cahyana's testimony stating he did not see a raft, and repeating Captain Black's denial of the same. See Respondents' Post Hearing Memorandum at 21-22. Respondents also point to Mr. Cahyana's and Captain Black's denials as countering the Agency's efforts to prove a violation. Id. at 22.

On balance, I find Mr. Morikawa's account more credible than Captain Black's and Mr. Cahyana's. The record establishes the F/V American Triumph made a set during the FAD closure period on or near a raft/FAD as alleged. Count 8 is therefore 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 Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan 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.

³⁴ The ship's Purse-Seine Logsheet indicates an estimate of 137 metric tons of skipjack tuna and 3 metric tons of bigeye were caught. See Agency Exh. 12 at 3.

4. 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.

5. Under 50 C.F.R. § 300.223(b)(4), it is unlawful to repair, clean, maintain, or otherwise service a fish aggregating device, including any electronic equipment used in association with a fish aggregating device.

6. Mr. Jason Morikawa's testimony and documents he generated while aboard the F/V American Triumph are found to be credible representations of what occurred during his trip about the F/V American Triumph.

7. Respondent Captain Anthony Black's claims that the F/V American Triumph never made a set on or within 1 nm of a FAD during the 2009 FAD closure period nor serviced a FAD are not credible for the reasons given in this Decision.

8. Respondent Indra "Cucu" Cahyana's claims that the F/V American Triumph never made a set on or within 1 nm of a FAD during the 2009 FAD closure period nor serviced a FAD are not credible for the reasons given in this Decision.

9. Each of the applicable rafts/buoys described by Mr. Jason Morikawa in his testimony and documents related to the Counts constituted a FAD under the definition given by Agency regulations at 50 C.F.R. § 300.211 ("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").

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

11. As to Count 1, the Agency has established by a preponderance of the evidence that Respondents Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b) on August 28, 2009, by servicing a FAD.

12. As to Count 2, the Agency has established by a preponderance of the evidence that Respondents Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b) on August 18, 2009, by setting a purse seine net on or within one nautical mile of a fish aggregating device.

13. As to Count 3, the Agency failed to establish by a preponderance of the evidence that Respondents Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b) on August 22, 2009, by setting a purse seine net on or within one nautical mile of a fish aggregating device.

14. As to Count 4, the Agency has established by a preponderance of the evidence that Respondents Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b) on August 24, 2009, by setting a purse seine net on or within one nautical mile of a fish aggregating device.

15. As to Count 5, the Agency has established by a preponderance of the evidence that Respondents Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying

regulations codified at 50 C.F.R. § 300.223(b) on September 4, 2009, by setting a purse seine net on or within one nautical mile of a fish aggregating device.

16. As to Count 6, the Agency has established by a preponderance of the evidence that Respondents Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b) on August 15, 2009, by setting a purse seine net on or within one nautical mile of a fish aggregating device.

17. As to Count 7, the Agency has established by a preponderance of the evidence that Respondents Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b) on August 17, 2009, by setting a purse seine net on or within one nautical mile of a fish aggregating device.

18. As to Count 8, the Agency has established by a preponderance of the evidence that Respondents Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. § 300.223(b) on August 31, 2009, by setting a purse seine net on or within one nautical mile of a fish aggregating device.

19. Under the joint and several liability and the theory respondeat superior, Respondents Anthony Black and Yen Ming Yuan are jointly and severally liable along with American Triumph LLC for the violations of the Western and Central Pacific Fisheries Convention Implementation 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' 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). Respondents are thus subject to a statutory maximum penalty of \$140,000 per proven violation for total of \$1,120,000 for the eight counts.

Given the application of the Magnuson-Stevens Act's penalty provisions, 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 Atlantic Spray

Corporation, 1996 WL 1352603 (NOAA 1996); In re Corsair Corporation, F/V CORSAIR, 1998 WL 1277924 (NOAA 1998); In re Atlantic Spray Corporation, 1997 WL 1402870 (NOAA 1997). Joint and several liability is imposed on the vessel's owner if the violation occurs within the scope of the crewmembers 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). 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). The Respondents here were employed by American Triumph, and the company did not argue that Captain Black or Yen Ming Yuan 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.

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).³⁵ 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 as the basis for calculating proposed penalties for various violations. See <http://www.gc.noaa.gov/enforce-office3.html> (providing the text of these now superseded penalty schedules). 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 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 2nd and 3rd 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. This new policy characterizes the setting of a purse seine net near or in association with a FAD during a FAD closure period as

³⁵ 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).

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 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. 2 at Preface, 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 \$872,500 against Respondents for the eight alleged violations.³⁶ Agency counsel sought the maximum allowable penalty for three counts (Counts 3, 6 and 8) and well over 50% of the allowable maximum penalty for all the remaining counts. Indeed, the total amount sought equaled approximately 78% of the maximum allowed by statute. Presumably, Agency counsel calculated these proposed penalties based, in part, on their proposed fishery price/market expert's (Dr. Christopher Reid) assessment of the value likely received for the tuna caught in each of the sets.

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 15-16.³⁷

³⁶ 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 American Triumph's permits be conditioned to prohibit the company from hiring Respondent Yen Ming Yuan in any capacity for a period of at least 5 years.

³⁷ See also Agency Reply Brief at 21-22 (repeating assertions made in the initial brief).

For the reasons discussed herein, the use of this explicitly inapplicable penalty policy as guidance is inappropriate. While Agency counsel recognized the inapplicability of the new penalty policy, they nevertheless stated that a penalty in the upper range of the statutorily allowable penalty (i.e., \$140,000) was appropriate. Id. at 16. However, Agency counsel did not discuss the specific penalty calculation for any particular Count or how the amount requested was justified.

Agency counsel discussed 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 16.

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. Id. at 17. Agency counsel supported this assertion by highlighting that although the seven unlawful sets accounted for only 17% of Respondents' sets during the trip, those sets accounted for 55% of the total catch. Id.³⁸ This statistic irrefutably establishes that it was in Respondents' best economic interest to set on FADs as opposed to fishing in open water without such aids. Importantly, this conclusion is separate and apart from the issue of whether such fishing violated the law.

Agency counsel also asserted Respondents' actions were intentional and done with knowledge of the regulations. Id. Agency counsel countered Respondents' claim of confusion

³⁸ These calculations assume all the alleged unlawful sets were found proven. Given the failure of proof on Charge 3, these numbers are somewhat less (i.e., 15% and ca. 45% respectively). See Agency Exh. 12 (F/V American Triumph's purse seine log showing results for all sets during this period).

as to the requirements of the regulations and instead maintained that Respondents, particularly the company American Triumph, was well aware of the FAD restrictions but did not effectively communicate these requirements to key personnel like the fishing master. See Agency Reply Brief at 19-20.

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 18.

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. 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 282:1-2 (July 10, 2012) and Resp. Exh. DDDDD. Dr. Reid's market analysis estimated that the price for tuna during the period when the F/V American Triumph sold its catch ranged from \$1160 per ton to a high of \$1297 per ton. Agency Exh. 16.

Despite the receipts Respondents proffered, Agency counsel also maintained that the record evidence showed some bigeye tuna was caught on unlawful sets and reiterated that the fact of violation does not require the catch of any bigeye or yellowfin tuna. Agency Reply at 20-21.

B. Respondents' Response

Respondents insisted they did not violate the regulations but 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. Respondents' Post-Hearing Memorandum at 31. Given that no bigeye tuna was caught and only twenty metric tons of yellowfin for the entire trip during which the alleged violations occurred, Respondents maintained that any harm to the bigeye and yellowfin fishery was negligible in terms of conservation effect and that the penalty should reflect that fact. Id.³⁹

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 31-32.⁴⁰

Finally, Respondents argue that any penalty must be based on the actual price the vessel received for the tuna caught – not the estimates provided by Dr. Reid. Id. at 32.⁴¹ In support of the claimed ex vessel price, Respondents proffered through discovery a document purporting to show that the vessel had actually received an average price for the [REDACTED]

[REDACTED] Agency Exh. 17.⁴² Respondents later produced copies of invoices showing the money received for the fish caught on this trip. See Resp. Exh.

DDDDD. The estimate provided in Agency Exh. 17 was a bare assertion with no explanation (a

³⁹ See also Respondents' Reply at 15.

⁴⁰ 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.

⁴¹ See also Respondents Reply at 15.

⁴² 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.

response to an interrogatory made during discovery). Respondents never made it clear how they calculated this number, but given representations by Respondents' counsel during the hearing and the testimony offered by Mr. Da Rosa, the amounts given in Resp. Exh. DDDDD are considered the best evidence available regarding the amount the vessel was paid for the fish. See, e.g., Tr. 257:6-10 (July 10, 2012) (explaining why the initial number was given); Tr. at 188:11-19 (August 27, 2012) (Respondents' witness explaining that the documents in Resp. Exh. DDDDD represent the final price paid the vessel for the tuna caught on that trip).

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 yellowfin and bigeye tuna – not skipjack. The F/V American Triumph landed a total of [REDACTED] metric tons of tuna during this trip, of which only [REDACTED] metric tons were [REDACTED] and the other [REDACTED] tons were [REDACTED]. See Resp. Exh. DDDDD. The percentage of [REDACTED] landed thus represents approximately [REDACTED] of the total catch.

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 (for 7 of the Counts) and servicing a FAD (for one of the Counts) and the regulations did not indicate that such sets/servicing 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. 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) (subsequently affirmed by the Agency Administrator on appeal); In re Christine Swanson, 2005 WL 776152 (NOAA 2005). 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 the value of only 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) 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.⁴³

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, 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. See Resp. Exh. DDDDD.

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, a different country for offload/sale, and not the specific economic arrangements American Triumph had with its purchasers. 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 by that particular entity. See Tr. at 270:12-271:13 (July 10, 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.⁴⁴

Second, discrepancies exist between the estimates of the fish caught for a particular set in terms of the species composition. Both Mr. Morikawa and the vessel's purse seine set logs indicate that some bigeye tuna were caught. See Agency Exhs. 3 and 12; see also Agency Exh. 2 at 31 (Mr. Morikawa claiming that when mixed species were caught, the vessel would report

⁴³ For the eight Charges at issue herein, no fish were seized by the Agency.

⁴⁴ Agency counsel intimated that the numbers provided might not be the result of a market, arms-length transaction (see Tr. at 271:14-24 (July 10, 2012)), but no record evidence indicates this to be the case. Therefore, I will not make an assumption of fraud without preponderant evidence to support such "below market" transactions.

small amounts of bigeye as yellowfin and vice versa). However, the actual receipts for fish landed and sold for this trip indicates that no bigeye tuna were in the catch. See Resp. Exh. DDDDD. 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 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' Exh. DDDDD is 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 these "bigeye" tuna 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 F/V American Triumph, 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. See Resp. Exh. DDDDD.

Neither party addressed possible identification problems among bigeye, yellowfin and skipjack. Therefore, I am left to account for what the record shows to be misidentified bigeye on the basis of mathematical averages. 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 F/V American Triumph and multiply that average price by the number of tuna caught. American Triumph's receipts for this trip show no bigeye tuna caught. Resp. Exh. DDDDD. For the purposes of this Decision, the price per metric ton for the incorrectly estimated amount of bigeye tuna will be the

weighted average of prices received for the skipjack and yellowfin tuna. Using such a weighted average is reasonable because vastly more skipjack were caught than yellowfin (ca. 98% of the total catch)). Therefore, it is proportionally much more likely that the misidentified bigeye were skipjack rather than yellowfin. Nothing in the record allows me to allocate the misidentified bigeye with any further precision.

Given this background, the following numbers shall be used to make a calculation of the value of fish caught in each unlawful set:

- Skipjack tuna = [REDACTED];⁴⁵
- Yellowfin tuna = [REDACTED];⁴⁶ and
- Misidentified bigeye tuna = [REDACTED]⁴⁷

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 master to be clearly the most culpable, followed by American Triumph, and then Captain Black. A complete discussion of the fishing master is set forth below.

The company respondent, American Triumph, cannot be exonerated because of the bad acts of its employee – the fishing master. First, the company elected to hire a fishing master who acted with little sense of complying with the FAD closure regulations. Second, the company representative who testified admitted that he never talked to the fishing master concerning the

⁴⁵ [REDACTED]

⁴⁶ [REDACTED]

⁴⁷ [REDACTED]

FAD closure requirements. Whether other personnel in the company spoke with the fishing master was unclear and does not appear in the record. The failure to explicitly instruct the individual conducting fishing operations on the company's vessel about his legal obligations with respect to the fishery is negligent at best or willful misconduct at worst.

Captain Black was given the task of running the vessel generally as its master – not to conduct fishing operations. Certainly, he was aware of, and should have ensured compliance with, the applicable FAD closure regulations. To the extent he failed to do so, he is liable for such failures. Furthermore, as master of the vessel, these violations occurred under his watch. It is possible that he elected to maintain ignorance of the details concerning the fishing activities of the fishing master. 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 the regulations 7 times on a single trip lasting a little over one month at sea.⁴⁸ The percentage of unlawful sets made (15% of the total for trip)⁴⁹ was not remarkably large, but those sets resulted in a disproportionate amount of the total catch (ca. 45%).⁵⁰ Clearly, the unlawful sets, which should not have been made, were

⁴⁸ Respondents also were within a few meters of violating the regulations on the charge found not proven.

⁴⁹ See Agency Exh. 12 (F/V American Triumph's purse seine log indicating a total of 40 sets were made during this trip).

⁵⁰ See Agency Exh. 12 (F/V American Triumph's purse seine log indication the unlawful sets accounted for 470 mt of the total 1050 mt for this trip).

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 delivered effectively to the field, particularly given the dynamics of multi-national crews. Respondents were absolutely under an obligation to know the rules and abide by them, but 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.

G. The Responsibility of the Fishing Master

The most troubling aspect for me in making the penalty determination involves Respondent Yen Ming Yuan. While he did not appear at the hearing and I did not hear his side of the story, the record indicates that Respondent Yuan bears the largest brunt of responsibility for the violations. Respondent Yuan directed all the fishing operations conducted; he told the crew where, when, and how to fish for the tuna. His acts were intentional and knowingly

unlawful as evidenced by his efforts to bribe the international observer whose duties included the unbiased reporting of fishing operations.

However, in point of fact, there is no way to render an effective sanction for the fishing master. Respondent Yuan appears to be a citizen of Taiwan. See Agency Exh. 3 at 2 (crew listing). The enforcement of any penalty against Respondent Yuan is extremely problematic and in all likelihood, despite the imposition of joint and several liability, the Agency will look to the company respondent – American Triumph – for payment of the penalty assessed. The end result is that the primary bad actor in this case essentially gets away with his unlawful activities and resultant large payday 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 master, I can and do recommend that the Agency take action with respect to all of American Triumph's fishing permits **prohibiting the hiring and/or retention** by American Triumph of this fishing master – **Mr. Yen Ming Yuan**—for a period of no less than **FIVE (5) years**. It is simply unacceptable for a U.S. flagged vessel to continue to employ a foreign national in a key role who acts with little or no recognition and adherence to the United States regulations directly impacting his activities.

H. Analysis of Each Count

1. Count 1

The record demonstrates the F/V American Triumph grappled onto a FAD and more likely than not replaced an existing radio beacon from another vessel with one of its own on August 28, 2009. This act during the FAD closure period violated the regulations' prohibitions on servicing a FAD. See 50 C.F.R. § 300.233(b)(4). Clearly, this was an intentional act, but the

record does not indicate that this action made the FAD more effective at aggregating fish or otherwise enhanced the FAD's capabilities. Furthermore, this action did not involve a set made on or in association with the FAD and the record does not indicate that the F/V American Triumph later returned to the FAD and made any such set during the closed period.

No proven harm to the resource occurred and the record evidence does not indicate any unlawful economic benefit obtained by switching the radio beacon on the FAD. Given the totality of the circumstances, the replacement of the beacon on the FAD is more in the nature of a technical violation than an act that damaged the bigeye/yellowfin stocks. Agency counsel failed to justify the proposed penalty of \$87,500. I find that a penalty of \$25,000 is appropriate for this violation on Count 1.

2. Count 2

The record demonstrates the F/V American Triumph made a set within 1 nm of a FAD while the vessel was investigating a free school of tuna, with the result of 5 metric tons of skipjack tuna caught on August 18, 2009. Mr. Morikawa pointed out the raft to the vessel's interpreter, but the interpreter took no action other than to try to get Mr. Morikawa away from that side of the ship (i.e., the starboard side where the raft was) and did not want Mr. Morikawa to tell Captain Black about the FAD.

The vessel violated the FAD closure and received 5 metric tons of skipjack tuna as a result. This was a clear violation of the regulations. It might very well be, given the position of the FAD and the fact the set was made on the port side of the vessel, that the set within 1 nm of a FAD was not intentional. Nevertheless, the vessel violated the FAD closure and received the benefit of catching 5 metric tons of skipjack as a result. The weighted average value for this

[REDACTED] As discussed above, that amount must

be added to any penalty assessed for this violation so that Respondents do not receive the economic benefit of their unlawful conduct.

Agency counsel did not provide a specific/detailed rationale for imposing a penalty of \$83,750 for this violation. Given the value of the catch at [REDACTED], the Agency's suggested penalty just for the fact of violation would be over [REDACTED]. Because this FAD set resulted in a relatively small amount of skipjack tuna caught, which was not a species CMM 2008-01 was designed to protect, and no other species of tuna were caught, a base penalty of \$25,000 is appropriate. When added to the value of the fish caught, this calculation results in a total civil penalty of [REDACTED] for Count 2.

3. Count 3

This Count was found not proven for the reasons given herein.⁵¹

4. Count 4

The record reveals the F/V American Triumph made a set within approximately 75 meters of a FAD on August 24, 2009. No fish were caught as a result of this set. The harm to the resource was thus nonexistent. Respondents obtained no unjust economic benefit from this unlawful activity. Agency counsel's general rationale applicable to all the Counts does not justify the imposition of the requested penalty of \$80,000. Respondents made an unlawful set but were unsuccessful. Under all the facts and circumstances discussed above, a penalty in the amount of \$25,000 is appropriate for Count 4.

⁵¹ The record demonstrates that the F/V American Triumph caught approximately [REDACTED] metric tons of tuna for this set, which consisted of [REDACTED] metric tons of [REDACTED] tuna and [REDACTED] metric tons of [REDACTED]. The estimated value of this catch equals 10 metric tons of yellowfin tuna at [REDACTED] per metric ton [REDACTED] total) and [REDACTED] metric tons of skipjack tuna at [REDACTED] per metric ton [REDACTED] total) for an estimated total value for this set equaling [REDACTED]. This amount is provided in the event the Administrator does not agree with my finding of not proved for Charge 3. With such a finding, the Administrator would add the \$50,000 (base amount) to the [REDACTED] (value of the catch) for a total exceeding the statutory maximum. Had this charge been found proven, I would have assessed \$140,000.

5. Count 5

The record evidence establishes the F/V American Triumph set within 50 meters of a FAD on September 4, 2009. This set was an early morning set involving the use of workboats and aggregating lights. The set resulted in the capture of 100 metric tons of tuna, 10 tons of which were estimated to be bigeye/yellowfin. Unlike the previous Counts, the F/V American Triumph deployed its workboats and used aggregating lights to keep the fish in place while the main vessel made the set. Respondents took direct, affirmative steps to keep the aggregated tuna in place for the set to be successful.

Like Count 3, the set resulted in the capture of some tuna that was the specific object of CMM 2008-01's management measures (i.e., approximately [REDACTED] mt of [REDACTED] tuna). The value for this unlawful catch is estimated to equal [REDACTED] tons of [REDACTED] at [REDACTED] per metric ton ([REDACTED] total), [REDACTED] tons of [REDACTED] at [REDACTED] per metric ton ([REDACTED] total) and [REDACTED] tons of [REDACTED] tuna at [REDACTED] per metric ton ([REDACTED] total), for a total economic benefit to Respondents of [REDACTED]. That amount must be added to a base penalty assessment to ensure Respondents do not receive a windfall from their violation of the regulations.

However, Agency counsel's suggested penalty of \$140,000 is not supported by the record. The harm to the resource is limited by the amount of yellowfin caught in this set, which was estimated to be [REDACTED] metric tons (a minimal, direct impact on the resource given the size of the yellowfin taken in 2009). However, because some yellowfin were caught in this set, a base penalty amount of \$50,000 is appropriate for this violation. When added to the value of the fish caught, this calculation results in a total civil penalty of [REDACTED] for Count 5.

6. Count 6

The record shows the F/V American Triumph set on a FAD during the FAD closure on August 15, 2009 and caught a total of [REDACTED] tons of tuna, consisting of an estimated [REDACTED] tons of [REDACTED] and [REDACTED] tons of alleged [REDACTED]. This was an early morning set and both the F/V American Triumph and its workboats used fish aggregating lights submerged in the water as in Count 5.

The set resulted in a catch of [REDACTED] tons of [REDACTED], valued at [REDACTED] per metric ton ([REDACTED] total) and [REDACTED] tons of [REDACTED] tuna at [REDACTED] per ton ([REDACTED]).

While it is more likely than not that the bigeye tuna only consisted of a small amount of actual yellowfin (i.e., [REDACTED]% of [REDACTED] metric tons), the fact remains that some tuna of a species meant to be protected by the FAD closure were taken in this set. While the amount of yellowfin was minimal and likely had an extremely negligible impact on the resource, the set was made on some of these tuna which recommends a more severe penalty than otherwise.

Furthermore, Respondents landed a considerable amount of tuna as a result of this unlawful set – the value for which exceeds the statutory maximum that may be imposed. Despite this fact, it would be inappropriate to compensate for this one violation by increasing the amount of penalty for others to offset this amount; in effect one would be exceeding the maximum penalty authorized by statute. Each violation should be taken as a whole given the particular facts and circumstances of that violation. And yet, the penalty for each violation can be considered as part of a larger picture in which Respondents' repeated violation of the regulations over a relatively short period of time further justifies the extent of the significant monetary penalties assessed.

Agency counsel's suggestion that the maximum civil penalty be imposed for this Count is reasonable and supported by the facts in the record. The penalty for Count 5 is thus \$140,000.

7. Count 7

The record evidence establishes the F/V American Triumph made a set on a raft during the FAD closure on August 17, 2009 and as a result caught an estimate [REDACTED] metric tons of [REDACTED] tuna and [REDACTED] metric tons of [REDACTED] tuna. The set involved the F/V American Triumph and its workboat using fish aggregating lights submerged in the water to help hold the fish in place while the set was made.

The set resulted in a catch of [REDACTED] metric tons of [REDACTED] tuna valued at [REDACTED] per metric ton ([REDACTED] total) and [REDACTED] metric tons of [REDACTED] at [REDACTED] per metric ton ([REDACTED] total). It is more likely than not that the bigeye tuna was in fact proportionally more likely to be skipjack, but the fact remains that some tuna of a species meant to be protected by the FAD closure were taken in this set (i.e., [REDACTED]% of [REDACTED] mt). While the amount of such yellowfin was minimal relative to the total amount of such tuna caught in 2009 and likely had an extremely negligible impact on the resource, the set was made on some of these tuna, which recommends a more severe penalty than otherwise. The total estimated value of the catch of \$20,544.42 must be added to a base penalty amount to account for Respondents' economic benefit from this unlawful set.

Because some amount of the targeted tuna species were caught in this set, a reasonable base penalty for the Count is \$50,000. The Agency failed to justify why the requested penalty of \$98,750 was warranted. The proper penalty for this set equals the value of the catch to this base penalty amount and results in a total civil penalty of [REDACTED] for Count 7.

8. Count 8

The record evidence establishes that the F/V American Triumph set its net on a raft in order to capture the fish that had aggregated in association with the raft in violation of law on

August 31, 2009. Specifically, the F/V American Triumph was investigating a school of tuna feeding on bait fish near a raft and then maneuvered near the raft to separate the tuna from the raft and made a set resulting in an estimated [REDACTED] metric tons of [REDACTED] tuna and [REDACTED] metric tons of [REDACTED] tuna.

The value of the catch associated with this unlawful set equaled [REDACTED] metric tons of [REDACTED] tuna at [REDACTED] per ton ([REDACTED] total) and [REDACTED] metric tons of [REDACTED] tuna at [REDACTED] per ton ([REDACTED] total) for a combined total of [REDACTED].

The catch included an extremely small proportion of yellowfin, but this species was the object of protection by CMM 2008-01, which leads me to conclude that a base penalty of \$50,000 for the violation is appropriate. Combining that base penalty number with the value of the catch results in an appropriate penalty for Count 8 of the statutory maximum of \$140,000.

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 count to be \$25,000 for Count 1; [REDACTED] for Count 2; \$0.00 for Count 3; \$25,000 for Count 4; [REDACTED] for Count 5; \$140,000 for Count 6; [REDACTED] for Count 7; and \$140,000 for Count 8 – for a total civil penalty of \$562,068.27. A summary of how these amounts calculated is provided below.⁵²

⁵² The Agency did not distinguish between any base penalty amounts requested and the economic value of the catch associated with the unlawful set. As set forth above, had Charge 3 been found PROVEN, the base penalty amount would have been \$50,000.00 as some targeted species of CMM 2008-01 were caught.

	Total Penalty Requested by the Agency	Base Penalty Assessed Herein	Economic Value of Catch	Total Assessed by this Decision and Order
Count 1	\$87,500.00	\$25,000.00		\$25,000.00
Count 2	\$83,750.00	\$25,000.00		
Count 3	\$140,000.00	\$0.00		\$0.00
Count 4	\$80,000.00	\$25,000.00		\$25,000.00
Count 5	\$102,500.00	\$50,000.00		
Count 6	\$140,000.00	\$50,000.00		\$140,000.00
Count 7	\$98,750.00	\$50,000.00		
Count 8	\$140,000.00	\$50,000.00		
Total	\$872,500.00	\$275,000.00		\$562,068.27

WHEREFORE:

VII. Order

IT IS HEREBY ORDERED that a civil penalty in the total amount of **FIVE HUNDRED SIXTY TWO THOUSAND SIXTY EIGHT DOLLARS AND TWENTY SEVEN CENTS (\$562,068.27)** is assessed, jointly and severally, against Respondents **ANTHONY BLACK, AMERICAN TRIUMPH LLC, and YEN MING YUAN.**

IT IS FURTHER STRONGLY RECOMMENDED that the Agency Administrator immediately condition all of Respondent **AMERICAN TRIUMPH LLC's** permits to prohibit the hiring and/or retaining of **YEN MING YUAN** in any capacity on any of its fishing vessels for a period of no less than **FIVE (5) YEARS.**

IT IS HEREBY FURTHER ORDERED that if any party disagrees with Finding of Fact No. 155, that party shall have twenty (20) days from the date of the service of this Initial Decision and Order to file a petition for reconsideration.

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.

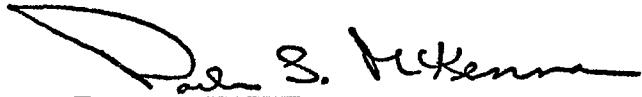
PLEASE BE FURTHER ADVISED that any party may petition for administrative review of this decision. The petition for review must be filed with the Administrator of the National Oceanic and Atmospheric Administration within thirty (30) days from the day of this Initial Decision and Order as provided in 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 22nd day of August, 2013
at Alameda, CA.

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

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

ATTACHMENT A: LIST OF WITNESSES AND EXHIBITS

Agency Witnesses

1. Jason Morikawa
2. Kevin Painter, NOAA Special Agent
3. Raymond Clarke, NOAA
4. Dr. Charles Karnella, NOAA
5. Siosifa Fukafuka
6. Keith Bigelow, NOAA
7. Dr. Christopher Reid

Respondents' Witnesses

1. Brian Hallman, Executive Director, American Tunaboat Association
2. Cucu Indra Cahyana, translator on the American Triumph
3. Captain Anthony Black
4. Larry Da Rosa, vessel manager for the American Triumph

Agency's Exhibits (Agency Exh. 1 through Agency Exh. 20)

1. Jason Morikawa's Trip Diary
2. Jason Morikawa's Purse Seine Trip Report
3. Jason Morikawa's Purse Seine Observer Workbook
4. Memorandum of Interview – Jason Morikawa
5. Follow-up Interview – Jason Morikawa
6. WCPFC Conservation and Management Measure 2008-01
7. 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 (June 1, 2009)
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)
9. Narrative Portion of SA Painter's Investigation Report
10. Certificate of Documentation – F/V American Triumph
11. Crew List – F/V American Triumph
12. Regional Purse Seine Logsheet – F/V American Triumph
13. Memorandum of Interview – Anthony Black – dated April 3, 2010 (both signed and unsigned versions)
14. Curriculum Vitae, Keith Bigelow
15. Curriculum Vitae, Dr. Chris Reid
16. Note regarding Ex-Vessel Prices for Certain Vessel Trips During Period of July – October 2009 (dated June 2012) – ***SUBJECT TO PROTECTIVE ORDER***
17. Fish sale price information provided by Respondents – ***SUBJECT TO PROTECTIVE ORDER***
18. Map of Western and Central Pacific Ocean

- 19. Sample Photo of US Purse Seine Vessel
- 20. Estimate Catch Values by Vessel and Count – ***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 Vessel Fishing
- D. Photo – Vessel with Net
- E. Photo – Catch
- F. Photo – Bailer
- G. NO EXHIBIT
- H. Conservation and Management Measure 2007-01
- I. Conservation and Management Measure 2008-01
- J. Conservation and Management Measure 2009-02
- K. WCPFC Seventh Regular Session, Review of the Implementation and Effectiveness of CMM 2008-01, WCPFC7-2010/15.1rev 1
- L. Federal Register Notice, 74 Fed. Reg. 26160-170 (Jun. 1, 2009)
- M. American Tuna Boat Association, Comments to Proposed Rule (June 19, 2009)
- N. Federal Register Notice, 74 Fed. Reg. 38544-558 (Aug. 4, 2009)
- 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, 300.222, and 300.223)
- S. Environmental Review, FONSI for Fishing Restrictions and Observer Requirements in Purse Seine Fisheries for 2009-2011 (July 13, 2009)
- T. to HH. NO EXHIBITS
- 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, NMFS, Pacific Island Regional Office (July 2009)
- JJ. Email exchange between SA Painer and Mr. Morikawa
- KK. to XXXX. NO EXHIBITS
- YYYY. Photo – F/V American Triumph
- ZZZZ. NO EXHIBIT.
- AAAAA. Written Statement of Cucu Indra Cahyana.
- BBBBB. to CCCCC. NO EXHIBITS
- DDDDD. Trip Settlement and Invoice Sheets (September 2009) – ***SUBJECT TO PROTECTIVE ORDER***
- EEEE. To CCCCCC. NO EXHIBITS

DDDDDD. Photo – FAD

EEEEEE. Photo – FAD

FFFFFF. To HHHHHH. NO EXHIBITS

IIIII. Marshall Islands Criminal Code, 31 MIRC Ch. 1 et seq.

ALJ Exhibits

1. Western Pacific Pelagic Fishery Penalty Schedule (revised 11/3/94)
2. Penalty Policy Preface (revised 8/02)

WESTERN PACIFIC PELAGIC FISHERY

VIOLATION	VIOLATION HISTORY -- PENALTY AMOUNT		
	FIRST	SECOND	THIRD
Fishing without a general permit.	Summary Settlement	\$1,000 - \$5,000 plus the catch or its fair market value	
Fishing or receiving management unit species without a valid limited entry permit.	\$1,000 - \$10,000 plus the catch or its fair market value	\$10,000 - \$50,000 plus the catch or its fair market value	
Improperly transfer a limited entry permit.	\$1,000 - \$5,000	\$5,000 - \$10,000	\$10,000 - \$20,000
Improperly transfer any permit other than a limited entry permit.	Written Warning - \$250	\$500	\$1,000 - \$5,000
Fishing within closed areas.	\$10,000 - \$20,000 plus the catch or its fair market value.	\$20,000 - \$50,000 plus the catch or its fair market value, and/or permit sanctions.	\$30,000 to \$100,000 plus the catch or its fair market value, and/or permit sanctions, and/or up to seizure of the vessel.
Failure to notify NMFS immediately upon entering and/or exiting the protected species zone.	Summary Settlement	\$1,000 - \$3,500	\$5,000 - \$10,000

ALS 1

WESTERN PACIFIC PELAGIC FISHERY

VIOLATION	VIOLATION HISTORY -- PENALTY AMOUNT		
	FIRST	SECOND	THIRD
Failure to maintain, make, keep or submit any logbook data (includes failure to record data within 24 hours, failure to submit data within 72 hours and other nonsubstantive violations).	Summary Settlement	\$1,000 - \$2,000	\$2,000 - \$5,000
Falsifying logbook entries or other required reports (e.g., underlogging and other substantive logbook violations).	\$2,500 - \$10,000 plus the catch or its fair market value	\$5,000 - \$25,000 plus the catch or its fair market value	\$25,000 plus the catch or its fair market value, and/or permit sanctions.
Refuse to make logbooks available for immediate inspection.	\$1,500 - \$10,000 plus the catch or its fair market value	\$2,500 - \$25,000 plus the catch or its fair market value	\$3,500 - \$25,000+ plus the catch or its fair market value, and/or permit sanctions.
Fail to make and/or file all reports of management unit species landings as required by applicable State law or regulation.	Summary Settlement	\$1,000 - \$2,000	\$2,000 - \$5,000
Failure to notify NMFS within 12 hours of landing a management unit species.	Summary Settlement	\$750 plus the catch or its fair market value.	\$1,000 plus the catch or its fair market value.
Failure to properly mark longline floats or maintain vessel markings.	Summary Settlement	\$1,000 - \$2,000	\$2,000 - \$5,000

WESTERN PACIFIC PELAGIC FISHERY

VIOLATION	VIOLATION HISTORY -- PENALTY AMOUNT		
	FIRST	SECOND	THIRD
Failure by fish dealer to allow inspection of records.	\$1,500 - \$10,000	\$2,500 - \$25,000	\$3,500 - \$25,000
Fish for management unit species in violation of an experimental fishing permit.	\$1,000	\$5,000	\$10,000
Fish for management unit species using prohibited gear (i.e., drift gill net).	\$5,000 plus the catch or its fair market value.	\$10,000 plus the catch or its fair market value.	\$20,000 plus the catch or its fair market
Foreign fishing vessel fishing without a permit.	Summary Settlement \$50,000 to \$100,000 per incursion, plus the catch or its fair market value, and/or seizure of the vessel		
Minor violation (e.g., fishing for personal consumption).			
Major Violation			
Interfere with, obstruct, delay, or prevent by any means a lawful investigation or search.	\$5,000 - \$15,000 plus the catch or its fair market value.	\$10,000 - \$25,000 plus the catch or its fair market value.	\$25,000 - \$50,000 plus the catch or its fair market value, and/or permit sanctions.

WESTERN PACIFIC PELAGIC FISHERY

VIOLATION	VIOLATION HISTORY -- PENALTY AMOUNT		
	FIRST	SECOND	THIRD
Refuse to take observer or fish without observer after request by Regional Director.	\$5,000 - \$15,000 plus the catch or its fair market value.	\$10,000 - \$25,000 plus the catch or its fair market value.	\$20,000 - \$50,000 plus the catch or its fair market value, and/or permit sanctions.
Interfere with observer (includes assault, impede, intimidate, influence or attempt to influence or to harass or sexually harass).	\$5,000 - \$25,000 plus the catch or its fair market value.	\$10,000 - \$50,000 plus the catch or its fair market value, and/or permit sanctions.	\$50,000 - \$100,000 plus the catch or its fair market value, and/or permit sanctions, and/or up to seizure of the vessel.
SUPPLEMENTAL SCHEDULE (amended April 2000)			
Falsify or fail to make and/or file all reports of management unit species landings, containing all data and in the exact manner as required by state law or regulation.			
Fail to make/file:	SS=\$500	SS=\$500	\$2,000-\$5,000
Transfer a permit in violation of the regulations.			
Limited Access Permit:	SS=\$500	\$5,000-\$10,000	\$10,000-\$20,000

WESTERN PACIFIC PELAGIC FISHERY

VIOLATION	VIOLATION HISTORY -- PENALTY AMOUNT		
	FIRST	SECOND	THIRD
Fail to comply with notification requirements set forth in §660.23 or in any EFP.	SS=\$500	SS=\$500	\$1,000 - \$5,000
Fail to comply with a term or condition governing the observer program. Minor:	SS=\$500	SS=\$500	\$1,000
Use a US vessel that has longline gear on board but does not have a valid Hawaii Longline Limited Access Permit or valid general permit to land or transship management unit species shoreward of the outer boundary of the EEZ around American Samoa, Guam or the Northern Mariana Islands, or U.S. possessions in the Pacific Ocean Area. General Permit:	SS=\$500	\$750-\$3,750	\$3,750-\$20,000

PREFACE

A. INTRODUCTION

The National Oceanic and Atmospheric Administration (NOAA) Civil Administrative Penalty Schedule (Penalty Schedule) is a compilation of internal guidelines used by NOAA enforcement attorneys in assessing penalties for violations of statutes and regulations that NOAA enforces. In addition to the Penalty Schedule, Summary Settlement and Fix-It Notice schedules that are utilized by enforcement personnel are also included and have been indexed by region.

The intent of the Penalty Schedule is to permit realization of two equally important goals: 1) assessment of individualized penalties to fit the specific facts of a case; and 2) establishment of relative uniformity in penalties assessed for similar violations nationwide.

The Penalty Schedule provides recommended ranges for penalties and permit sanctions based both on the specific violation and the history of previous violations. NOAA enforcement attorneys are expected to use their prosecutorial discretion in determining the appropriateness of a recommended penalty or permit sanction, basing their decisions on the particular facts of the cases, including aggravating and mitigating circumstances.

B. APPLICATION OF PRIOR VIOLATIONS

A prior violation is a criterion for increasing the penalty assessed or permit sanction imposed for a subsequent violation. The Agency's long standing practice has been to define a "prior violation" broadly to include violations of any statute or regulation administered by NOAA, including violations of permit conditions or restrictions. The Agency may also consider violations of other Federal natural resource statutes as priors. The Agency's procedure for determining applicability of a prior violation to a penalty or permit sanction, is to look back from the date of the current violation and take into account prior violations that have been reduced to final administrative decisions during the previous five years.

A violation is considered to be a prior violation if it has been reduced to either a court decision (civil or criminal) or it has become a final administrative decision of the Agency as defined in 15 C.F.R. §904 *et seq.*. The Agency considers the date that an action becomes a final administrative decision to be the marking date for consideration as a prior violation, both with regard to the Agency's use thereof and a violator's accountability. Finality is necessary to provide actual notice of the prior violation to effectuate an enforcement scheme that uses higher penalties and more severe permit sanctions for repeat violations as an incentive for compliance. Thus, a mere investigation, without a complaint and without a conviction or fine does not constitute a prior violation, nor may a penalty assessment or permit sanction be based upon allegations still in litigation which have not become final. Similarly, simultaneous violations are not considered priors for each other.

When a case involves multiple respondents who may be charged jointly and severally, fairness may require that the respondents be charged individually if their histories of prior offenses are different. In the alternative, they may be charged jointly and severally if the penalty assessed, and/or permit sanction imposed, is based upon the lesser number of priors.

Any violation involving the use of a vessel is a prior violation against that vessel unless controlling ownership changes. A violation by a master or crewmember on a vessel is a prior violation for any subsequent violation they commit on a different vessel. If two or more vessels are owned by the same person, then a violation by one vessel is imputed to be a prior for the other vessel or vessels. If two or more vessels are owned by separate corporations, but the same person or company controls these corporations, then a violation by one vessel is imputed to be a prior for the other vessel or vessels.

C. AGGRAVATING/MITIGATING CIRCUMSTANCES

The following list of factors supersedes all "factors" and "aggravating/mitigating circumstances" contained in any individual NOAA Administrative Penalty Schedule. The superseded factors are incorporated in the broader factors below.

The following list of factors are intended to be broadly construed. NOAA attorneys have wide latitude in considering how the specific facts and circumstances of a particular case apply to these listed factors. Furthermore, the following listed factors are not meant to be an exclusive or exhaustive list. Some factors may be disregarded, while additional factors may be considered, if appropriate, depending on the facts and circumstances of any particular case.

Factors that may be considered in determining the proper penalty level within the penalty range or, where appropriate, above or below the range include, but are not limited to, the following:

- (1) Gravity of the violation;
- (2) Harm to the resource;
- (3) Condition and/or value of 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 offense was committed in such a way as to avoid detection, e.g., whether there was concealment or flight (to the extent such conduct not charged as a separate offense); (c) degree of dependence on illegal behavior for livelihood (if such information is available at time of charging); (d) whether offense was part of a pattern, course of conduct, common scheme or conspiracy, and violator's role in the activity;
- (7) Whether there are multiple violations (charged or not charged, including, if appropriate, whether the case involves multiple counts that would justify a downward adjustment of the

- overall assessment in order to reflect appropriately the severity of the illegal conduct);
- (8) Degree of cooperation;
 - (9) Whether violator obstructed administration of justice during investigation or thereafter (to extent not charged as a separate offense) by destroying evidence, intimidating, threatening, materially lying, etc.
 - (10) Acceptance of responsibility;
 - (11) Danger of violence or injuries (or substantial likelihood) to the extent conduct not separately charged;
 - (12) Ability to pay;
 - (13) History of past offenses; and
 - (14) Deterrence of future violations by the violator.

Where authorized by Statute, seizure of the entire catch or its value, and seizure of vessel and/or gear, may apply even on first violations. The quantity and value of each catch should be included in the documentation of each case because such value may be added to NOVA penalty amounts.

(Revised 8/02)

**ATTACHMENT B: RULINGS ON PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Agency's Proposed Findings of Fact:

1. 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.

2. 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.

3. 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.

4. 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 in Finding of Fact (FoF) 24 and the Analysis Section of this Decision. In addition, "it" refers to CMM 2008-01, a management measure promulgated under the WCPFC, which the United States implemented in its regulations pursuant to that treaty.

5. 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 as MODIFIED in FoF 25 and the Analysis Section of this Decision.. 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.

6. 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. See FoF 26 and the Analysis Section herein.

7. 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 8.

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.

8. The measures went immediately into effect. *Id.*

Respondents' Response: Disputed in part. *See Response to Agency's FF No. 7 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).

9. The regulations at 50 C.F.R. § 300.223(b) prohibit the following activities during a FAD closure:

(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 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

(3) Deploying a FAD into the water

(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) 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.

Respondents' Response: Disputed to the extent Agency FF No. 9 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.

10. 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. 10 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.

11. At the time of the charged violations, the F/V American Triumph was a U.S.-flagged purse seine vessel owned by American Triumph Fishing LLC. *See* Agency Exhibit 10.

Respondents' Response: Undisputed.

Ruling: ACCEPTED AND INCORPORATED.

12. At the time of the charged violations, the captain of the F/V American Triumph was respondent Anthony Black. Agency Exhibit 11.

Respondents' Response: Undisputed.

Ruling: ACCEPTED AND INCORPORATED.

13. At the time of the charged violations, the fishing master of the F/V American Triumph was respondent Yen Ming Yuan. Agency Exhibit 3, at PS-1, page 2 and TR 158 (July 9 - 11, 2012 Hearing).

Respondents' Response: Undisputed.

Ruling: ACCEPTED AND INCORPORATED.

14. At the time of the charged violations, the F/V American Triumph carried an observer, Jason Morikawa, on board the vessel. *See* Agency Exhibit 11.

Respondents' Response: Undisputed.

Ruling: ACCEPTED AND INCORPORATED.

15. Mr. Morikawa was a trained Pacific Islands Forum Fisheries Agency (FFA) observer. *See* TR 13 - 15 generally (January 31, 2012 Hearing).

Respondents' Response: Disputed. This statement is vague as to the nature of the training Mr. Morikawa purportedly received. Further, Mr. Morikawa had no training on the FAD closure in 2009, nor did the Marshall Island Marine Resource Authority talk to him about the deployment of FADs. He was not provided any information about U.S. regulations regarding FAD closures. *See* Resp. FF Nos. 35-38.

Ruling: ACCEPTED AND INCORPORATED. This Proposed Finding of Fact merely asserts that Mr. Morikawa was trained by the FFA as an observer.

16. FFA observers go through a lengthy training process that includes training about purse seine fishing. *See* TR 113 - 126 generally (July 9 - 11, 2012 Hearing).

Respondents' Response: Disputed. This statement is vague as to the term "lengthy" with respect to the training Mr. Morikawa purportedly received. Further, Mr. Morikawa had no training on the FAD closure in 2009, nor did the Marshall Island Marine Resource Authority talk to him about the deployment of FADs. He was not provided any information about U.S. regulations regarding FAD closures. *See* Resp. FF Nos. 35-38.

Ruling: ACCEPTED IN PART AND INCORPORATED AND REJECTED IN PART. The fact that Mr. Morikawa's training included elements associated with purse seine fishing is accepted; whereas the characterization of the training as "lengthy" is rejected as vague.

17. Prior to his deployment on the American Triumph, Mr. Morikawa received training regarding the 2009 prohibition against FAD fishing from the Marshall Island Marine Resource Authority. See TR 21 - 22 generally (January 31, 2012 Hearing).

Respondents' Response: Disputed. See response to Agency FF No. 15.

Ruling: ACCEPTED AND INCORPORATED. Details concerning the training form part of this Decision.

18. While Mr. Morikawa was aboard the F/V American Triumph, 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 American Triumph. See TR 15 (January 31, 2012).

Respondents' Response: Disputed. Captain Black believed that Mr. Morikawa's document entries were false and he had a plan to report violations in order to obtain a reward. Testimony of Anthony Black, Tr. at 157:20-158:15 (August 27, 2012). Both the translator and Captain Black testified that Mr. Morikawa knew he could receive a reward for reporting violations; this provided a motive for him to misrepresent what he observed on the trip in his diary, workbooks, and trip report. See Resp. FF Nos. 61-66.

Ruling: ACCEPTED AND INCORPORATED to the extent this Proposed Finding of Fact states that Mr. Morikawa maintained observer reports. Whether such reports accurately reflected the events on board the American Triumph is discussed in this Decision. Respondents' argument concerning Mr. Morikawa's credibility is fully addressed in this Decision.

19. Mr. Morikawa testified that on August 28, 2009, he witnessed the F/V American Triumph service a FAD. *Id.* at 23.

Respondents' Response: Disputed. The vessel did not service a FAD. See Resp. FF Nos. 75-80. Mr. Morikawa's claim that he saw the vessel service a FAD by swapping a buoy is not credible. It is contradicted by the testimony of two reliable, percipient witnesses - the Captain and translator. No other witness corroborated Mr. Morikawa's version of events. See Resp. FF No. 76-80.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

20. Specifically, he testified that on that date the F/V American Triumph spotted a floating raft constructed of cork, nets, and pieces of bamboo, plastic and ropes that was marked with a beacon that apparently belonged to another boat, the F/V Koo's 108. *Id.* at 25.

Respondents' Response: Disputed in part. While the vessel did hook a raft as described alongside the vessel, Mr. Morikawa's claim that he saw a beacon number indicating the buoy he allegedly saw belonged to another boat, the F/V Koo's, is not credible. TR 20:7-12 (January 31, 2012). It is contradicted by the testimony of two reliable, percipient

witnesses – the Captain and translator. No other witness corroborated Mr. Morikawa's version of events. See Resp. FF No. 76-80.

Ruling: ACCEPTED AND INCORPORATED. Mr. Morikawa never claimed that he could see the beacon number until he examined the beacon after it was brought on board. See Tr. at 27:3-12 (January 31, 2012).

21. This raft was a “fish aggregating device” within the meaning of that term set forth at 50 C.F.R. § 300.211 (“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...”).

Respondents' Response: Undisputed that the raft hooked by the vessel was a fish aggregating device. However, the language of the regulations speaks for itself.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

22. He further testified that crew members from the F/V American Triumph then removed the beacon on the raft belonging to the F/V Koo 108 and replaced it with a beacon belonging to the F/V American Triumph. *Id.* at 24-27.

Respondents' Response: Disputed. The crew of the vessel did not remove the beacon on the raft and replace it with a beacon belonging to the F/V American Triumph or any other vessel. *See* Resp. FF Nos. 76-80. His claim that he determined the buoy number because it was brought on board the vessel is not credible given that the translator testified that the radio buoy used by the vessels do not have numbers on them and are identified only by their frequencies. Testimony of Cucu Indra Cahyana, Tr. at 90:5-19 (August 27, 2012).

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

23. Mr. Morikawa recorded these events in his Purse Seine Observer Workbook (admitted as Agency Exhibit 3) by making entries on line 4 of PS-2, Daily Log, page 19 of 30, dated August 28, 2009, 0710, that indicate the F/V American Triumph deployed ship's own beacon # 39. *Id.* at 23-24.

Respondents' Response: Disputed. Mr. Morikawa misrepresented events in his document entries; his testimony and documents are not credible as they are contradicted by the testimony of two credible, percipient witnesses – Captain Black and the translator, Cucu Indra Cahyana, who had no incentive or motivation to lie. *See* Agency Exh. 13 (Captain's response to question 11 from Agent Kevin Painter, dated April 14, 2010), Testimony of Anthony Black, Tr. at 121:24-123:17; 138:6-139:6 (August 27, 2012), Resp. FF Nos. 49-55 and 67-69. Captain Black believed that Mr. Morikawa's document entries were false and he had a plan to report violations in order to obtain a reward. Testimony of Anthony Black, Tr. at 157:20-158:15 (August 27, 2012). Both the

translator and Captain Black testified that Mr. Morikawa knew he could receive a reward for reporting violations; this provided a motive for him to misrepresent what he observed on the trip in his diary, workbooks, and trip report. *See* Resp. FF Nos. 61-66.

Ruling: ACCEPTED AND INCORPORATED. Respondent's objection fails to account for the fact that the record reflects that Mr. Cahyana's testimony concerned the F/V American Triumph's buoys and did not make a general statement about all purse seiners. The record does not reflect that he was speaking about buoys from other boats.

24. Mr. Morikawa recorded details related to these events in his Trip Diary entries for August 28, 2009. Agency Exhibit 1 at 32.

Respondents' Response: Disputed. Mr. Morikawa misrepresented events in his document entries; his testimony and documents are not credible as they are contradicted by the testimony of two credible, percipient witnesses – Captain Black and the translator, Cucu Indra Cahyana, who had no incentive or motivation to lie. *See* Agency Exh. 13 (Captain's response to question 11 from Agent Kevin Painter, dated April 14, 2010), Testimony of Anthony Black, Tr. at 121:24-123:17; 138:6-139:6 (August 27, 2012), Resp. FF Nos. 49-55 and 67-69. Captain Black believed that Mr. Morikawa's document entries were false and he had a plan to report violations in order to obtain a reward. Testimony of Anthony Black, Tr. at 157:20-158:15 (August 27, 2012). Both the translator and Captain Black testified that Mr. Morikawa knew he could receive a reward for reporting violations; this provided a motive for him to misrepresent what he observed on the trip in his diary, workbooks, and trip report. *See* Resp. FF Nos. 61-66.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

25. At all times during the events of August 28, 2009, described above, the F/V American Triumph was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. *See* TR 162 at 18 - 19 (July 9 - 11, 2012 Hearing) and Agency Exhibit 9.

Respondents' Response: Undisputed that the vessel was located within the Convention area. However, the regulation and the definitions speak for themselves.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

26. Mr. Morikawa testified that on August 18, 2009, he witnessed the F/V American Triumph make a set within approximately 100 meters of a FAD. TR 27 - 30 (January 31, 2012 Hearing).

Respondents' Response: Disputed. There was no raft; there was no set on a raft. *See* Resp. FF Nos. 87-91. Mr. Morikawa's testimony is not credible as he had an incentive to report violations to receive a reward. Nor was his account of the alleged violation corroborated by any other witness. In contrast, Mr. Morikawa's version of events was

contradicted by two reliable, percipient witnesses – the Captain and the translator. *See* Response to Agency FF No. 31.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

27. Specifically, Mr. Morikawa testified that on the morning of August 18, 2009, while the F/V American Triumph was investigating a free school of tuna, he spotted a raft consisting of a raft and a buoy approximately 100 meters from the F/V American Triumph. *Id.* at 27 - 28.

Respondents' Response: Disputed. Mr. Morikawa's claim that he saw a raft is not credible. Mr. Morikawa could not describe the alleged raft when asked about it. *See* Resp. FF Nos. 84; 87-91. *See* also Response to Agency FF No. 26.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

28. This raft was a "fish aggregating device" within the meaning of that term set forth at 50 C.F.R. § 300.211 ("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...").

Respondents' Response: Disputed that there was a FAD of any kind involved with the August 18, 2009 set. The evidence does not establish that there was a raft. Mr. Morikawa could not and did not describe what he supposedly saw. *See* Responses to Agency FF Nos. 26-27, 29-32.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

29. Mr. Morikawa testified that he was together with the fishing vessel's translator at this time and that he pointed out the raft to the translator. *Id.* at 28.

Respondents' Response: Disputed. The translator did not see a raft. Mr. Morikawa could not find the raft when he allegedly pointed it out to the translator. *See* Resp. FF Nos. 88-89.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

30. Mr. Morikawa testified that after the F/V American Triumph investigated the free school, the vessel made a set approximately 100 meters from the raft. *Id.* at 28-29.

Respondents' Response: Disputed. There was no raft; the vessel did not make a set approximately 100 meters from a raft. *See* Resp. FF Nos. 89-91.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

31. Mr. Morikawa recorded these events in his Purse Seine Observer Workbook for 18 August 2009 in an entry dated 1058. Agency Exhibit 3 at PS-2, page 8 of 30.

Respondents' Response: Mr. Morikawa's records contradict his account. He claims the vessel was investigating a free school associated with a raft. However, the codes he wrote in his daily log indicate that the school was associated with bait fish and not with any raft. *See* Resp. FF Nos. 84-85. Moreover, Mr. Morikawa misrepresented events in his document entries; his testimony and documents are not credible as they are contradicted by the testimony of two credible, percipient witnesses – Captain Black and the translator, Cucu Indra Cahyana, who had no incentive or motivation to lie. *See* Agency Exh. 13 (Captain's response to question 11 from Agent Kevin Painter, dated April 14, 2010), Testimony of Anthony Black, Tr. at 121:24-123:17; 138:6-139:6 (August 27, 2012), Resp. FF Nos. 49-55 and 67-69. Captain Black believed that Mr. Morikawa's document entries were false and he had a plan to report violations in order to obtain a reward. Testimony of Anthony Black, Tr. at 157:20-158:15 (August 27, 2012). Both the translator and Captain Black testified that Mr. Morikawa knew he could receive a reward for reporting violations; this provided a motive for him to misrepresent what he observed on the trip in his diary, workbooks, and trip report. *See* Resp. FF Nos. 61-66.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

32. Mr. Morikawa recorded details related to these events in his Trip Diary entries for 18 August 2009. Agency Exhibit 1 at 12.

Respondents' Response: *See* Response to Agency FF No. 31.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

33. At all times during the events of August 18, 2009 described above, the F/V American Triumph was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. *See* TR 162 at 18 - 19 (July 9 - 11, 2012 Hearing) and Agency Exhibit 9.

Respondents' Response: Undisputed that the vessel was located within the Convention area. However, the regulation and the definitions speak for themselves.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

34. Mr. Morikawa testified that on August 22, 2009, he witnessed the F/V American Triumph make a set within approximately 50 meters of a FAD. TR 30 - 31 (January 31, 2012 Hearing).

Respondents' Response: Disputed. There was no raft; no other person saw a raft. *See* Resp. FF Nos. 96-99. Mr. Morikawa's testimony is not credible as he had an incentive to report violations to receive a reward. Nor was his account of the alleged violation corroborated by any other witness. In contrast, Mr. Morikawa's version of events was

contradicted by two reliable, percipient witnesses – the Captain and the translator. *See* Response to Agency FF No. 38.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

35. Specifically, Mr. Morikawa testified that at approximately 1433 on August 22, 2009, while the F/V American Triumph was investigating a free school of tuna, he spotted a raft approximately 50 meters from the F/V American Triumph. *Id.* at 31.

Respondents' Response: Disputed. Mr. Morikawa's records contradict his account. He claims the vessel was investigating a free school associated with a raft. However, the codes he wrote in his daily log indicate that the school was associated with bait fish and not with any raft. *See* Resp. FF Nos. 94-95.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

36. This raft was a "fish aggregating device" within the meaning of that term set forth at 50 C.F.R. § 300.211 ("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...").

Respondents' Response: Disputed that there was a FAD of any kind involved with the August 22, 2009 set. The evidence does not establish that there was a raft. Mr. Morikawa could not and did not describe what he supposedly saw. *See* Responses to Agency FF Nos. 34-35, 37-39.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

37. Mr. Morikawa testified that the F/V American Triumph then made a set at 1436 approximately 50 meters from the raft. *Id.*

Respondents' Response: Disputed. There was no raft; no one else saw a raft. *See* Resp. FF Nos. 96-99.

Ruling: ACCEPTED AND INCORPORATED in part and rejected in part. For the reasons provided in this Decision, the fact that a set was made at 14:36 is accepted. However, the distance between the sighting of the raft and the commencement of the set in question is rejected since the distance between the F/V American Triumph and the raft was greater than 1 nm, thus resulting in a finding of charge not proven.

38. Mr. Morikawa recorded these events in his Purse Seine Observer Workbook for 22 August 2009 in entries at 1433 and 1436. Agency Exhibit 3 at PS-2, page 8 of 30.

Respondents' Response: Disputed. The events did not occur as recounted by Mr. Morikawa's testimony and the discrepancies in his documentation reflect this. Mr.

Morikawa's own recorded entries contradict that he saw school fish associated with a raft. He recorded in his daily log a school association code for feeding on baitfish but not for a floating object or fad. *See* Resp. FF Nos. 94-95. Moreover, Mr. Morikawa misrepresented events in his document entries; his testimony and documents are not credible as they are contradicted by the testimony of two credible, percipient witnesses – Captain Black and the translator, Cucu Indra Cahyana, who had no incentive or motivation to lie. *See* Agency Exh. 13 (Captain's response to question 11 from Agent Kevin Painter, dated April 14, 2010), Testimony of Anthony Black, Tr. at 121:24-123:17; 138:6-139:6 (August 27, 2012), Resp. FF Nos. 49-55 and 67-69; *see also* Resp. FF Nos. 96-98. Captain Black believed that Mr. Morikawa's document entries were false and he had a plan to report violations in order to obtain a reward. Testimony of Anthony Black, Tr. at 157:20-158:15 (August 27, 2012). Both the translator and Captain Black testified that Mr. Morikawa knew he could receive a reward for reporting violations; this provided a motive for him to misrepresent what he observed on the trip in his diary, workbooks, and trip report. *See* Resp. FF Nos. 61-66.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

39. Mr. Morikawa recorded details related to these events in his Trip Diary entries for 22 August 2009. Agency Exhibit 1 at 20.

Respondents' Response: Disputed. *See* Response to Agency FF No. 28.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

40. At all times during the events of August 22, 2009 described above, the F/V American Triumph was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. *See* TR 162 at 18 - 19 (July 9 - 11, 2012 Hearing) and Agency Exhibit 9.

Respondents' Response: Undisputed that the vessel was located within the Convention area. However, the regulation and the definitions speak for themselves.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

41. Mr. Morikawa testified that on August 24, 2009, he witnessed the F/V American Triumph make a set within approximately 75 meters of a FAD. TR 34 - 35 (January 31, 2012 Hearing).

Respondents' Response: Disputed. There was no raft; no other person on the vessel saw a raft. *See* Resp. FF Nos. 104-106. Mr. Morikawa's testimony is not credible as he had an incentive to report violations to receive a reward. Nor was his account of the alleged violation corroborated by any other witness. In contrast, Mr. Morikawa's version of events was contradicted by two reliable, percipient witnesses – the Captain and the translator. *See* Response to Agency FF No. 45.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

42. Specifically, Mr. Morikawa testified that at approximately 0928 on August 24, 2009, while the F/V American Triumph was investigating a free school of tuna, he spotted a raft approximately 70 meters from the F/V American Triumph. *Id.* at 34-35.

Respondents' Response: Disputed. Mr. Morikawa's claim that he saw a raft is not credible. The events did not occur as recounted by Mr. Morikawa and the discrepancies between his testimony and the documentation reflect this. Mr. Morikawa's own recorded entries contradict that he saw school fish associated with a raft. He recorded in his daily log a school association code for feeding on baitfish but not for a floating object or fad. *See* Resp. FF No. 102.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

43. This raft was a "fish aggregating device" within the meaning of that term set forth at 50 C.F.R. § 300.211 ("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...").

Respondents' Response: Disputed that there was a FAD of any kind involved with the August 24, 2009 set. The evidence does not establish that there was a raft. Mr. Morikawa could not and did not describe what he supposedly saw. *See* Responses to Agency FF Nos. 41-42, 44-46.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

44. Mr. Morikawa testified that the F/V American Triumph then made a set at 0931 approximately 75 meters from the raft. *Id.*

Respondents' Response: Disputed. There was no raft; no other person on the vessel saw a raft. *See* Resp. FF Nos. 104-106.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

45. Mr. Morikawa recorded these events in his Purse Seine Observer Workbook for 24 August 2009 in entries at 0928 and 0931. Agency Exhibit 3 at PS-2, page 14 of 30.

Respondents' Response: Disputed. The events did not occur as recounted by Mr. Morikawa and his documentation reflects this. Mr. Morikawa's own recorded entries contradict that he saw school fish associated with a raft. He recorded in his daily log a school association code for feeding on baitfish but not for a floating object or fad. *See* Resp. FF No. 102. Moreover, Mr. Morikawa misrepresented events in his document entries; his testimony and documents are not credible as they are contradicted by the testimony of two credible, percipient witnesses – Captain Black and the translator, Cucu Indra Cahyana, who had no incentive or motivation to lie. *See* Agency Exh. 13

(Captain's response to question 11 from Agent Kevin Painter, dated April 14, 2010), Testimony of Anthony Black, Tr. at 121:24-123:17; 138:6-139:6 (August 27, 2012), Resp. FF Nos. 49-55 and 67-69; *see also* Resp. FF Nos. 104-106. Captain Black believed that Mr. Morikawa's document entries were false and he had a plan to report violations in order to obtain a reward. Testimony of Anthony Black, Tr. at 157:20-158:15 (August 27, 2012). Both the translator and Captain Black testified that Mr. Morikawa knew he could receive a reward for reporting violations; this provided a motive for him to misrepresent what he observed on the trip in his diary, workbooks, and trip report. *See* Resp. FF Nos. 61-66.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

46. Mr. Morikawa recorded details related to these events in his Trip Diary entries for 24 August 2009. Agency Exhibit 1 at 24.

Respondents' Response: Disputed. *See* Response to Agency FF No. 45.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

47. At all times during the events of August 24, 2009 described above, the F/V American Triumph was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. *See* TR 162 at 18 - 19 (July 9 - 11, 2012 Hearing) and Agency Exhibit 9.

Respondents' Response: Undisputed that the vessel was located within the Convention area. However, the regulation and the definitions speak for themselves.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

48. Mr. Morikawa testified that on September 4, 2009, he witnessed the F/V American Triumph make a set on or near a FAD. TR 35 - 38 (January 31, 2012 Hearing).

Respondents' Response: Disputed. The vessel did not set on or near a FAD. *See* Resp. FF No. 138. Mr. Morikawa's testimony is not credible as he had an incentive to report violations to receive a reward. Nor was his account of the alleged violation corroborated by any other witness. In contrast, the captain of the vessel directly contradicted Mr. Morikawa's version of events. *See* Response to Agency FF Nos. 49, 53-55.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

49. Specifically, Mr. Morikawa testified that at approximately 0510 on September 4, 2009, while the F/V American Triumph was investigating its own beacon number 42 and an associated raft, the vessel determined that there were tuna around it. *Id.* at 35-36.

Respondents' Response: Disputed. The captain signed a sworn statement that the vessel did not set on a raft. This was a standard fish under the boat set. *See* Resp. FF No. 138.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

50. This raft was a “fish aggregating device” within the meaning of that term set forth at 50 C.F.R. § 300.211 (“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...”).

Respondents’ Response: Disputed that there was a FAD of any kind involved with the September 4, 2009 set. The evidence does not establish that there was a raft. Mr. Morikawa could not and did not describe what he supposedly saw. *See* Responses to Agency FF Nos. 48-49, 51-55.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

51. Mr. Morikawa testified that approximately two minutes later the F/V American Triumph lowered an auxillary work boat into the water. *Id* at 36.

Respondents’ Response: Disputed that the set was anything other than a standard fish under the boat set. During this set, the vessel used standard workboats and working safety lights to assist the fishing master in marking his position. No aggregating lights were used. *See* Resp. FF No. 138-139. Further, Mr. Morikawa’s claim is not credible and no other witness corroborated his version of events. *See e.g.*, Response to Agency FF No. 54.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

52. Mr. Morakawa testified that the work boat deployed submerged green and yellow lights which he described as “aggregating lights” while it stayed near the raft. *Id* at 37.

Respondents’ Response: Disputed. The crew did not put aggregating lights in the water during this set. *See* Resp. FF No. 138-139. Further, Mr. Morikawa’s claim is not credible and no other witness corroborated his version of events. *See e.g.*, Response to Agency FF No. 54.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

53. Mr. Morikawa testified that the F/V American Triumph then set on the raft, but managed to exclude the raft from the net before it was fully pursed. *Id* at 37.

Respondents’ Response: Disputed. *See* Responses to Agency FF Nos. 48, 51.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

54. Mr. Morikawa recorded details related to these events in his Purse Seine Observer Workbook for September 4, 2009, in entries at 0510 and 0532. Agency Exhibit 3 at PS-2, page 26 of 30.

Respondents' Response: Disputed. Mr. Morikawa misrepresented events in his document entries; his testimony and documents are not credible as they are contradicted by the testimony of two credible, percipient witnesses – Captain Black and the translator, Cucu Indra Cahyana, who had no incentive or motivation to lie. *See* Agency Exh. 13 (Captain's response to question 11 from Agent Kevin Painter, dated April 14, 2010), Testimony of Anthony Black, Tr. at 121:24-123:17; 138:6-139:6 (August 27, 2012), Resp. FF Nos. 49-55 and 67-69; *see also* Resp. FF Nos. 138-139. Captain Black believed that Mr. Morikawa's document entries were false and he had a plan to report violations in order to obtain a reward. Testimony of Anthony Black, Tr. at 157:20-158:15 (August 27, 2012). Both the translator and Captain Black testified that Mr. Morikawa knew he could receive a reward for reporting violations; this provided a motive for him to misrepresent what he observed on the trip in his diary, workbooks, and trip report. *See* Resp. FF Nos. 61-66.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

55. Mr. Morikawa recorded details related to these events in his Trip Diary entries for September 4, 2009. Agency Exhibit 1 at 43 - 44.

Respondents' Response: Disputed. *See* Response to Agency FF No. 54.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

56. At all times during the events of September 4, 2009 described above, the F/V American Triumph was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. *See* TR 162 at 18 - 19 (July 9 - 11, 2012 Hearing) and Agency Exhibit 9.

Respondents' Response: Undisputed that the vessel was located within the Convention area. However, the regulation and the definitions speak for themselves.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

57. Mr. Morikawa testified that on August 15, 2009, he witnessed the F/V American Triumph make a set on or near a FAD. TR 39 - 43 (January 31, 2012 Hearing).

Respondents' Response: Disputed. There was no raft; the vessel did not set on or near raft. *See* Resp. FF Nos. 121-122. Mr. Morikawa's testimony is not credible as he had an incentive to report violations to receive a reward. Nor was his account of the alleged violation corroborated by any other witness. In contrast, both the captain of the vessel and the translator directly contradicted Mr. Morikawa's version of events. *See* Response to Agency FF Nos. 58-59, 60-67.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

58. Specifically, Mr. Morikawa testified that at approximately 0430 on August 15, 2009, he went to the bridge of the F/V American Triumph and at 0459 he spotted a buoy. *Id.* at 39.

Respondents' Response: Disputed. Mr. Morikawa's claim that he saw a buoy is not credible. He admitted it was dark at that time of morning and that it could have been up to 10 miles away. *See* Resp. FF No. 116-117, 121-122.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

59. Mr. Morikawa testified the buoy was attached to a raft and that the vessel proceeded to investigate the buoy and the raft. *Id.* at 40.

Respondents' Response: Disputed. Mr. Morikawa's claim that he saw a buoy is not credible; there was no raft. *See id.*

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

60. This raft was a "fish aggregating device" within the meaning of that term set forth at 50 C.F.R. § 300.211 ("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...").

Respondents' Response: Disputed that there was a FAD of any kind involved with the August 15, 2009 set. The evidence does not establish that there was a raft. *See* Responses to Agency FF Nos. 57-59, 61-67.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

61. Mr. Morikawa testified that the F/V American Triumph investigated the raft by going slowing around the raft and used its sonar to see fish present under the raft. *Id.* at 40.

Respondents' Response: Mr. Morikawa's claim that he saw a buoy is not credible; there was no raft. The vessel did not and could not use sonar to detect fish under the boat. *See* Resp. FF Nos. 116-118.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

62. Mr. Morikawa testified that the F/V American Triumph then deployed submerged green and yellow aggregating lights of the same type used by the work boat on September 4, 2009. *Id.* at 40-41.

Respondents' Response: Disputed. Mr. Morikawa's claim that the vessel used aggregating lights is not credible. It did not do so. *See* Resp. FF Nos. 119-124.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

63. Mr. Morikawa testified that the F/V American Triumph next lowered an auxiliary work boat into the water. *Id.* at 41.

Respondents' Response: Disputed that this was anything other than a standard fish under the boat set, which used workboats and working safety lights to assist the fishing master in positioning the net. Aggregating lights were not used. *See* Resp. FF No. 122.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

64. Mr. Morakawa testified that once the work boat deployed its submerged green and yellow aggregating lights, the F/V American Triumph pulled up its aggregating lights and moved away from the work boat, the raft and the beacon. *Id.* at 41-42.

Respondents' Response: *See* Response to Agency FF No. 63.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

65. Mr. Morikawa testified that the F/V American Triumph then set on the raft at 0532. *Id.* at 42.

Respondents' Response: Disputed that there was a FAD of any kind involved with the August 15, 2009 set. The evidence does not establish that there was a raft. *See* Responses to Agency FF Nos. 57-59, 61-4, and 67.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

66. Mr. Morikawa recorded details related to these events in his Purse Seine Observer Workbook for August 15, 2009, in entries at 0430, 0459 and 0532. Agency Exhibit 3 at PS-2, page 5 of 30.

Respondents' Response: Disputed. Mr. Morikawa misrepresented events in his document entries; his testimony and documents are not credible as they are contradicted by the testimony of two credible, percipient witnesses – Captain Black and the translator, Cucu Indra Cahyana, who had no incentive or motivation to lie. *See* Agency Exh. 13 (Captain's response to question 11 from Agent Kevin Painter, dated April 14, 2010), Testimony of Anthony Black, Tr. at 121:24-123:17; 138:6-139:6 (August 27, 2012), Resp. FF Nos. 49-55 and 67-69; *see also* Resp. FF Nos. 115-124. Captain Black believed that Mr. Morikawa's document entries were false and he had a plan to report violations in order to obtain a reward. Testimony of Anthony Black, Tr. at 157:20-158:15 (August 27, 2012). Both the translator and Captain Black testified that Mr. Morikawa knew he could receive a reward for reporting violations; this provided a motive for him to misrepresent

what he observed on the trip in his diary, workbooks, and trip report. *See* Resp. FF Nos. 61-66.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

67. Mr. Morikawa recorded details related to these events in his Trip Diary entries for August 15, 2009. Agency Exhibit 1 at 6.

Respondents' Response: *See* Response to Agency FF No. 66.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

68. At all times during the events of August 15, 2009 described above, the F/V American Triumph was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. *See* TR 162 at 18 - 19 (July 9 - 11, 2012 Hearing) and Agency Exhibit 9.

Respondents' Response: Undisputed that the vessel was located within the Convention area. However, the regulation and the definitions speak for themselves.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

69. Mr. Morikawa testified that on August 17, 2009, he witnessed the F/V American Triumph make a set on a FAD. TR 43 - 48 (January 31, 2012 Hearing).

Respondents' Response: Disputed. There was no raft. This was a normal fish under the boat set. *See* Resp. FF Nos. 131-133. Mr. Morikawa's testimony is not credible as he had an incentive to report violations to receive a reward. Nor was his account of the alleged violation corroborated by any other witness. In contrast, both the captain of the vessel and the translator directly contradicted Mr. Morikawa's version of events. *See* Responses to Agency FF Nos. 70-72, 75-77.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

70. Specifically, Mr. Morikawa testified that at approximately 0430 on August 17, 2009, he went to the bridge of the F/V American Triumph and saw that vessel was searching for a raft because the track finder that is used to find locator buoys was on. *Id.* at 45-46.

Respondents' Response: Disputed. Mr. Morikawa's statement that he saw the vessel was searching for a raft because the track finder was on is not credible. Buoy numbers cannot be read by a track finder, only frequencies, and Mr. Morikawa could not have seen the buoy number in the dark at that time of day. *See* Resp. FF No. 128.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

71. Mr. Morikawa testified that at 0458 he saw buoy and a raft. *Id.* at 46.

Respondents' Response: Disputed. There was no raft; no FAD set was made. *See* Responses to Agency FF Nos. 69 and 70.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

72. This raft was a "fish aggregating device" within the meaning of that term set forth at 50 C.F.R. § 300.211 ("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...").

Respondents' Response: Disputed that there was a FAD of any kind involved with the August 15, 2009 set. The evidence does not establish that there was a raft. *See* Responses to Agency FF Nos. 69-71, 75-77.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

73. Mr. Morikawa testified that he next saw the F/V American Triumph deploy submerged aggregating lights and then saw the F/V American Triumph lower an auxiliary workboat into the water. *Id.* at 46.

Respondents' Response: Disputed. The set was a ordinary fish under the boat situation. The fish were caught using the standard deployment of a workboat and working lights to assist the fishing master in the position. The vessel did not use aggregating lights. *See* Resp. FF No. 132.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

74. Mr. Morikawa testified that once the workboat, which had deployed its own submerged aggregating lights, was in the water, the F/V American Triumph retrieved its submerged aggregating lights and moved away from the workboat so that it could make a set. *Id.*

Respondents' Response: Disputed. *See* Responses to Agency FF No. 69 and 73.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

75. Mr. Morikawa testified that the F/V American Triumph then set on the raft at 0533. *Id.* at 47-48.

Respondents' Response: Disputed. There was no raft; no FAD set was made. *See* Response to Agency FF No. 69.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

76. Mr. Morikawa recorded details related to these events in his Purse Seine Observer Workbook for August 17, 2009, in entries at 0430, 0458 and 0533. Agency Exhibit 3 at PS-2, page 7 of 30.

Respondents' Response: Disputed. Mr. Morikawa misrepresented events in his document entries; his testimony and documents are not credible as they are contradicted by the testimony of two credible, percipient witnesses – Captain Black and the translator, Cucu Indra Cahyana, who had no incentive or motivation to lie. *See* Agency Exh. 13 (Captain's response to question 11 from Agent Kevin Painter, dated April 14, 2010), Testimony of Anthony Black, Tr. at 121:24-123:17; 138:6-139:6 (August 27, 2012), Resp. FF Nos. 49-55 and 67-69; *see also* Resp. FF Nos. 128, 130-133. Captain Black believed that Mr. Morikawa's document entries were false and he had a plan to report violations in order to obtain a reward. Testimony of Anthony Black, Tr. at 157:20-158:15 (August 27, 2012). Both the translator and Captain Black testified that Mr. Morikawa knew he could receive a reward for reporting violations; this provided a motive for him to misrepresent what he observed on the trip in his diary, workbooks, and trip report. *See* Resp. FF Nos. 61-66.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

77. Mr. Morikawa recorded details related to these events in his Trip Diary entries for August 17, 2009. Agency Exhibit 1 at 10.

Respondents' Response: Disputed. *See* Response to Agency FF No. 76.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

78. At all times during the events of August 17, 2009 described above, the F/V American Triumph was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. *See* TR 162 at 18 - 19 (July 9 - 11, 2012 Hearing) and Agency Exhibit 9.

Respondents' Response: Undisputed that the vessel was located within the Convention area. However, the regulation and the definitions speak for themselves.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

79. Mr. Morikawa testified that on August 31, 2009, he witnessed the F/V American Triumph make a set on a FAD. TR 48 - 49 (January 31, 2012 Hearing).

Respondents' Response: Disputed. There was no raft; no set was made on a raft. No one else reported that they saw a raft. *See* Resp. FF Nos. 110-112. Mr. Morikawa's testimony is not credible as he had an incentive to report violations to receive a reward. Nor was his account of the alleged violation corroborated by any other witness. In contrast, both the captain of the vessel and the translator directly contradicted Mr. Morikawa's version of events. *See* Responses to Agency FF Nos. 84 and 85.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

80. Specifically, Mr. Morikawa testified that at approximately 1434 on August 31, 2009, he observed the F/V American Triumph investigating a free school of tuna that was feeding on bait fish near a raft. *Id.* at 48.

Respondents' Response: Disputed. Mr. Morikawa's claim that he saw a raft is not credible. The events did not occur as recounted by Mr. Morikawa and the discrepancies between his testimony and the documentation reflect this. Mr. Morikawa's own recorded entries contradict that he saw school fish associated with a raft. He recorded in his daily log a school association code for feeding on baitfish but not for a floating object or fad. *See* Resp. FF No. 109.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

81. This raft was a "fish aggregating device" within the meaning of that term set forth at 50 C.F.R. § 300.211 ("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...").

Respondents' Response: Disputed that there was a FAD of any kind involved with the August 15, 2009 set. The evidence does not establish that there was a raft. *See* Responses to Agency FF Nos. 79-80, 82-85.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

82. Mr. Morikawa testified the F/V American Triumph then maneuvered near the raft to separate the tuna from the raft. *Id.*

Respondents' Response: Disputed. No FAD set was made. At the time the skiff boat was released, no FAD was observed by the captain nor was one reported by anyone to be within one mile of the vessel. *See* Resp. FF No. 110-111.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

83. Mr. Morikawa testified that he later saw a school approximately 50 meters from the raft and that F/V American Triumph then made at set near the raft at 1503. *Id.*

Respondents' Response: Disputed. *See* Responses to Agency FF Nos. 80 and 82.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

84. Mr. Morikawa recorded details related to these events in his Purse Seine Observer Workbook for August 31, 2009, in entries at 1434 and 1503. Agency Exhibit 3 at PS-2, page 22 of 30.

Respondents' Response: Disputed. The events did not occur as recounted by Mr. Morikawa and his documentation reflects this. Mr. Morikawa's own recorded entries contradict that he saw school fish associated with a raft. He recorded in his daily log a school association code for feeding on baitfish but not for a floating object or fad. *See* Resp. FF No. 109. Moreover, Mr. Morikawa misrepresented events in his document entries; his testimony and documents are not credible as they are contradicted by the testimony of two credible, percipient witnesses – Captain Black and the translator, Cucu Indra Cahyana, who had no incentive or motivation to lie. *See* Agency Exh. 13 (Captain's response to question 11 from Agent Kevin Painter, dated April 14, 2010), Testimony of Anthony Black, Tr. at 121:24-123:17; 138:6-139:6 (August 27, 2012), Resp. FF Nos. 49-55 and 67-69; *see also* Resp. FF Nos. 110-111. Captain Black believed that Mr. Morikawa's document entries were false and he had a plan to report violations in order to obtain a reward. Testimony of Anthony Black, Tr. at 157:20-158:15 (August 27, 2012). Both the translator and Captain Black testified that Mr. Morikawa knew he could receive a reward for reporting violations; this provided a motive for him to misrepresent what he observed on the trip in his diary, workbooks, and trip report. *See* Resp. FF Nos. 61-66.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

85. Mr. Morikawa recorded details related to these events in his Trip Diary entries for August 17, 2009. Agency Exhibit 1 at 37.

Respondents' Response: Disputed that Mr. Morikawa did not record details related to these events for August 17, 2009; It is disputed that Mr. Morikawa's entries in Agency Exhibit 1 at 37 are a credible representation of the events on August 31, 2009. *See* Response to Agency FF No. 84.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

86. At all times during the events of August 17, 2009 described above, the F/V American Triumph was located within the Western and Central Pacific Fisheries Convention Area as defined by 50 CFR 300.211. *See* TR 162 at 18 - 19 (July 9 - 11, 2012 Hearing) and Agency Exhibit 9.

Respondents' Response: Disputed that the above alleged events occurred on August 17, 2009; undisputed that the vessel was located within the Convention area. However, the regulation and the definitions speak for themselves.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

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 Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan are all "persons" as defined by the Western and Central Pacific Fisheries Convention Implementation Act. *See* 50 C.F.R. § 300.211.

Respondents' Response: Undisputed. The regulations speak for themselves.

Ruling: ACCEPTED AND INCORPORATED.

3. 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.

4. 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.

5. Under 50 C.F.R. § 300.223(b)(4), it is unlawful to repair, clean, maintain, or otherwise service a fish aggregating device, including any electronic equipment used in association with a fish aggregating device.

Respondents' Response: Undisputed. The regulations speak for themselves.

Ruling: ACCEPTED AND INCORPORATED.

6. The Agency has established by a preponderance of the evidence that Respondents Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. §§ 300.223(b) on August 28, 2009, by servicing a FAD.

Respondents' Response: Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

7. The Agency has established by a preponderance of the evidence that Respondents Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. §§ 300.223(b) on August 18, 2009, by setting a purse seine on or within one nautical mile of a fish aggregating device.

Respondents' Response: Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

8. The Agency has established by a preponderance of the evidence that Respondents Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. §§ 300.223(b) on August 22, 2009, by setting a purse seine on or within one nautical mile of a fish aggregating device.

Respondents' Response: Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

Ruling: REJECTED for the reasons stated herein.

9. The Agency has established by a preponderance of the evidence that Respondents Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. §§ 300.223(b) on August 24, 2009, by setting a purse seine on or within one nautical mile of a fish aggregating device.

Respondents' Response: Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

10. The Agency has established by a preponderance of the evidence that Respondents Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. §§ 300.223(b) on September 4, 2009, by setting a purse seine on or within one nautical mile of a fish aggregating device.

Respondents' Response: Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

11. The Agency has established by a preponderance of the evidence that Respondents Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. §§ 300.223(b) on August 15, 2009, by setting a purse seine on or within one nautical mile of a fish aggregating device.

Respondents' Response: Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

12. The Agency has established by a preponderance of the evidence that Respondents Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. §§ 300.223(b) on August 17, 2009, by setting a purse seine on or within one nautical mile of a fish aggregating device.

Respondents' Response: Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

13. The Agency has established by a preponderance of the evidence that Respondents Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan violated the Western and Central Pacific Fisheries Convention Implementation Act and its underlying regulations codified at 50 C.F.R. §§ 300.223(b) on August 31, 2009, by setting a purse seine on or within one nautical mile of a fish aggregating device.

Respondents' Response: Disputed. The agency has failed to prove this charge by a preponderance of the evidence.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

14. Under the theory of respondeat superior, Respondents Anthony Black, American Triumph Fishing LLC and Yen Ming Yuan are jointly and severally liable for the violations of the Western and Central Pacific Fisheries Convention Implementation Act. *See* 15 C.F.R. § 904.107; *see also In the Matter of Bruce Stiller, et al.*, 1998 NOAA LEXIS 6 at 14-15 (Aug. 10, 1998).

Respondents' Response: Disputed. The agency has failed to prove any of the charges alleged in the NOVA by a preponderance of the evidence.

Ruling: ACCEPTED AND INCORPORATED for the reasons stated herein.

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. Resp. Exh. L (Fed. Reg. at 26161).

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. Resp. Exh. A, at p. 2. 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. *See id.* at p. 3.

Agency Response: The Agency disagrees as the proposed finding is both compound and argumentative.

Ruling: ACCEPTED AND INCORPORATED.

3. 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.

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.

4. 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. Testimony of Siosifa Fukafuka, Tr. at 110:12-112:25 (July 9, 2012).

Agency Response: The Agency disagrees.

Ruling: ACCEPTED IN PART AND INCORPORATED AND REJECTED IN PART. The cited testimony supports Respondents' contention that the Secretariat of the Pacific Community and the Forum Fisheries Agency coordinate in the training of observers. However, the cited testimony does not support the other statements in this Proposed Finding of Fact.

5. The training course was described as rather short, about three to five weeks. *Id.* at 116:10-21.

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."

6. 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. Resp. Exh. H at p. 2.

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.

7. 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. Resp. Ex. I.

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.

8. 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. Resp. Ex. I, at 2-3.

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”.

9. 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. Resp. Ex. I, at 3. See Agency Exh. 18 for a map of the relevant geographical area.

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.

10. This case involves a U.S. flag tuna purse seine vessel. 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 devices] between 0000 hours on 1 August 2009 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. Resp. Exh. I at 3-4.

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 a U.S. law and regulation, not CMM 2008-01.

Ruling: ACCEPTED AND INCORPORATED in the Principles of Law section.

11. 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.” Resp. Exh. I, at 2, n. 1.

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.

12. 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 fishing operations.” Resp. Ex. I, at 39 (Att. E).

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.

13. 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.” Resp. Exh. R (50 C.F.R. § 300.211). 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.

14. 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.” Resp. Exh. M, at 2. 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...

Resp. Exh. N, 74 Fed. Reg. 38544, 38546 (August 4, 2009).
CMM 2009-02

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.

15. 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." Resp. Ex. J., at 2.

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.

16. 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.*

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

17. 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. Resp. Exh. H at p. 1; *see also* Testimony of Brian Hallman ("Hallman Test."), Exec. Dir. American Tunaboat Ass'n., Tr. at 27:18-23 (August 27, 2012); Resp. Exh. R; 50 C.F.R. § 300.223(e)(1).

Agency Response: The Agency agrees, with exception that the final rule did not publish until August 4, 2009, and went immediately into effect at that time.

Ruling: ACCEPTED AND INCORPORATED.

18. 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. Hallman Test., Tr. at 31:14-22 (August 27, 2012).

Agency Response: The Agency disagrees.

Ruling: REJECTED.

19. The rights and responsibilities of the vessel operators and captains include "[t]imely notification from the observer provider on completion of the observer's trip of any comments concerning the vessel operations." Resp. Exh. H, Annex A, at Para. 1.c.

Agency Response: The Agency agrees that the document says what is quoted above, but notes that is contained within an attachment to a WCPFC Conservation and Management Measure and not within a U.S. law or regulation and therefore is beyond the scope of the Court. Further, the Agency notes that the American Tunaboat Association directly contracts with the observer provider for observer services so this is matter between those two entities and not relevant to this proceeding.

Ruling: ACCEPTED AND INCORPORATED.

20. 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. However, the captain is obligated to ensure that the observer is not, among other things, intimidated, interfered with, or bribed. *Id.* at Annex 1, Para. 2.m.

Agency Response: The Agency disagrees to the extent that this is argument and not a finding of fact. In addition, it misunderstands the nature of a regional fishery management organization. Conservation and management measures adopted by the Commission are binding on countries, not individuals.

Ruling: ACCEPTED AND INCORPORATED.

21. For his part, the observer is to abide by the rights and responsibilities set forth in Annex A to CMM 2007-02, which includes "adherence to the ROP Code of Conduct for observers." Resp. Exh. H, Annex A at Para. 2.k; *see also* Resp. Exh. O (Schedule 3—FFA [Forum Fisheries Agency] Observer Code of Conduct).

Agency Response: The Agency disagrees for several reasons: 1) this is argument and not a finding of fact. In addition, it misunderstands the nature of a regional fishery management organization. Conservation and management measures adopted by the

Commission are binding on countries, not individuals; 2) CMM 2007-02 is a measure about the Commission Vessel Monitoring System; and 3) the Code of Conduct attached to Respondents' Exhibit O is the FFA Observer Code of Conduct which is not the same thing as the ROP Observer Code of Conduct.

Ruling: REJECTED.

22. Under "Conduct," this Code requires that an observer report any attempt to compromise or harass them, and must not "accept inducement with money or gifts of any kind." Resp. Exh. O at Schedule 3, p. 4 (Conduct para. e).

Agency Response: The Agency disagrees as the Respondents' have truncated the quote, changing the meaning of the language, making it argumentative rather than factual.

Ruling: ACCEPTED IN PART TO THE EXTENT THAT RESPONDENTS ARE REFERRING TO WHAT THE CODE OF CONDUCT ACTUALLY STATES IN FULL – FOR WHICH THE DOCUMENT IS THE BEST EVIDENCE.

23. In addition, an observer must not possess or use any betel nut on the vessel. *Id.* at Schedule 3, p. 5 (Conduct, para. c).

Agency Response: The Agency disagrees as this is a term of an attachment to an MOU between the American Tunaboat Association and the Forum Fisheries Agency and is beyond the scope of this Court.

Ruling: ACCEPTED AND INCORPORATED.

24. In the Notice of Violation, September 29, 2010 ("NOVA"), NOAA charged Respondents with eight violations of NOAA regulations related to setting a purse seine net near or in association with a fish aggregating device ("FAD") under 50 CFR §300.222(w) and 223 (b). Resp. Exh. R. Total penalties sought equal \$872,500. *See* NOVA.

Agency Response: The Agency agrees with the exception that one of the eight counts was for deploying a beacon on a FAD rather than setting on or near a FAD.

Ruling: ACCEPTED AND INCORPORATED IN PART with respect to the date of the issuance of the NOVA and its contents, which speak for themselves; REJECTED to the extent this proposed Finding of Fact misstates the document.

25. Under Count 1, NOAA alleged that Respondents deployed a FAD on August 28, 2009 in violation of law. NOAA assessed a penalty in the amount of \$87,500. *See* NOVA.

Agency Response: The Agency agrees with the exception that it amended the NOVA on the record at the hearing to deploying a beacon on a FAD.

Ruling: ACCEPTED AND INCORPORATED.

26. Under Count 2, NOAA alleged that the vessel set its net within 100 meters of a FAD on August 18, 2009 in violation of applicable law. NOAA assessed a penalty in the amount of \$83,750. *See* NOVA.

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

27. Under Count 3, NOAA alleged the vessel set its net within 50 meters of a FAD on August 22, 2009 in violation of law. NOAA assessed a penalty in the amount of \$140,000, the maximum civil penalty that may be charged for a single violation. *See* NOVA.

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

28. Under Count 4, NOAA alleged the vessel set its net within 75 meters of a FAD on August 24, 2009 in violation of law. NOAA assessed a penalty in the amount of \$80,000. *See* NOVA.

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

29. Under Count 5, NOAA alleged the vessel set its net within 50 meters of a FAD on August 31, 2009 in violation of law. NOAA assessed a penalty in the amount of \$140,000, the maximum civil penalty that may be charged for a single violation. *See* NOVA.

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

30. Under Count 6, NOAA alleged the vessel set its net on a raft in order to capture the fish that had aggregated in association with the raft in violation on August 15, 2009 of applicable law. NOAA assessed a penalty in the amount of \$140,000, the maximum civil penalty that may be charged for a single violation. *See* NOVA.

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

31. Under Count 7, NOAA alleged the vessel set its net on a raft in order to capture the fish that had aggregated in association with the raft on August 17, 2009 in violation of applicable law. NOAA assessed a penalty in the amount of \$98,750. *See* NOVA.

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

32. Under Count 8, NOAA alleged the vessel set its net on a raft in order to capture the fish that had aggregated in association with the raft on September 4, 2009 in violation of law. NOAA assessed a penalty in the amount of \$102,500. *See NOVA.*

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

33. In August of 2009, Jason Morikawa was placed on the AMERICAN TRIUMPH as the observer. Testimony of Jason Morikawa ("Morikawa Test."), Tr. at 15:12-14 (January 31, 2012). He was from the Marshall Islands. Morikawa Test., Tr. at 13:17-19 (January 31, 2012).

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

34. He had also been on the vessel previously for three trips. Testimony of Captain Anthony Black ("Black Test."), Tr. at 121:10-15 (August 27, 2012).

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

35. Mr. Morikawa claimed he attended a two-month training course before undertaking his first trip on a purse seiner. Morikawa Test., Tr. at 14:23-25 (January 31, 2012).

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

36. Mr. Morikawa admitted he had no specific training on the FAD closure in 2009. *Id.* at 21:2-5.

Agency Response: The Agency disagrees. Mr. Morikawa testified that the observer coordinator from the Marshall Islands Marine Resources Authority, Dike, gave him information about the FAD closure. *See TR 21 at 6 – 25 (January 31, 2012 Hearing).*

Ruling: REJECTED. Mr. Morikawa stated that he was not given specific training on the FAD closure in 2009 but Respondents Proposed Finding of Fact neglects to acknowledge that Mr. Morikawa's observer coordinator provided Mr. Morikawa instructions or information about the FAD closure which entailed no fishing on any floating object. *See Tr. at 21:3-22:1 (January 31, 2012).*

37. The Marshall Island Marine Resource Authority did not talk to Mr. Morikawa about the deployment of FADs. *Id.* at 22:8-10.

Agency Response: The Agency agrees that Mr. Morikawa testified to that.

Ruling: ACCEPTED AND INCORPORATED.

38. Mr. Morikawa was provided no information about U.S. regulations regarding the FAD closure before he got on the AMERICAN TRIUMPH. *Id.* at 22:11-14.

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

39. Mr. Morikawa was instructed to keep his work quiet and secret and not report anything “illegal” to the captain. *Id.* at 22:23-23:4; 74:9-12. He never discussed any of his allegations about the deployment of FADs, the use of FADs, or the alleged “bribery” by the fishing master with Captain Black, the person in charge of the AMERICAN TRIUMPH. Morikawa Test., Tr. at 71:21 to 72: 4 (January 31, 2012). He also admitted that he never gave the Captain an opportunity to correct any alleged violations he claims to have observed. *Id.*, Tr. at 74:3-8.

Agency Response: The Agency disagrees for several reasons: 1) the cited portions of the transcript do not support the contentions the Respondents are putting forward; 2) it is argumentative; and 3) several of Mr. Morikawa’s answers were in response to questions asked about a totally different set of U.S. regulations having no bearing whatsoever to these proceedings and well beyond the scope of Mr. Morikawa’s knowledge.

Ruling: ACCEPTED AND INCORPORATED to the extent that the Mr. Morikawa was told to keep his observations of illegal activity secret from the fishing master and the captain of the vessel is accepted (see Tr. at 22:23-23:6 (January 31, 2012)) and that he did not tell Captain Black or the fishing master about his observations (see Tr. at 71:21-72:4 (January 31, 2012)) – to the extent this proposed Finding of Fact seeks to state or imply that Mr. Morikawa was under an obligation to do any such reporting, it is REJECTED.

40. The captain of the AMERICAN TRIUMPH during the charge period was Anthony Black. Testimony of Anthony Black (“Black Test.”), Tr. at 115:10-13 (August 27, 2012). Captain Black has been involved in the fishing industry since approximately 1965, when he got his first license. *Id.* at 116:3-9. Captain Black has an unlimited license and is also a fishing master. *Id.* at 118:19-21.

Agency Response: The Agency agrees with the first sentence, but cannot agree or disagree with the second and third sentence as they are beyond the scope of the Agency’s knowledge.

Ruling: ACCEPTED AND INCORPORATED.

41. Captain Black has a contract with the American Triumph LLC. *Id.* at 119:4-6. He is not paid on the basis of how much fish the vessel catches. *Id.* at 119:18-20.

Agency Response: The Agency cannot agree or disagree with this proposed finding as it is beyond the scope of the Agency's knowledge.

Ruling: ACCEPTED AND INCORPORATED.

42. On the vessel, the fishing master is in charge of the fishing operations. *Id.* at 118:22-119:4; Testimony of Larry Da Rosa, Fleet Manager, ("Da Rosa Test."), Tr. at 183:23-184:10 (August 27, 2012). However, in order to be under the American flag, the vessel must have an American captain and the captain's role is to make sure the fishing master is aware of the laws and observes them. Black Test. Tr. at 119:21-120:12 (August 27, 2012). When Captain Black runs a ship, there is no doubt that he is in charge. *Id.* at 118:22-119:4.

Agency Response: The Agency disagrees as the proposed finding is argumentative rather than factual.

Ruling: ACCEPTED IN PART AND INCORPORATED to the extent of the role of the fishing master and the oversight of operations generally by Captain Black as master of the vessel and his claimed instruction of the fishing master as to the FAD closure and Captain Black's view that there was no doubt he was in charge; but REJECTED to the extent of the particular instructions given the fishing master regarding the closure or the extent of any such instructions.

43. In 2009, when the FAD closure first came out, the fleet manager for the AMERICAN TRIUMPH instructed its captains, including Captain Black, about the FAD closure. The fleet manager told the captains that FADs did not exist for them during the FAD closure – they should not go near them or touch them. Da Rosa Test., Tr. at 181:20-182:15 (August 27, 2012)

Agency Response: The Agency cannot agree or disagree with this proposed finding as it is beyond the scope of the Agency's knowledge.

Ruling: ACCEPTED AND INCORPORATED.

44. Captain Black spoke with the fishing master and he was aware of the FAD closure. Black Test., Tr. at 120:16-24 (August 27, 2012); Agency Exh. 13 at ¶¶6-7 (Memorandum of Interview, Anthony Black by SA Painter, April 3, 2010).

Agency Response: The Agency disagrees. There is no evidence in the record of the fishing master's knowledge.

Ruling: ACCEPTED IN PART AND INCORPORATED to the extent Captain Black claimed he spoke with the fishing master about the FAD closure; **REJECTED** to the extent that this Proposed Finding of Fact states or implies anything about the nature of the extent of the fishing master's knowledge of the FAD closure beyond being "aware" of it.

45. Captain Black and Jason Morikawa had a good relationship. Captain Black met with Mr. Morikawa regularly and he went over every set with Mr. Morikawa, specifically during the FAD closure. *Id.* at 121:18-122:18.

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 states or implies what Captain Black felt was his relationship with Mr. Morikawa and his claim that he went over "just about every set" with Mr. Morikawa. See Tr. at 122:5-18 (August 27, 2012).

46. Except for one occasion, Captain Black and Mr. Morikawa did not talk about seeing any rafts. *Id.* at 122:19-123:8. One time, Captain Black noticed the type of fish that were usually associated with a raft. He mentioned this to Mr. Morikawa, but Captain Black did not see a raft at that time. He asked Mr. Morikawa if he saw a raft and Mr. Morikawa said no. *Id.*

Agency Response: The Agency disagrees as the proposed finding is argumentative rather than factual.

Ruling: REJECTED. Captain Black's testimony generally stated what is offered in this Proposed Finding of Fact, but no date is given for this alleged conversation, nor is there any evidence in the record that this alleged conversation occurred in connection with any of the sets for which Respondents were charged for unlawful fishing.

47. Captain Black was awake for every morning set and wrote the position and time for every set in the morning. *Id.* at 138:6-17.

Agency Response: The Agency disagrees.

Ruling: REJECTED for the reasons given in this Decision.

48. The interpreter on the AMERICAN TRIUMPH during the charging period and at the same time as Mr. Morikawa was Cucu Indra Cahyana. Testimony of Cucu Indra Cahyana ("Cucu Test."), Tr. at 68:5-8 (August 27, 2012).

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

49. Mr. Cahyana graduated from professional high school, for marine school, and is licensed by Indonesia as a second deck officer for fishing vessels. *Id.* at 66:23-67:8.

Agency Response: The Agency cannot agree or disagree with this proposed finding as it is beyond the scope of the Agency's knowledge.

Ruling: ACCEPTED AND INCORPORATED.

50. Mr. Cahyana had experience as a fisherman before he became an interpreter. He worked as crew on fishing vessels and would hold the net, pull the net, and watch for fish. *Id.* at 67:12-20.

Agency Response: The Agency cannot agree or disagree with this proposed finding as it is beyond the scope of the Agency's knowledge.

Ruling: ACCEPTED AND INCORPORATED.

51. Mr. Cahyana speaks four languages: English, Chinese, Philippine, and Indonesian. *Id.* at 68:1-4.

Agency Response: The Agency cannot agree or disagree with this proposed finding as it is beyond the scope of the Agency's knowledge.

Ruling: ACCEPTED AS TO THE FACT THAT HE CLAIMED SUCH LANGUAGE PROFICIENCY- THE DEGREE TO WHICH HE SPOKE SUCH LANGUAGES DOES NOT APPEAR IN THE RECORD.

52. As the ship's interpreter, it was Mr. Cahyana's responsibility to translate between the captain and fishing master and also the chief engineer. He would also translate to the crew if the captain or fishing master asked him to do so. *Id.* at 68:9-15.

Agency Response: The Agency cannot agree or disagree with this proposed finding as it is beyond the scope of the Agency's knowledge.

Ruling: ACCEPTED AND INCORPORATED.

53. Mr. Cahyana would tell what the captain wanted him to the fishing master or the chief engineer without lying. He did not care if the captain or fishing master were angry, he would tell the crew what the captain or fishing master said. He was the messenger. *Id.* at 16-25.

Agency Response: The Agency cannot agree or disagree with this proposed finding as it is beyond the scope of the Agency's knowledge.

Ruling: ACCEPTED AND INCORPORATED to the extent of what Mr. Cahyana claimed was his role on the vessel and how he approached his interpreting duties.

54. Mr. Cahyana considered Mr. Morikawa a “good friend.” Most of the time, they talked about their families and their town when they were on the ship but they did not talk about what happened on the job. *Id.* at 74:2-16.

Agency Response: The Agency disagrees.

Ruling: REJECTED. The record indicates that Mr. Morikawa spoke with the translator about fishing activities on the vessel.

55. The investigator, Kevin Painter, never contacted Mr. Cahyana during the investigation to obtain the translator’s eye-witness views on what happened on the vessel, despite seeing the written statement disputing the observer. *Id.*, Tr. at 73:5-25.

Agency Response: The Agency agrees that Kevin Painter did not contact Mr. Cahyana, but disputes the rest of the proposed finding as argumentative.

Ruling: ACCEPTED AND INCORPORATED IN PART to the extent of SA Painter not contacting Mr. Cahyana and having his statement available as part of the investigation. The remaining is **REJECTED** as argumentative.

56. Mr. Morikawa alleged to officials in the Marshall Islands, at the end of the trip, that the fishing master gave him [a combined total of] \$440 [over] three different occasions as a bribe. Morikawa Test., Tr. at 56:11-13; 59:22-60:21; 62:23-63:7; 64:17-65:18; 66:7-11 (January 31, 2012); Agency Exh. 4 (question 22 and 23) (alleging that the translator was present during one incident).

Agency Response: The Agency disagrees. The total amount from the three separate occasions was \$440, not \$440 each time.

Ruling: ACCEPTED AND INCORPORATED AS MODIFIED.

57. The translator, Mr. Cahyana, denied that he ever saw the fishing master give Jason Morikawa any money. Cahyana Test., Tr. at 75:20-23 (August 27, 2012).

Agency Response: The Agency agrees that Mr. Cahyana said that, but does not agree that it is true.

Ruling: ACCEPTED AND INCORPORATED to the extent that this is what Mr. Cahyana claimed.

58. The fishing master had a practice of giving money to people on the vessel that he thought were “good luck” or when he was “happy.” Cucu Test., Tr. at 75:20-76:12 (August 27, 2012); Black Test., Tr. at 133:9-18; 153:7-155:13 (August 27, 2012).

Agency Response: The Agency cannot agree or disagree with this proposed finding as it is beyond the scope of the Agency's knowledge given that the fishing master did not testify, so there is no way to know his thoughts.

Ruling: ACCEPTED AND INCORPORATED IN PART BUT REJECTED to the extent this Proposed Finding of Fact states or implies that the fishing master gave the money to Mr. Morikawa for any purpose other than to bribe him not to report the FAD sets observed.

59. The Marshall Island officials demanded that the vessel owner pay a penalty of \$200,000 before the AMERICAN TRIUMPH could be released. Da Rosa Test., Tr. at 173:4-11 (August 27, 2012).

Agency Response: The Agency disagrees. The AMERICAN TRIUMPH was not being detained at the time that the vessel owner and fishing master paid a combined penalty of \$200,000. Respondents are mischaracterizing the testimony to which they cite. In fact, the testimony is quite clear that the vessel was not detained pending resolution of this matter. See TR 175 at 11 – 14 (August 27, 2012 Hearing).

Ruling: REJECTED. The testimony does not support Respondents' characterization of the event. The Marshall Islands and the vessel owner agreed to work something out with respect to the bribery allegations. The vessel was allowed to leave port before the agreement concerning the amount of payment was made.

60. Mr. Morikawa received payment of \$2,000 as a result of the information he provided. Resp. Exh. JJ (question 4); Marshall Islands Marine Resources Code of 1977; sec. 104 (Where an individual provides the necessary information relating to a civil or criminal fine or forfeiture against a commercial fishing vessel pursuant to this title, such individual shall receive, or where more than one individual is involved, share, 5 percent of the amount of the fine or \$2,000, which is lesser).

Agency Response: The Agency clarifies that Mr. Morikawa's received payment of \$2,000 for the information he provided related to the incidents during which the fishing master provided money to him. Mr. Morikawa has not and will not receive any payments as a result of the information or testimony he has provided related to the FAD violations.

Ruling: ACCEPTED AND INCORPORATED to the extent that Mr. Morikawa received a \$2,000 reward for his reporting of the fishing master's attempted bribery.

61. Mr. Morikawa claimed he did not know he would receive a reward until after the trip was over. Morikawa Test., Tr. at 66:12-19 (January 31, 2012); Morikawa Test., Tr. at 7:17-25 (August 28, 2012).

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

62. His account is contradicted by his own statements. On or about April 2010, Special Agent Kevin Painter asked Mr. Morikawa about his awareness of receiving a reward for reporting violations on the vessel. Resp. Exh. JJ. Specifically, Special Agent Painter asked:

Prior to making your trip on the American Triumph, were you ever instructed to try and note as many violations as you can, because you would receive a percentage of the fines or penalties involved? Resp. Exh. JJ at NOAA 000215.

Agency Response: The Agency disagrees with Respondents' characterization.

Ruling: REJECTED.

63. At one point Mr. Morikawa responded to this question:

Yes, Kevin, everything I said is true but too bad I didn't bring any camera to get more solid evidences. Resp. Exh. JJ at NOAA 000215.

Agency Response: The Agency disagrees with the Respondents' characterization, but agrees that Mr. Morikawa wrote that.

Ruling: ACCEPTED AND INCORPORATED to the extent that Mr. Morikawa wrote the cited response. REJECTED to the extent this response indicates that Mr. Morikawa had advanced knowledge of the possibility of a reward for the reasons given in this Decision.

64. Mr. Morikawa changed his answer to this question on the list of questions that he signed on April 7, 2010 and said:

I didn't know about receiving any reward money for reporting violations, until after I returned from my trip on the American Triumph. After reporting the violations I was made aware of the possibility of an award. Resp. Exh. JJ at NOAA 000020.

Agency Response: The Agency disagrees with the Respondents' characterization, but agrees that Mr. Morikawa wrote that.

Ruling: ACCEPTED AND INCORPORATED.

65. Mr. Cahyana testified that he had a conversation with Mr. Morikawa about whether it was possible that he could get a reward for turning a vessel in for a violation. Cucu Test., Tr. at 99:19-100:8 (August 27, 2012) ("Yes, Jason told me about that.")

Agency Response: The Agency disagrees.

Ruling: REJECTED AS NOT CREDIBLE.

66. Captain Black also had a conversation with Mr. Morikawa about rewards for reporting violations on vessels. Black Test., Tr. at 123:19-124:18 (August 27, 2012). Captain Black was certain that Jason Morikawa understood, while on the vessel, that he would receive a reward for reporting violations, including for bribery.

Agency Response: The Agency disagrees.

Ruling: REJECTED AS NOT CREDIBLE.

67. Mr. Cahyana challenged Mr. Morikawa's credibility and testified that Mr. Morikawa's statements about alleged violations by the AMERICAN TRIUMPH were not true. Cucu Test., Tr. at 72:6-25.

Agency Response: The Agency agrees that Mr. Cahyana testified that Mr. Morikawa's statements were not true; however, the Agency asserts that Mr. Cahyana's own credibility was lessened by his testimony, not Mr. Morikawa's.

Ruling: Mr. Cahyana's denial of the truth of Mr. Morikawa's testimony and statements about alleged violations is ACCEPTED AND INCORPORATED but found not credible for the reasons given in this Decision.

68. Mr. Cahyana prepared a statement about the events on the AMERICAN TRIUMPH:

....I was on here the trip that Jason the Observer was. The Captain is very honest about making sets. He did not want to do anything wrong. I do not understand why Jason say these things. They are not true. We do not make sets on rafts. I never see raft in the net or by the boat. I tell the truth. Resp. Exh. AAAAAA (emphasis added)

Agency Response: The Agency agrees that there is a statement attributed to Mr. Cahyana of which the above is a portion.

Ruling: The fact of Mr. Cahyana's statement is ACCEPTED AND INCORPORATED but rejected as not credible for the reasons given in this Decision.

69. Mr. Cahyana reinforced this statement during the hearing. Cucu Test., Tr. at 72:3-25 (August 27, 2012).

Agency Response: The Agency agrees that Mr. Cahyana continued to assert the same positions as those in the statement attributed to Mr. Cahyana.

Ruling: The fact of Mr. Cahyana's continued denial of any unlawful fishing activities is ACCEPTED AND INCORPORATED but rejected as not credible for the reasons given in this Decision.

70. The investigator, Kevin Painter, never contacted Mr. Cahyana during the investigation to obtain the observer's eye-witness views on what happened on the vessel, despite seeing the written statement disputing the observer. *Id.* at 73:5-25.

Agency Response: The Agency disagrees with the characterization in this proposed finding as argumentative and notes that Special Agent Painter did obtain the "observer's eye-witness views on what happened on the vessel."

Ruling: ACCEPTED AND INCORPORATED to the extent of SA Painter's not contacting Mr. Cahyana directly or interviewing him as part of the investigation.

71. Mr. Cahyana saw Mr. Morikawa chewed betel nut while on the vessel. Cucu Test., Tr. at 74:20-75:19 (August 27, 2012).

Agency Response: The Agency disagrees.

Ruling: REJECTED as not credible.

72. Mr. Morikawa first reported he had a "great" trip while on the AMERICAN TRIUMPH. Agency Exh. 4 at 38; Morikawa Test., Tr. at 40:21-25 (August 28, 2012). He later changed the characterization of the trip and said by "great" trip, he really meant he had a "safe" trip. *Id.* at 39:25-40:25; *see also* Morikawa Test., Tr. at 133:9-12 (January 31, 2012).

Agency Response: The Agency disagrees with the Respondents' characterization in this proposed finding as it is argumentative, not factual. Mr. Morikawa did report it as a great trip and explained that by that he meant a safe trip as well as other things.

Ruling: ACCEPTED IN PART AND INCORPORATED to the extent of Mr. Morikawa's statement and testimony but REJECTED to the extent of any implications of Mr. Morikawa's lack of credibility concerning the observed unlawful fishing operations.

73. NOAA's claim that Respondents deployed a FAD is based on information provided by the observer, Jason Morikawa. Mr. Morikawa claimed that he entered into his daily log for the time 7:10 in the morning the reference 15D, which corresponds to "Deploy Radio Beacon" on the Activity Code on the Form PS-2. Agency Exh. 3 at page 19 of 30; Morikawa Test., Tr. at 24:5-10 (January 31, 2012). He asserted that the AMERICAN TRIUMPH was investigating a fish aggregating device or "raft" that had a radio beacon attached, which he claimed belonged to another vessel, the KOO'S 108. *Id.* at 25:2-22. He then claimed that the AMERICAN TRIUMPH "replaced" that buoy with one of the vessel's own buoys. Mr. Morikawa also made reference to his hand-written daily diary where the vessel retrieved a "beacon" and "deployed own #39." Agency Exh. 1, at 32; Morikawa Test., Tr. at 26:15-27:6 (January 31, 2012). In his daily diary, Mr. Morikawa also stated he was on the bridge with the translator, Indra Cahyana, during the events just discussed. Agency Exh. 1 at 32. At no point, however, did Mr. Morikawa claim that the vessel *deployed* a FAD.

Agency Response: The Agency disagrees with this proposed finding as argument rather than findings of fact.

Ruling: The fact and nature of Mr. Morikawa's testimony is ACCEPTED AND INCORPORATED.

74. The translator on the AMERICAN TRIUMPH specifically recalled the "buoy deployment" incident. He explained that, on August 28, 2009, when the crew was searching for fish in the morning, they found a raft. The crew told the fishing master they found a raft. Cucu Test., Tr. at 78:8-79:21 (August 27, 2012); Agency Exh. 13 at ¶8(H).

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED.

75. The raft was hooked alongside the AMERICAN TRIUMPH. Cucu Test., Tr. at 78:8-79:21 (August 27, 2012); Black Test., Tr. at 142:8-21 (August 27, 2012); Agency Exh. 13 at ¶8(H).

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED.

76. The fishing master went to change the beacon on the raft, but the Captain ordered Mr. Cahyana to tell the fishing master he could not change the buoy. Cucu Test., Tr. at 78:8-80:1 (August 27, 2012); Black Test., Tr. at 142:8-143:10 (August 27, 2012); Agency Exh. 13 at ¶8(H).

Agency Response: The Agency disagrees.

Ruling: REJECTED for the reasons given in this Decision.

77. The captain said to tell the fishing master that if he wanted the buoy, he could take the buoy and put it on the boat, but could not change it and deploy it in the water. Otherwise, he would have to release it unchanged. Cucu Test., Tr. at 78:8-79:21 (August 27, 2012); Black Test., Tr. at 142:8-143:10 (August 27, 2012); Agency Exh. 13 at ¶8(H).

Agency Response: The Agency disagrees.

Ruling: REJECTED for the reasons given in this Decision.

78. Mr. Cahyana went to the fishing master and told him what the captain said to tell him and the fishing master let the raft go. They put the buoy back and let the raft go. They did not do anything with the buoy. Mr. Cahyana observed that the vessel did not change a beacon. *Id.* at 79:3-7; 79:22-80:1 ("we don't do anything with that buoy after all...we don't change it").

Agency Response: The Agency disagrees.

Ruling: REJECTED for the reasons given in this Decision.

79. The raft was released with no changes made. Cucu Test., Tr. At 79:22-24 (August 27, 2012); Agency Exh. 13 at ¶8(H).

Agency Response: The Agency disagrees.

Ruling: REJECTED for the reasons given in this Decision.

80. The captain confirmed Mr. Cahyana's testimony in his written statement and at the hearing. Specifically, Captain Black wrote in a statement to the NOAA investigator that: "A FAD was hooked alongside the vessel and I instructed the fishing master that he could do one (1) of two (2) things. Either pull it out of the water entirely, retaining it on board for use after the [FAD] closure, or release it. It was released with no changes made." Agency Exh. 13 at ¶8(H); Black Test., Tr. at 142:8-143-10. (August 27, 2012).

Agency Response: The Agency disagrees except that it agrees that Captain Black provided a statement that included the quoted language.

Ruling: ACCEPTED AND INCORPORATED with respect to Captain Black's denial but REJECTED as not credible.

81. No FAD was deployed.

Agency Response: The Agency agrees that a FAD was not deployed, but asserts that a beacon on a FAD was deployed.

Ruling: ACCEPTED AND INCORPORATED with respect to no FAD being deployed but REJECTED to the extent this Proposed Finding of Fact states or implies that Respondents did not service the FAD in question by replacing another vessel's beacon with one of its own.

82. There was no set and no fish caught.

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

83. NOAA based its allegation that Respondents made a set within 100 meters of a FAD on the testimony and records of Jason Morikawa. In his trip diary, he claims that at 10:58 he "saw a raft 100 meters from our boat." Agency Exh. 1 at p. 12. He further claimed that he told the translator about the "raft" and that the vessel later "do a set near the raft." Morikawa Test., Tr. at 28:10-25 (January 31, 2012). He also noted "raft sght 100 meters" for that time and date in his daily log. Agency Exh. 3 at 8 of 30.

Agency Response: The Agency disagrees with this proposed finding as argument rather than findings of fact.

Ruling: The fact and nature of Mr. Morikawa's testimony is **ACCEPTED AND INCORPORATED**.

84. Mr. Morikawa, however, did not otherwise describe the "raft" other than using that word. In fact, his daily log contains a contradictory entry. His entries indicate that he sighted a raft 100 meters away at 10:58. Agency Exh. 3 at 8 of 30. On the next line, his entries indicate a set (#10) was made (activity code: 1) and the box for school association was marked with a "2". *Id.*

Agency Response: The Agency disagrees with this proposed finding as argument rather than findings of fact.

Ruling: **ACCEPTED AND INCORPORATED** to the extent of Mr. Morikawa's log entries but Respondents' contention that Mr. Morikawa's entries were contradictory is **REJECTED** for the reasons given in this Decision.

85. The entry "2" related to this charge means the fish were in a "free school," not one associated with a FAD, which would require use of either of the following numbers: 3, 4, or 5 from the school association codes found on the lower right hand portion of the daily log form (PS-2). Agency Exh. 3 at 8 of 30. Mr. Morikawa's entries indicate that he saw a FAD but that the vessel set on a "free school" of tuna, not a FAD. *Id.*

Agency Response: The Agency disagrees.

Ruling: **ACCEPTED AND INCORPORATED** to the extent of Mr. Morikawa's log entries but Respondents' contention that Mr. Morikawa's entries indicate no unlawful set was made is **REJECTED** for the reasons given in this Decision.

86. Mr. Morikawa also stated that he showed the FAD to the translator but that he did not know if the fishing master or the Captain saw the FAD. Morikawa Test., Tr. at 28:15-19 (January 31, 2012).

Agency Response: The Agency agrees.

Ruling: **ACCEPTED AND INCORPORATED**.

87. The translator, Mr. Cahyana, recalled that Mr. Morikawa told Mr. Cahyana that there was a raft 100 meters from the vessel. Cucu Test., Tr. at 83:1-12 (August 27, 2012).

Agency Response: The Agency agrees.

Ruling: **ACCEPTED AND INCORPORATED**.

88. Mr. Cahyana asked Mr. Morikawa where the raft was but when Mr. Morikawa started looking for it again, he could not find it. *Id.*

Agency Response: The Agency disagrees.

Ruling: REJECTED as not credible.

89. Mr. Cahyana could not find a raft either. Mr. Cahyana went up to the mast where the big binoculars are but he could not see anything. *Id.* at 83:13-24. No one else reported seeing a raft. *Id.* at 84:18-85:15.

Agency Response: The Agency disagrees.

Ruling: REJECTED as not credible.

90. At no time during the trip when the skiff boat was released, did the captain see or set on a FAD. Black Test., Tr. at 140:21-141:4 (August 27, 2012); Agency Exh. 13 at ¶¶8(C); 11.

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED as the fact of Captain Black's denial, but REJECTED as not credible.

91. At no time during the trip did anyone report to the captain that there was a FAD to be within one mile of the vessel. The captain said that no FAD was reported by anyone to be within one mile of the vessel. *Id.*

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED as the fact of Captain Black's denial, but REJECTED to the extent this Proposed Finding of Fact states or implies that an unlawful FAD set was not made.

92. No yellowfin or bigeye were caught. Agency Exh. 12 at p. 1 (entry 8/17 (UTC) at 23:09); *see also* Resp. Exh. DDDDD (no bigeye caught for entire trip).

Agency Response: The Agency agrees that no bigeye were caught.

Ruling: ACCEPTED AND INCORPORATED to the extent that this Proposed Finding of Fact relates to this specific set.

93. Mr. Morikawa claimed that the vessel set its net near a "raft," which he did not otherwise describe, that was approximately 50 meters from the corkline. Morikawa Test., Tr. at 30:23-31:12 (January 31, 2012).

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

94. Mr. Morikawa claimed that vessel was investigating a “free school” at 14:33 and he saw the raft. *Id.* His diary includes an entry that he saw a raft “and has fish underneath.” Agency Exh. 1 at 20. He also made an entry in his daily log for this date and time: “raft sight about 50 meter.” Agency Exh. 3 at 12 of 30.

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

95. Once again, in the next line, contradicted his claims when he recorded the school association (for set #18) as “2,” meaning feeding on baitfish, and not 3, 4 or 5, which would have signified that the fish were associated with a floating object or FAD. *Id.*

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED to the extent of Mr. Morikawa’s log entries but Respondents’ contention that Mr. Morikawa’s entries were contradictory is REJECTED for the reasons given in this Decision.

96. Mr. Cahyana, however, did not see a raft. Cucu Test. Tr. at 86:5-15 (August 27, 2012).

Agency Response: The Agency disagrees.

Ruling: REJECTED as not credible.

97. No one else saw a raft on that day. *Id.* If the crew had seen a raft, they would have told the fishing master or Mr. Cahyana and the captain. *Id.*

Agency Response: The Agency disagrees.

Ruling: REJECTED as not credible.

98. At no time during the trip when the skiff boat was released, did the captain see or set on a FAD. Black Test., Tr. at 141:13-21 (August 27, 2012); Agency Exh. 13 at ¶¶8(E), 11.

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED as the fact of Captain Black’s denial.

99. At no time during the trip did anyone report to the captain that there was a FAD to be within 1 mile of the vessel. The captain said that no FAD was reported by anyone to be within one mile of the vessel. *Id.*

Agency Response: The Agency disagrees.

Ruling: **ACCEPTED AND INCORPORATED as the fact of Captain Black's denial.**

100. No bigeye were caught. Agency Exh. 12 at p. 2 (entry 8/22 at 2:36); *see also* Resp. Exh. DDDDD (no bigeye caught for entire trip).

Agency Response: The Agency agrees.

Ruling: **ACCEPTED AND INCORPORATED to the extent that this Proposed Finding of Fact relates to this specific set.**

101. On August 24, 2009, the observer claimed the crew was investigating a free school feeding on bait fish. He contends he saw a raft near the vessel approximately 75 meters away and the vessel then made a set near the raft. Morikawa Test., Tr. at 34:4-35:3 (January 31, 2012). He then said the vessel set its net "near the raft." *Id.*

Agency Response: The Agency agrees.

Ruling: **ACCEPTED AND INCORPORATED.**

102. Mr. Morikawa recorded these observations in his diary and in his daily log. Agency Exh. 1 at p. 24; Agency Exh. 3 at 14 of 30. He recorded the set (#22) as a "2," meaning feeding on bait fish, and not a 3, 4, or 5, which would have signified a FAD set. Agency Exh. 3 at 14 of 30.

Agency Response: The Agency disagrees.

Ruling: **ACCEPTED AND INCORPORATED to the extent of Mr. Morikawa's log entries but Respondents' contention that Mr. Morikawa's entries indicate no unlawful set was made is REJECTED for the reasons given in this Decision.**

103. The set was a "skunk" set, meaning no fish were caught. *Id.*

Agency Response: The Agency agrees.

Ruling: **ACCEPTED AND INCORPORATED.**

104. Mr. Cahyana, however, did not see any raft. Mr. Cahyana, who has experience as a fisherman, explained that it is not possible for there to have been a raft if there was a free school feeding on bait fish. Small bait fish do not stay with a raft. Cucu Test., Tr. at 86:5-88:3.

Agency Response: The Agency disagrees.

Ruling: REJECTED as not credible.

105. At no time during the trip when the skiff boat was released, did the captain see or set on a FAD. Black Test., Tr. at 141:25-142:7 (August 27, 2012 Agency Exh. 13 at ¶¶8(F), 11.

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED as the fact of Captain Black's denial, but REJECTED to the extent this Proposed Finding of Fact states or implies that an unlawful FAD set was not made.

106. At no time during the trip did anyone report to the captain that there was a FAD to be within one mile of the vessel. The captain said that no FAD was reported by anyone to be within one mile of the vessel. *Id.*

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED as the fact of Captain Black's denial, but REJECTED to the extent this Proposed Finding of Fact states or implies that an unlawful FAD set was not made.

107. No fish were caught. Agency Exh. 3 at 14 of 30; Agency Exh. 12 at p. 2.

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

108. On August 31, 2009, Mr. Morikawa wrote in his diary that he saw a FAD. Agency Exh. 1 at 37. He wrote that the vessel "investigated free school, saw raft 50 meters from the raft and we do a set at 1503 near the raft." *Id.*

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

109. He did not, however, record these "observations" in his daily log. Agency Exh. 3 at 22 of 30. He recorded in his daily log that set #32 at 1503 that day was associated ("2") with a school of tuna feeding on baitfish. *Id.*

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED to the extent of Mr. Morikawa's log entries but Respondents' contention that Mr. Morikawa's entries indicate no unlawful set was made is REJECTED for the reasons given in this Decision.

110. Mr. Morikawa claimed he pointed out the raft to the translator. Morikawa Test., Tr. at 48:17-49:13 (January 31, 2009). However, the translator, Mr. Cahyana confirmed no FAD set was made. Cucu Test., Tr. at 98:14-99:3 (August 27, 2012).

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED with respect to Mr. Morikawa's pointing the raft out to the translator; REJECTED as to the credibility of Mr. Cahyana's denial no FAD set was made.

111. The captain also confirmed that no FAD set was made. At the time the skiff boat was released, no FAD was observed by the captain nor was one reported by anyone to be within one mile of the vessel. Black Test., Tr. at 143:11-17 (August 27, 2012); Agency Exh. 13 at ¶8(J).

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED as the fact of Captain Black's denial, but REJECTED to the extent this Proposed Finding of Fact states or implies that an unlawful FAD set was not made.

112. No set was made on a FAD. Agency Exh. 13 at ¶11.

Agency Response: The Agency disagrees.

Ruling: REJECTED.

113. No bigeye were caught. *See* Resp. Exh. DDDDD (no bigeye caught for entire trip).

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED to the extent that this Proposed Finding of Fact relates to this specific set.

114. On August 15, 2009, the set was made at 5:32 a.m. Agency Exh. 3 at p. 5 of 30.

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

115. Mr. Morikawa claimed that, at 04:59 in the morning he “saw” a buoy and that the vessel investigated the buoy and saw, from sonar, that there was fish under the “raft” to which it was attached. Morikawa Test., Tr. at 39:20-40:16 (January 31, 2012).

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED as to the nature of Mr. Morikawa’s testimony.

116. He admitted, however, that at 5:00 in the morning, it was still dark. Morikawa Test., Tr. at 86:9-12 and 114:19-20 (January 31, 2012).

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

117. He was not certain where the buoy was, perhaps 10 miles away. *Id.* at 112:24-113:6.

Agency Response: The Agency disagrees.

Ruling: REJECTED for the reasons given in this Decision. Mr. Morikawa was not speaking about that particular buoy but was stating that the range finder to track the buoy does not give discrete distance but picks up signals from up to 10 miles away.

118. The vessel, however, could not have used sonar to detect fish under a nearby raft. Cucu Test., Tr. at 94:14-22 (August 27, 2012).

Agency Response: The Agency disagrees.

Ruling: REJECTED.

119. Mr. Morikawa also claimed that the vessel “deployed aggregating lights from the vessels.” *Id.* at 40:17-21. He first claimed that these lights were lowered from the AMERICAN TRIUMPH below the surface of the water. *Id.* at 41:2-7. However, he later testified that the lights on the AMERICAN TRIUMPH were on the port side of the vessel and not deployed in the water. Morikawa Test., Tr. at 113:7-20 (January 31, 2012).

Agency Response: The Agency disagrees.

Ruling: REJECTED for the reasons given in this Decision. Respondents’ contentions regarding Mr. Morikawa’s testimony are not complete. Mr. Morikawa very specifically stated the lights were deployed in the water when asked for clarification by the court reporter.

120. Mr. Morikawa said that next the crew lowered a work boat with its own lights which then, after the net was set, pulled the raft from the net. *Id.* at 42:2-9. In his daily log, he stated that this set (#3) was made in association with a FAD (“4”). Agency Exh. 3 at p. 5 of 30. Mr. Morikawa claimed it was impossible to set on a “free school” in the morning. Morikawa Test., Tr. at 44:24-45:6 (January 31, 2012).

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED.

121. The translator, Mr. Cahyana did not see either a buoy or a raft. Cucu Test., Tr. at 96:13-18 (August 27, 2012).

Agency Response: The Agency disagrees.

Ruling: REJECTED as not credible.

122. The captain disputes Mr. Morikawa’s version of the events. In a written statement, signed by the captain, he told the NOAA investigator that “[n]o FAD set was made. This was fish under the boat. The work boats were deployed as a normal course of operations to assist the fishing master in positioning the net. The lights deployed on the work boat were deck and working lights used for the safety of the crew as this set was made in the dark.” Agency Exh. at ¶¶8(A), 11.

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED as the fact of Captain Black’s denial, but REJECTED to the extent this Proposed Finding of Fact states or implies that an unlawful FAD set was not made.

123. Captain Black explained that in one of the first sets they made, a crew member turned on a submersible light, which he ordered be turned off. Both Mr. Morikawa and Mr. Cahyana were there. Black Test., Tr. at 139:7-14. Captain Black told Mr. Cahyana to tell the fishing master to turn off the light. It was probably less than one minute when the light was turned out. *Id.* at 139:15-22. Captain Black told the crew member “that they could not use submersible lights during the [FAD] closure and that policy was strictly adhered to.” Agency Exh. 13 at 11.

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED as the fact of Captain Black’s denial, but REJECTED to the extent this Proposed Finding of Fact states or implies that an unlawful FAD set was not made.

124. On no fish-under-the-boat set did the crew or fishing master use a light in the water. Agency Exh. 13 at ¶8(A). The Captain told them they could not do so. They followed

the Captain's instructions not to use lights in the water. Black Test., Tr. at 139:23-140:6 (August 27, 2012).

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED as the fact of Captain Black's denial, but REJECTED to the extent this Proposed Finding of Fact states or implies that an unlawful FAD set was not made.

125. No bigeye were caught. *See* Resp. Exh. DDDDD (no bigeye caught for the entire trip).

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED to the extent this Proposed Finding of Fact relates to this particular set.

126. On August 17, 2009, the set was made at 5:33 a.m. Agency Exh. 3 at p. 7 of 30.

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

127. Mr. Morikawa claimed he saw a buoy and a raft at 4:38 in the morning of August 17, 2009. Morikawa Test., Tr. at 45:18-46:5 (January 31, 2012).

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

128. He claimed the vessel located the buoy and raft with a "track finder." *Id.* Buoy numbers, however, cannot be read on the track finder, only frequencies, and Mr. Morikawa could not have seen the buoy numbers at that time of day. Cucu Test., Tr. at 96:20-97:18 (August 27, 2012).

Agency Response: The Agency disagrees.

Ruling: REJECTED for the reasons stated in this Decision.

129. Mr. Morikawa also claimed that the vessel used "aggregating lights" on the port side of the AMERICAN TRIUMPH and "aggregating lights" on the work boat to make a set. Morikawa Test., Tr. at 47:1-40 (January 31, 2012).

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

130. Mr. Morikawa's daily log shows school association for this set (#7) as "4", or a drifting FAD. Agency Exh. 3 at 7 of 30.

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

131. Mr. Morikawa claimed in his diary that he talked to Captain Black about this set but the Captain said it was a "fish under the boat" set. Agency Exh. 1 at 10. He then said he told the translator it was a raft. *Id.*

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

132. The captain, in a signed statement, explained that this set was standard fish-under-the-boat. The fish were caught using standard deployment of workboats and working lights to assist the fishing master in the position. Black Test., Tr. at 140:7-20; Agency Exh. 13 at ¶¶8(B), 11.

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED as the fact of Captain Black's denial, but REJECTED to the extent this Proposed Finding of Fact states or implies that an unlawful FAD set was not made.

133. The Captain did not observe a FAD come up in the net, nor was any FAD reported to the Captain by anyone on board the vessel. *Id.*

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED as the fact of Captain Black's denial, but REJECTED to the extent this Proposed Finding of Fact states or implies that an unlawful FAD set was not made.

134. No bigeye were caught. *See* Resp. Exh. DDDDD (no bigeye caught for the entire trip).

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED to the extent this Proposed Finding of Fact relates to this particular set.

135. The set on September 4, 2009 was made at 5:32 a.m. Agency Exh. 3 at p. 26 of 30.

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

136. Mr. Morikawa claimed that the vessel investigated and located a buoy in the dark in the morning of September 4, 2009 using the “track finder” and then, using aggregating lights and work boats, made a set on a raft. Morikawa Test., Tr. at 35:17-38:23 (January 31, 2012); Agency Exh. 3 at 26 of 30; Agency Exh. 1 at 43-44.

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

137. He claimed in his diary that he pointed out the raft to the translator. Agency Exh. 1 at 44.

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

138. The captain disputed that the vessel set on a raft. No set was made on a FAD. This was standard fish-under-the-boat set and standard deployment of the workboats using working and safety lights to assist the fishing master in marking his position. Black Test., Tr. at 143:18-145:12 (August 27, 2012); Agency Exh. 13 at ¶¶8(K), 11.

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED as the fact of Captain Black’s denial, but REJECTED to the extent this Proposed Finding of Fact states or implies that an unlawful FAD set was not made.

139. The crew did not put any aggregating lights in the water during this set. Black Test., Tr. at 144:11-12 (August 27, 2012).

Agency Response: The Agency disagrees.

Ruling: REJECTED for the reasons given in this Decision.

140. No bigeye were caught. *See* Resp. Exh. DDDDD (no bigeye caught for the entire trip).

Agency Response: The Agency disagrees.

Ruling: ACCEPTED AND INCORPORATED to the extent this Proposed Finding of Fact relates to this particular set.

Respondents' Proposed Conclusions of Law:

A. NOAA Has Failed to Meet its Burden of Proof for a Penalty

141. 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 (6th 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 as a Principle of Law.

142. 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 as a Principle of Law.

143. Under NOAA's regulations, all evidence that is relevant, material, reliable and probative is admissible at the hearing. 50 CFR §904.251(a)(2).

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED as a Principle of Law.

144. The trier of fact may consider any matter that has a tendency to prove or disprove the truthfulness of a witness' testimony at trial.

Agency Response: The Agency disagrees with this proposed finding as argument rather than conclusion of law.

Ruling: ACCEPTED AND INCORPORATED as a Principle of Law.

145. 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. *See Ninth Circuit Model Civil Jury Instructions No. 1.11.*

Agency Response: The Agency disagrees with this proposed finding as argument rather than conclusion of law.

Ruling: ACCEPTED AND INCORPORATED as a Principle of Law.

146. As explained below, Mr. Morikawa's testimony and evidence have been impeached with respect to each of Counts 1-8. Thus, NOAA has failed to prove any count by a preponderance of the evidence.

Agency Response: The Agency disagrees.

Ruling: REJECTED except for Count 3 for the reasons given in this Decision.

B. Jason Morikawa's Testimony and Evidence Lacks Credibility

147. Mr. Morikawa had an economic interest in claiming that violations were committed by Respondents, which reflects his bias. Under Marshall Islands Marine Resources Code of 1977, Sec. 104, individuals reporting information relating to a civil or criminal fine or forfeiture against a commercial fishing vessel, shall receive 5% of the amount of the fine or \$2,000, whichever is lesser. Resp. IIIII.

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.

148. Mr. Morikawa claimed that the fishing master bribed him and reported this alleged bribery to Marshall Islands officials after the trip ended. *See Respondents' Proposed Findings of Fact ("Resp. FF") No. 56.* He then received a payment for \$2,000 for as a result of the information he provided. Resp. FF No. 60.

Agency Response: The Agency disagrees with this proposed finding as argument rather than conclusion of law.

Ruling: ACCEPTED AND INCORPORATED as a Finding of Fact.

149. Mr. Morikawa's own testimony and evidence presents a conflicting account of events. *See* Resp. FF No. 61-64. Mr. Morikawa testified that he did not know he would receive a "reward" for providing information about possible violations of law during the fishing trip until after the trip was over. Resp. FF No. 61.

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.

150. However, this testimony is not consistent with statements he made to the NOAA investigator. In response to a direct question from NOAA special agent Painter, he responded in two opposite ways. Special Agent Painter asked him:

Prior to making your trip on the American Triumph, were you ever instructed to try and note as many violations as you can, because you would receive a percentage of the fines or penalties involved? Resp. Exh. JJ at NOAA 000215.

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.

151. Mr. Morikawa responded: "Yes, Kevin, everything I said is true but too bad I didn't bring any camera to get more solid evidences." Resp. Exh. JJ at NOAA 000215. Yet, he separately responded to the same question and changed his answer and said: I didn't know about receiving any reward money for reporting violations, until after I returned from my trip on the American Triumph. After reporting the violations I was made aware of the possibility of an award." Resp. Exh. JJ at NOAA 000020; *see* Resp. FF Nos. 62-64.

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.

152. However, neither the Captain nor the translator, whose testimony was consistent with each other, believed that Mr. Morikawa did not know about receiving a reward until after the trip was over. Resp. FF Nos. 65-66. They each had discussions with him while on the trip where he acknowledged the possibility of receiving a reward for reporting violations. *Id.*

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.

153. Mr. Morikawa's lack of credibility is also reflected in inconsistent observations and testimony regarding whether or not he saw any FADs or FAD violations. *See e.g.,* Resp. FF

Nos. 83-85 (Count 2); 94-95 (Count 3); 102 (Count 4); 109 (Count 5); 115-120 (Count 6); 128-131 (Count 7).

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.

154. Mr. Morikawa's violation of the Observer Code of Conduct also shows his lack of credibility. He violated the observer program mandate by failing to report or discuss any possible illegal activities to the captain. Resp. FF Nos. 20, 39. He also violated the observer code of conduct by accepting money from the fishing master and by chewing betel nut on the vessel. Resp. FF Nos. 21-23, 39, 56, and 71.

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.

155. Mr. Morikawa's testimony is unreasonable given the totality of the evidence presented in this case. Mr. Morikawa's original characterization of the trip does not support his claims that he was bribed or observed any violations. Upon completion of his final Trip Report, Mr. Morikawa stated: "I [had] great trip." Resp. FF No. 72. It is questionable that he would have made this statement if in fact he believed he had been bribed or harassed. The evidence as to Mr. Morikawa's state of mind does not indicate that he believed, at all, that he had been bribed.

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.

156. In contrast, both the translator and Captain presented a credible and consistent account of the trip and dispute Mr. Morikawa's claims for each of the alleged violations. Mr. Cahyana submitted a statement during the investigation challenging Mr. Morikawa's claims. Resp. FF No. 68. He was never contacted by the NOAA investigator to discuss his statement. Resp. FF No. 70. In contrast to Mr. Morikawa's version of the events, which has changed several times throughout his written reports, testimony, and interviews with Kevin Painter, Captain Black's and Mr. Cahyana's version of the trip are consistent and support a finding that the vessel did not deploy or set on or near any FADs. *See* Resp. FF Nos. 74-81 (Count 1); 87-91 (Count 2); 96-99 (Count 3); 104-106 (Count 4); 110-112 (Count 5); 121-124 (Count 6); 132-133 (Count 7) and 138-139 (Count 8). Neither of their testimony has been impeached.

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.

157. NOAA only presented one percipient witness, Mr. Morikawa, to testify as to the “evidence” in support of the eight violations alleged against Respondents. As demonstrated above, his inconsistent, biased, and changing testimony demonstrates a lack of credibility as to the facts underlying NOAA’s charges. In contrast, the testimony of both Captain Black and Mr. Cahyana is consistent with each other and more reliable than that of Mr. Morikawa. As a result, NOAA has failed to prove by a preponderance of evidence the charges alleged in each of Counts 1 through 8 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.

C. NOAA Regulations are Unconstitutionally Vague and Unenforceable

158. 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* Resp. FF No. 13.

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.

159. 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* Resp. FF No. 14. 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.

D. NOAA Regulations Violate the APA by being made Immediately Effective

160. Under the Administrative Procedure Act, publication of agency final regulations “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 on the Administrative Procedure Act requirements.

Ruling: REJECTED for the reasons given in this Decision.

161. NOAA published its final FAD regulations on August 4, 2009. Agency Exh. 8. The Federal Register Notice said that the regulation was effective as of August 4, 2009 for those provisions that prohibited setting on, near or in association with FADs or deploying or serving FADs. *Id.* at 38544. The agency claimed that “there was good cause to waive the 30-day delay in effective date” for these provisions under .” 5 U.S.C. §553(d). *Id.* at 38552.

Agency Response: The Agency agrees.

Ruling: ACCEPTED AND INCORPORATED.

162. NOAA, however, lacked good cause to immediately implement the final regulations and not wait the statutorily required 30-day delay period after they were published in the Federal Register.

Agency Response: The Agency disagrees.

Ruling: REJECTED for the reasons given in this Decision.

163. Thus, because NOAA failed to comply the requirement of the Administrative Procedure Act, the regulations cannot be enforced in the circumstances of this case.

Agency Response: The Agency disagrees.

Ruling: REJECTED for the reasons given in this Decision.

E. NOAA Failed to Support the Assessment of Any Penalty

164. 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.

165. 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.

166. Here, the purpose of the FAD regulations was to protect juvenile bigeye and yellowfin tuna. The evidence indicates, however, that the AMERICAN TRIUMPH caught no bigeye tuna on this trip and only 20 tons of yellowfin, which could have been caught on the days on which there were no violations of the FAD regulations. Resp. Exh. DDDDD (Invoice #7 dated September 15, 2009). The impact on the yellowfin stock in the Pacific of catching 20 tons is also inconsequential, as a matter of conservation concern. The fishing activity at issue in connection with the charges in this case had no impact, at all, on the bigeye tuna population.

Agency Response: The Agency disagrees with this proposed finding as argument rather than conclusion of law.

Ruling: ACCEPTED IN PART AND REJECTED IN PART for the reasons given in this Decision.

167. 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.

168. 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.⁵³

Agency Response: The Agency disagrees with this proposed finding as argument rather than conclusion of law.

Ruling: ACCEPTED AND INCORPORATED to the extent that the Commission adopted a clarifying measure reflected in CCM 2009-02. The rest is reject as argumentative.

⁵³ Respondents dispute that any penalty be assessed in light of the evidence presented at the hearings. However, a penalty, if any, should be based on the value of the yellowfin tuna that was caught, if any, on the day the violation was alleged to have occurred. The total price, and average price per ton, received by the owner of the AMERICAN TRIUMPH is set forth in Agency Exh. 17, in the Response to Interrogatory #3. The evidential support for the total price, and price per ton, is set forth in Resp. Exh. DDDDD.

ATTACHMENT C: PROCEDURES GOVERNING ADMINISTRATIVE REVIEW

49 C.F.R. § 904.273

Administrative review of decision.

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

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

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

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

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

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

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

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

- (5) Copies of all cited portions of the record must be attached to the petition;
- (6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and
- (7) Issues of fact or law not argued before the Judge may not be raised in the petition unless such issues were raised for the first time in the Judge's initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.
- (e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content requirements in paragraph (d) of this section without further review.
- (f) No oral argument on petitions for discretionary review will be allowed.
- (g) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. An answer must comport with the format and content requirements in paragraphs (d)(5) through (d)(7) of this section and set forth detailed responses to the specific objections, bases for review and relief requested in the petition. No further replies are allowed, unless requested by the Administrator.
- (h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective date 150 days after the petition is served.
- (i) If the Administrator issues an order denying discretionary review, the order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final agency decision. The Administrator need not give reasons for denying review.
- (j) If the Administrator grants discretionary review or elects to review the initial decision without petition, the Administrator will issue an order to that effect. Such order may identify issues to be briefed and a briefing schedule. Such issues may include one or more of the issues raised in the petition for review and any other matters the Administrator wishes to review. Only those issues identified in the order may be argued in any briefs permitted under the order. The Administrator may choose to not order any additional briefing, and may instead make a final determination based on any petitions for review, any responses and the existing record.
- (k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review;

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

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

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

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

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

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