UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:	**DOCKET NUMBER**
Pacific Ranger, LLC, Matthew James Freitas, Joao Moniz, and Tien Shih Su, Respondents.	PI1101523, F/V Pacific Ranger

INITIAL DECISION AND ORDER

Date: November 25, 2014

Before: Susan L. Biro, Chief Administrative Law Judge, U.S. EPA[1]

Appearances: For the Agency:

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For Respondents:

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[1] The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the National Oceanic and Atmospheric Administration, pursuant to an Interagency Agreement effective for a period beginning September 8, 2011.

I. PROCEDURAL HISTORY

On November 1, 2012, the National Oceanic and Atmospheric Administration ("NOAA" or the "Agency") issued a six count Notice of Violation and Assessment of Administrative Penalty ("NOVA") to Matthew James Freitas, Joao Moniz, Tien Shih Su, and Pacific Ranger LLC ("Pacific Ranger") (collectively, "Respondents"). The NOVA charges Mr. Freitas, Mr. Su,[2] and Pacific Ranger with four counts of violating the Marine Mammal Protection Act ("MMPA") and one count of violating the Western and Central Pacific Fisheries Convention Implementation Act ("WCPFCIA"). Counts 1, 2, 3, and 5 allege that on or about August 21, August 23, August 25, and October 18, 2010, respectively, Mr. Freitas, Mr. Su, and Pacific Ranger knowingly set their purse seine fishing gear on live whales on the high seas, in violation of 16 U.S.C. § 1372(a)(1) and 50 C.F.R. § 216.11(a). Count 4 alleges that on or about August 31, 2010, Mr. Freitas, Mr. Su, and Pacific Ranger set a purse seine net on a manmade raft within ten meters of a school of tuna, when it was prohibited to do so around fish aggregating devices ("FADs"), in violation of "16 U.S.C. § 6901 et seq.," and 50 C.F.R. § 300.223(b). Count 6 alleges that, on or about December 11, 2010, Mr. Moniz, Mr. Su, and Pacific Ranger knowingly set their purse seine fishing gear on a live whale on the high seas, in violation of 16 U.S.C. § 1372(a)(1) and 50 C.F.R. § 216.11(a). The Agency proposes a $5,000 penalty for Count 1, $11,000 for Count 2, $11,000 for Count 3, $110,000 for Count 4, $7,250 for Count 5, and $5,000 for Count 6. The Agency therefore seeks a total penalty of $144,250 against Respondents Freitas, Su, and Pacific Ranger, jointly and severally, and a total penalty of $5,000 against Respondents Moniz, Su, and Pacific Ranger, jointly and severally. The NOVA advised Respondents of their right to request a hearing before an Administrative Law Judge ("ALJ" or "Judge") within thirty days of receiving the NOVA.

By letter dated January 4, 2013, Respondents, acting through counsel, James P. Walsh, Esq., requested a hearing. NOAA notified this Tribunal of Respondents' request by letter dated February 8, 2013. An Assignment of Administrative Law Judge and Order to Submit Preliminary Positions on Issues and Procedures (PPIP) ("PPIP Order") was issued on February 21, 2013, designating the undersigned to preside in this matter and setting forth various prehearing filing deadlines and procedures. The parties were directed to file their PPIPs no later than March 29, 2013. Respondents filed their PPIP on March 19, 2013. The Agency filed its PPIP on March 25, 2013.

On June 4, 2013, a Hearing Order set forth deadlines for the filing of discovery motions, joint stipulations, and prehearing briefs, and scheduled the hearing to begin on September 18, 2013, to continue as necessary through September 20, 2013. On June 6, 2013, the Headquarters Hearing Clerk issued a Notice of Hearing Location.

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[2] On August 27, 2013, the Agency filed a Notice of Amendment to Agency Pleading explaining that the charging language in the NOVA mistakenly omitted Mr. Su's name and title. The Agency corrected the omission by amending the "Facts Constituting Violations" section of the NOVA to include Mr. Su's name and position as fish master.

On August 30, 2013, the parties filed their Joint Stipulation of Facts ("Stipulations" and "Stip."), and Respondents filed a Hearing Memorandum addressing the Agency's claims against Respondents under the MMPA.

The hearing in this matter was held on September 18, 2013, in San Diego, California.[3] At the hearing, the Agency offered the testimony of three fisheries observers: Alick Tada, Alfred Siau, and Nigel Mamutu. Respondents offered the testimony of two witnesses: Robert Virissimo, Vice President of Vessel Operations for South Pacific Tuna Corporation ("SPTC"),[4] and Mr. Freitas. Thirty-eight Joint Exhibits ("JX") and one Court's Exhibit ("CX 1") ("Stip.") were admitted into the record. Tr. 6.

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

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

On November 8, 2013, the parties filed a Joint Motion to Conform Hearing Transcript to Testimony, which was granted, with some modifications, by Order dated December 3, 2013.

Also on November 8, 2013, Respondents filed a Motion for Reconsideration of Use of Material from Stayed Initial Decision in Another Case ("Motion"), wherein Respondents request that certain lines of the transcript be struck from the record. The Agency responded to the Motion on November 21, 2013, and the next day, Respondents filed a reply.

On November 21, 2013, the Agency filed its Post-Hearing Brief ("Agency's Brief" and "AB"). On December 19, 2013, Respondents filed their Post-Hearing Brief ("Respondents' Brief" and "RB"). On January 2, 2014, the Agency filed its Post-Hearing Reply Brief ("Agency's Reply Brief" and "ARB"), and on January 15, 2014, Respondents filed their Post-Hearing Reply Brief ("Respondent's Reply Brief" and "RRB").

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[3] Citations herein to the transcript of the hearing are in the following format: "Tr. [page]."

[4] South Pacific Tuna Corporation is the "vessel manager" for Pacific Ranger and the F/V Pacific Ranger. Tr. 138. The vessel manager hires the fishing masters and oversees the operations of the vessel. *Id.*

II. APPLICABLE LAWS AND REGULATIONS

A. Liability

i. Marine Mammal Protection Act

In 1972, Congress enacted the MMPA, 16 U.S.C. §§ 1361-1423, as amended, in response to the public's growing concern over the continued survival of marine mammals.[5] Congress recognized that "certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities," that "marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic," and that "the primary objective of their management should be to maintain the health and stability of the marine ecosystem."[6] In furtherance of this goal, the MMPA imposes a moratorium on the "taking" of marine mammals, with limited exceptions. 16 U.S.C. § 1371(a) (imposing the moratorium) (exceptions include: taking in accordance with a permit for scientific research, public display, photography, and other specific purposes, per 16 U.S.C. § 1371(a)(1); taking in accordance with a permit *or* authorization to incidentally take marine mammals in the course of commercial fishing operations, per 16 U.S.C. § 1371(a)(2); and taking with a permit in the course of a specified activity other than commercial fishing, per 16 U.S.C. § 1371(a)(5)).

Specifically, the MMPA declares "it is unlawful— (1) for any person subject to the jurisdiction of the United States or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas . . . ." 16 U.S.C. § 1372(a)(1). To "take" is defined by the MMPA as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 6 U.S.C. § 1362(13). The term is further defined in the pertinent regulations as follows:

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

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

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

50 C.F.R. § 216.3.

The MMPA defines "harassment" as:

> . . . any act of pursuit, torment, or annoyance which –
>
> (i) has the potential to injure a marine mammal or marine mammal stock in the wild [i.e., Level A Harassment]; or
>
> (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [i.e., Level B Harassment].

16 U.S.C. §§ 1362(18)(A), (C), (D).

One of the exceptions to the moratorium on taking, referenced in MMPA Section 1371(a)(2), is more fully set forth in Section 1387, entitled, "Taking of marine mammals incidental to commercial fishing operations." 16 U.S.C. §§ 1371(a)(2), 1387. Congress established a regulatory scheme for the issuance of "authorizations" to incidentally take marine mammals in the course of commercial fishing operations. 16 U.S.C. § 1387(c)(2). According to the regulations promulgating this scheme, 50 C.F.R. Part 229, "incidental" means, "with respect to an act, a non-intentional or accidental act that results from, but is not the purpose of, carrying out an otherwise lawful action." 50 C.F.R. § 229.2.[7]

First, fisheries are to be classified into one of three categories (Category I-III) based on the frequency of their incidental mortality and serious injury of marine mammals.[8] 16 U.S.C. § 1387(c)(1); *see also* 50 C.F.R. Part 229. Fisheries under Category I are characterized by the frequent incidental mortality and serious injury of marine mammals; fisheries in Category II are characterized by the occasional incidental mortality and serious injury of marine mammals; and, finally, fisheries in Category III are characterized by a remote likelihood of or no known incidental mortality and serious injury of marine mammals. 16 U.S.C. § 1387(c)(1)(A); 50 C.F.R. § 229.2. The Agency must publish a list of commercial fisheries each year, selecting the

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

[8] The term "fishery" means in pertinent part "one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational and economic characteristics." 16 U.S.C. § 1362(16)(A). The term "stock" means a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature." 16 U.S.C. § 1362(11).

appropriate category for each. 16 U.S.C. § 1387(c)(1)(B). For the applicable period at issue in this case, all Pacific purse seine fisheries on the high seas were listed as Category II fisheries. *See* 74 Fed. Reg. 58,859, 58,898 (Nov. 16, 2009) (effective Jan. 1, 2010) (Table 3 - Commercial Fisheries on the High Seas).

For a vessel engaged in a Category II fishery, the regulations at Part 229 require that the owner of a vessel must have in possession a valid Certificate of Authorization in order for incidental takes by that vessel's crew to be authorized. 50 C.F.R. § 229.4(a)(1). Vessel owners and crew must comply with all deterrence provisions set forth in the MMPA and all guidelines and prohibitions published thereunder when necessary "to deter a marine mammal from damaging fishing gear, catch, or other private property, or from endangering personal safety." 50 C.F.R. § 229.4(i).

ii. Western and Central Pacific Fisheries Convention Implementation Act

Signed by the United States on September 5, 2000, the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean ("Convention") aims to "to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean." Convention art. 2, Sept. 5, 2000; 2000 U.S.T. LEXIS 182, 2275 UNTS 43.[9] The Convention established a Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean ("Commission"), in order to: "adopt measures to ensure long-term sustainability of highly migratory fish stocks in the Convention Area and promote the objective of their optimum utilization;" "ensure that such measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors;" "assess the impacts of fishing, other human activities and environmental factors on target stocks;" "take measures to prevent or eliminate over-fishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources;" et al. *Id.* art. 5. The U.S. Senate gave its advice and consent to the ratification of the Convention on November 16, 2005, President George W. Bush ratified it on May 15, 2007, and it entered into force of law on July 27, 2007. S. Ex. Rep. No. 109-8 (2005); 2000 U.S.T. LEXIS 182.

The Convention is implemented domestically through the Western and Central Pacific Fisheries Convention Implementation Act ("WCPFCIA"), 16 U.S.C. §§ 6901–6910, Pub. Law 109-479, 120 Stat. 3635 (Jan. 12, 2007), which directs the Department of Commerce to issue regulations "as may be necessary to carry out the United States international obligations under the [Convention] and this chapter, including recommendations and decisions adopted by the Commission." 16 U.S.C. § 6904(a). The WCPFCIA provides generally that it is "unlawful for any person: (1) to violate any provision of this chapter or any regulation or permit issued pursuant to this chapter." 16 U.S.C. § 6906(a)(1).

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[9] The Convention text is publically available at https://treaties.un.org/doc/Publication/UNTS /Volume%202275/v2275.pdf and https://www.wcpfc.int/system/files/text.pdf.

In December 2008, the Commission adopted a Conservation and Management Measure for Bigeye and Yellowfin Tuna in the Western and Central Pacific Ocean ("CMM 2008-01"), which set to achieve, among other things, "a 30% reduction in fishing mortality on bigeye tuna in the purse seine fishery in [the Convention] area and a reduction in the risk of overfishing yellowfin tuna." JX 38 at 346-347.[10] CMM 2008-01 contained specific requirements related to fishery observers and limitations on the use of fish aggregating devices ("FADs").

NOAA implemented the requirements of CMM 2008-01 through regulations promulgated under the authority of the WCPFCIA, set forth at 50 C.F.R. Part 300, Subpart O. 74 Fed. Reg. 38,544 (Final Rule) (Aug. 4, 2009) (effective August 3, 2009). A FAD is defined under Subpart O as follows:

> *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. The meaning of FAD does not include a fishing vessel provided that the fishing vessel is not used for the purpose of aggregating fish.

Id. at 38,554-55; 50 C.F.R. § 300.211 (2009). Subpart O set the following purse seine fishing restrictions related to FADs:

> (b) *Use of fish aggregating devices*. From August 1 through September 30, 2009, and from July 1 through September 30 in each of 2010 and 2011, owners, operators, and crew of fishing vessels of the United States shall not do any of the following in the Convention Area:
>
> (1) Set a purse seine around a FAD or within one nautical mile of a FAD.
>
> (2) Set 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) Deploy a FAD into the water.
>
> (4) Repair, clean, maintain, or otherwise service a FAD, including any electronic equipment used in association with a FAD, in the water or on a vessel while at sea, except that:

[10] CMM 2008-01 is publically available at: https://www.wcpfc.int/system/files/CMM%202008-01%20%5BBigeye%20and%20yellowfin%5D.pdf.

> (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) (2009); *see also* 50 C.F.R. § 300.222(w) (declaring 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)).

B. Penalty

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

The WCFCIA incorporates by reference the civil penalty amounts and authorities of the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"). 16 U.S.C. § 6905(c). The Magnuson-Stevens Act, in turn, provides for civil penalties of $100,000 per violation. 16 USCS § 1858(a).

The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended by the Debt Collection and Improvement Act of 1996, Pub. L. 104-134, resulted in the Secretary increasing the maximum civil penalties to $11,000 per MMPA violation, and to $140,000 per WCPFCIA (and Magnuson-Stevens Act) violation. 15 C.F.R. §§ 6.4(f)(10), 6.4(f)(26) (2010).

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

> Factors to be taken into account in assessing a civil penalty, depending upon the statute in question, may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior violation, and ability to pay; and such other matters as justice may require.

15 C.F.R. § 904.108(a). Further, the Magnuson-Stevens Act (the penalty provisions of which are incorporated into the WCPFCIA), requires that the Agency "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).

III. FACTUAL BACKGROUND

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

The F/V Pacific Ranger ("Vessel") is a large-scale tuna purse seine[11] fishing vessel that has a carrying capacity of 1,492 tons of fish, hails from Pago Pago, American Samoa, and carries a crew of approximately 40 people. Stip. ¶ 31. At all times relevant to the counts contained in the NOVA, the Vessel was a properly documented United States purse seine fishing vessel. Stip. ¶ 28. During this same time, the Vessel possessed a High Seas Fishing Permit, as well as an authorization issued pursuant to Section 118 of the MMPA that authorized the incidental taking of marine mammals in the course of commercial fishing operations. Stip. ¶ 29.

At all relevant times for Counts 1-5, the Vessel was owned by Pacific Ranger and operated by Mr. Freitas. Stip. ¶¶ 2, 3. Captain Freitas completed and signed the South Pacific Regional Purse Seine Logsheets for each trip at issue in these Counts. JX 23 at 268-70; JX 16 at 202.

At all relevant times for Count 6, the Vessel was owned by Pacific Ranger and operated by Mr. Moniz. *Id.* Captain Moniz completed and signed the South Pacific Regional Purse Seine Logsheets for the trip at issue in this Count. JX 23 at 271-77; JX 22 at 267.

Additionally, at all relevant times for all Counts contained in the NOVA, Mr. Su was the fishing master onboard the Vessel. Stip. ¶ 4. The fishing master on a purse seine vessel is the officer responsible for directing the crew and deploying/retrieving the fishing gear and catch during purse seine fishing operations. *Id.*

During the 2010 FAD closure period, purse seine vessels operating in the western and central Pacific Ocean were required to carry fishery observers on all fishing trips. Stip. ¶ 33. Fishery observers were tasked with the collection of scientific data and the documentation of fishing operations. *Id.* NOAA utilized fishery observers provided by the Pacific Islands Forum Fisheries Agency ("FFA"), an intergovernmental agency of Pacific Island nations created to facilitate and promote regional cooperation and coordination in marine fishery policy and

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

management. Stip. ¶ 34. All three of the observers on the Vessel at times relevant to this matter took contemporaneous notes of their observations. Tr. 32-33; 102; 124.

At all times relevant to Counts 1-4, the FFA observer onboard the Vessel was Alick Tada. Stip. ¶ 35. Mr. Tada is a citizen and resident of the Solomon Islands and had been a fishery observer for four years at the time of the hearing. Tr. 22. Prior to sailing with the Vessel, Mr. Tada had been on 10 to 16 trips as an observer on other purse seine vessels. *Id.*

At all times relevant to Count 5, the FFA observer onboard the Vessel was Alfred Siau. Stip. ¶ 36. Mr. Siau is a citizen and resident of the Solomon Islands and had been a fishery observer for approximately four years at the time of the hearing, in which he had been on almost forty fishing trips. Tr. 98-99.

At all times relevant to Count 6, the FFA observer onboard the Vessel was Nigel Mamutu. Stip. ¶ 37. Mr. Mamutu is a citizen and resident of the Solomon Islands and had been a fishery observer for ten years at the time of the hearing. Tr. 118. Prior to sailing with the Pacific Ranger, Mr. Mamutu worked as a crew member of a purse seine fishing vessel for approximately one year. Tr. 118-19.

August 21, 2010 (Count 1)

On August 21, 2010, at approximately 12:55 p.m. local time (01:51 a.m. Coordinated Universal Time ("UTC")), the Vessel made a purse seine set ("Set 4") on the high seas of the Pacific Ocean on a live whale. Stip. ¶¶ 40,[12] 41; Tr. 29; RB 32 at ¶ 33.

Prior to making the set, while the crew was investigating the school of fish, there was a whale "diving in and out around the school." Tr. 69. Even though he could clearly identify the animal as a whale, Mr. Tada said there was "no clear view/picture of identity" for him to be able to identify the species of whale. Tr. 36. The Vessel "set on a whale that was associated with a school" of fish, but before the net closed, the live whale escaped. Tr. 30-31. After he witnessed the set, at "the end of the day," Mr. Tada recorded what he saw in his trip journal (JX 6), and then, based on those notes, completed his SPC/FFA Regional Purse-Seine Observer Daily Log – Form PS-2 (JX 5); SPC/FFA Regional Observer Species of Special Interest - Form Gen-2 (JX 7), and SPC/FFA Regional Purse Seine Observer Set Details - Form PS-3 (JX 8).[13] Tr. 32, 34-37.

In Mr. Tada's trip journal describing this set, he wrote that the Vessel's helicopter spotted a live whale associated with a school of fish at 12:35 p.m., and a few minutes later, the whale successfully escaped the purse seine net before it closed. JX 6 at 33-34.

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[12] Stipulation 40 actually states the date as August 21, 2013, which is taken to be a scrivener's error.

[13] "SPC" is understood to refer to the Secretariat of the Pacific Community; the United States and 22 pacific island countries and others make up the Pacific Community. See, http://www.spc.int/en/about-spc/history.html. The SPC publishes these standard forms for use by FFA. *Id.*

In the PS-2 form, the Observer's Daily Log, Mr. Tada recorded for 12:35 p.m. an activity code of "8," indicating the Vessel was investigating a free school, a detection code of "2," meaning the school was detected by helicopter, and a school association code of "6," identifying a "live whale." Tr. 32-33; JX 5 at 17. Then, for 12:55 p.m., Mr. Tada recorded an activity code of "1," indicating the Vessel made a set, a detection code of "2," meaning the school was detected by helicopter, and a school association code of "6," again identifying the presence of a "live whale." Tr. 33; JX 5 at 17.

On the Species of Special Interest Gen 2 form, Mr. Tada wrote that he identified a whale associated with the school of fish set upon, but indicated he was uncertain which particular species of whale it was due to distance. Tr. 36; JX 7 at 82.

On the Set Details PS-3 form, Mr. Tada described the set at that time as being made on a "live whale." Tr. 37; JX 8 at 88.

Captain Freitas recorded a school association code of "2," indicating "feeding on baitfish," in the South Pacific Regional Purse Seine Logsheet entry for this set, and did not record the code for "live whale," "6." JX 23 at 268; Stip. ¶ 43.

This set did not result in the lethal taking of any whale, nor in the landing of any fish. Stip. ¶¶ 42, 44.

August 23, 2010 (Count 2)

On August 23, 2010, at approximately 11:33 a.m. local time (00:29 UTC), the Vessel made a purse seine set ("Set 6") on the high seas of the Pacific Ocean on a live whale. Stip. ¶¶ 45-46; Tr. 39-40, 43; RB 33 ¶ 41.

During the set, Mr. Tada observed from his position on the quarterdeck a "live whale species inside the seining net." Tr. 40. The whale was "[s]wimming among the fish . . . [g]oing this way and that," and diving. Tr. 75-76. He took notes during the set, then later wrote in his journal and filled out the forms described below. Tr. 41, 43.

In Mr. Tada's trip journal describing Set 6, he wrote that at 11:30 a.m., the crew was investigating "another group of foamer associated with a live whale, detected by the helicopter," and later, after the pursing began, the whale was "inside the seiner net but somehow did not landed [sic] onboard; it release[d] itself before the pursing ended." Tr. 43-44; JX 6 at 38.

In his Observer's Daily Log, Mr. Tada recorded for 11:30 a.m. an activity code of "8," indicating the Vessel was investigating a free school, a detection code of "2," meaning the school was detected by helicopter, and a school association code of "6," identifying a "live whale." Tr. 42; JX 5 at 18. Then, for 11:33 a.m., Mr. Tada recorded an activity code of "1," indicating the Vessel started a set (dropped the skiff off the back of the boat), a detection code of "2," meaning the school was detected by helicopter, and a school association code of "6," again identifying the presence of a "live whale." Tr. 42-43; JX 5 at 18.

On the Species of Special Interest form, Mr. Tada wrote that he identified, during Set 6 at 11:33 a.m., a whale species by the code "MEP," meaning a mesoplodon whale, and described it on the form as having a tiny fin located after its mid-back, and it had a black body. Tr. 44; JX 7 at 84. The whale was seen, alive and healthy, "swimming together with the tuna school inside the seiner net." Tr. 45.

Captain Freitas recorded a school association code of "2," indicating "feeding on baitfish," on the South Pacific Regional Purse Seine Logsheet entry for this set, and did not record the code for "live whale," "6." JX 23 at 268; Stip. ¶ 49.

There was no lethal taking of any whale during this set. Stip. ¶ 50. The Vessel landed approximately 40 metric tons of yellowfin tuna, which had an ex-vessel value of $36,000. Stip. ¶¶ 47-48.

August 25, 2010 (Count 3)

On August 25, 2010, at approximately 10:53 a.m. local time (23:30 p.m. UTC on August 24, 2010), the Vessel made a purse seine set ("Set 10") on the high seas of the Pacific Ocean on a live whale approximately seven meters long. Stip. ¶¶ 51-52; Tr. 47, 51; RB 34 at ¶¶ 48, 49.

Mr. Tada saw the whale when the crew was investigating the school, before the school was set upon. Tr. 47. Then, as he described, "[a]fter the bottom of the net was closed I still saw the whale was still inside the seinner net, couldn't escape somehow but how it escaped it, they use [sic] the speed boat to try and force the whale to get out from the net, so in order for the whale to get out, they rip the net." Tr. 52. He took notes during the set and then later filled out the forms described below. Tr. 48.

In Mr. Tada's trip journal describing Set 10, he wrote that at 10:45 a.m., the crew was investigating "another school of boiler associated with two live whale [sic] detected by the helicopter . . . ." JX 6 at 43; Tr. 50. For the time of 11:23 a.m., Mr. Tada wrote that one of the whales was still inside the net when the crew began pursing (closing) the net, however, the whale was not landed because "they used the workboat to chase it out and possibly it released itself . . . ." JX 6 at 44; Tr. 50. The species, Mr. Tada, wrote, was a mesoplodon whale, "because it has a dorsal fin located after the midback[,] obvious beak of varying length with a dash white-grey spot at the upper belly view." *Id.*

In his Observer's Daily Log, Mr. Tada recorded for 10:45 a.m. an activity code of "8," indicating the Vessel was investigating a free school, a detection code of "2," meaning the school was detected by helicopter, and a school association code of "6," identifying a "live whale." Tr. 48-49; JX 5 at 19. Then, for 10:53 a.m., Mr. Tada recorded an activity code of "1," indicating the Vessel started a set, and a school association code of "6," again identifying the presence of a "live whale." Tr. 49; JX 5 at 19.

On the Species of Special Interest form, Mr. Tada wrote that he identified, during Set 10 at 10:53 a.m., a whale species by the code "MEP," meaning a mesoplodon whale, and described

it on the form. Tr. 51; JX 7 at 85. According to the form, the whale was seen "associate[d] with the tuna school inside the net." *Id.*

Captain Freitas recorded a school association code of "2," indicating "feeding on baitfish," on the South Pacific Regional Purse Seine Logsheet entry for this set, and did not record the code for "live whale," "6." JX 23 at 268; Stip. ¶ 55.

As a result of this set, the Vessel landed approximately 50 metric tons of skipjack tuna and 10 metric tons of yellowfin tuna, which together had an ex-vessel value of $48,402. Stip. ¶¶ 53-54. There was no lethal taking of any whale during this set. Stip. ¶ 56.

August 31, 2010/September 1, 2010 (Count 4)

On September 1, 2010, at approximately 08:35 a.m. local time (August 31, 2010, at 21:30 UTC), the Vessel made a purse seine set ("Set 28") on the high seas of the Pacific Ocean at a location within the Convention Area. Stip. ¶¶ 57-58.

While the crew was investigating the school of fish to be set upon before it made this set, Mr. Tada recalled standing on the helicopter deck with his journal and he "viewed the school very clearly, and . . . saw [a] raft 10 meters away from where the school was." Tr. 56. At the time, the fishing master was on "the bridge" of the Vessel, and a crewman was in the crow's nest. Tr. 57. The raft did not get inside the net, because the crew "drug it away from the net." Tr. 86-87.

In his Observer's Daily Log, Mr. Tada recorded for the time of 8:30 a.m. an activity code of "8," indicating the Vessel was investigating a free school, a detection code of "2," meaning the school was detected by helicopter, and a school association code of "4," identifying a "Drifting raft, FAD or payao,"[14] and a numeral "1" meaning there was one FAD. Tr. 57-59; JX 5 at 21. Then, for 8:35 a.m., on the PS-2 form, Mr. Tada recorded an activity code of "1," indicating the Vessel started a set, and a school association code of "4," again identifying the presence of one "Drifting raft, FAD or payao." Tr. 59; JX 5 at 21. Mr. Tada completed this form at the end of the day, based on the notes he made during his observations of the set. Tr. 60.

In Mr. Tada's trip journal describing this set, he wrote that at 8:30 a.m., the crew was "investigating a foamer school feeding on baitfish, associated is a man made raft drifting about 10 meters from the foamer school, detected by the helicopter." JX 6 at 66; Tr. 60. Mr. Tada described the appearance of the raft in detail ("net hanging down underneath," "eight yellow floaters coiled together," "bamboo at the center," "GPS buoy is attache[d]"), and drew a diagram of the raft based on his notes from his initial observation. JX 6 at 66; Tr. 60-61. Mr. Tada wrote in his journal that he suspected the crew of the Vessel of removing the raft's GPS buoy and hiding it from him. Tr. 61-62; 93.

On the Set Details form, Mr. Tada wrote that "this can be a raft set because there is a man made raft . . . drifting probably 10 meters away from this school." Tr. 62-63; JX 8 at 92.

[14] According to Mr. Tada, a payao is a FAD. Tr. 58.

In Mr. Tada's Purse Seine Trip Report, a comprehensive report he completes before, during, and at the conclusion of the fishing trip (Tr. 53), he wrote that during the whole trip on the Vessel, they only encountered the one drifting FAD during the "FAD closure period and somehow we set on it." JX 10 at 117; Tr. 63-64.

Captain Freitas recorded a school association code of "2," indicating "feeding on baitfish," on the South Pacific Regional Purse Seine Logsheet entry for this set, and did not record the code for either "drifting raft, FAD or payao," or the code for "anchored raft, FAD or payao." JX 23 at 269; Stip. ¶ 61.

As a result of this set, the Vessel landed approximately 1 metric ton of skipjack tuna and 39 metric tons of yellowfin tuna, which together had an approximate ex-vessel value of $36,000. Stip. ¶¶ 59-60.

October 18, 2010 (Count 5)

On October 18, 2010, at approximately 7:03 a.m. local time (20:02 UTC on October 17, 2010), the Vessel made a purse seine set ("Set 16") on the high seas of the Pacific Ocean on a live whale. Stip. ¶¶ 62-63; RB 37 at ¶ 70. The whale was trapped in the net, but eventually escaped on its own. RB 37 at ¶ 71; JX 14 at 193.

Prior to the set, at around 6:55 a.m., the Vessel's helicopter took off to search and, after a few minutes, Mr. Siau "heard the pilot and the chopper man[;] they radioed back to the bridge reporting that they found a school of fish associated with the whale." Tr. 102-103. Mr. Siau "heard the pilot mention a whale." Tr. 103. Mr. Siau first saw the whale when it was approximately .2 nautical miles away from the boat. Tr. 104.

Directly after the set, Mr. Siau completed a PS-2 Daily Log form (JX 11), a PS-3 Set Details form (JX 12), made an entry in his Trip Journal or Diary (JX 13), and filled out a Gen-2 Species of Special Interest form (JX 14). Tr. 106-109.

In the PS-2 form, his Observer's Daily Log, Mr. Siau recorded for 6:55 a.m., an activity code of "8," indicating the Vessel was investigating a free school, a detection code of "2," meaning the school was detected by helicopter, and a school association code of "6," identifying the presence of a "live whale." Tr. 105-06; JX 11 at 146. Then, for 7:03 a.m., Mr. Siau recorded an activity code of "1," indicating the Vessel started a set, and a school association code of "6," again identifying the presence of a "live whale." Tr. 106; JX 11 at 146.

On his PS-3 Set Details form, Mr. Siau wrote again that the set's school of fish was "associate[d] by live whale." JX 12 at 147; Tr. 110.

In Mr. Siau's trip journal describing this set, he wrote that at 6:55 a.m., the crew was investigating "a school of yellowfin tuna, seen by helicopter . . . associate[d] with one live whale." JX 13 at 166; Tr. 107. For 7:03 a.m., Mr. Siau wrote that the "skiff boat was released, set no. 16 was done [ ] Whale was seen inside net with the school [of] fish." JX 13 at 166; Tr.

107-08. The entry for 8:15 a.m. states, "whale was seen escaping over the net by itself [] It was a short-finned pilot whale (SHW)." JX 13 at 166; Tr. 108.

On the Gen 2 Species of Special Interest form, Mr. Siau wrote that during this set, he identified the whale species "SHW," meaning a short-finned pilot whale, and described it on the form as being "black in colour," having a "short dorsal fin and rounded head," and at the end of the Vessel's interaction with the species, "alive and healthy, escaping." JX 14 at 193; Tr. 108-09. According to the Gen 2 form, the "setting was done around" the whale, which became "trapped inside net" before it escaped "by itself." JX 14 at 193.

Captain Freitas recorded a school association code of "2," indicating "feeding on baitfish," on the South Pacific Regional Purse Seine Logsheet entry for this set, and did not record the code for "live whale," "6." JX 23 at 272; Stip. ¶ 66.

There was no lethal taking of a whale in this set, however, the Vessel landed approximately three metric tons of yellowfin tuna, which had an ex-vessel value of $2,129.91. Stip. ¶¶ 64-65, 67.

December 11, 2010 (Count 6)

On December 11, 2010, at approximately 09:12 a.m. local time (22:10 UTC on December 10, 2010), the Vessel made a purse seine set (another "Set 10") on the high seas of the Pacific Ocean on two live whales. Stip. ¶¶ 68-69; RB 38 at ¶ 82. The two whales were able to escape the net by ripping through it below the cork line. RB 39 at ¶ 83.

Mr. Mamutu and most of the crew were "out on the deck" that day. Tr. 121-22. He did not see the captain. Tr. 122. From about three miles away, Mr. Mamutu saw "something blowing water out from the surface, and the school of tuna around the bait;" in his mind, he "knew it was a whale." *Id.* The Vessel moved closer to the school and began "circling," and after a couple minutes, the fishing master set the net. *Id.* The whales, each approximately 12 meters in length, were caught inside the net, but eventually escaped. Tr. 123-24, 129-30.

In his PS-2 Observer's Daily Log, Mr. Mamutu recorded for 8:52 a.m., an activity code of "8," indicating the Vessel was investigating a free school, a detection code of "2," meaning the school was detected by helicopter, and a school association code of "6," identifying the presence of a "live whale." Tr. 125; JX 17 at 205. Then, for 9:12 a.m., Mr. Mamutu recorded an activity code of "1," indicating the Vessel started a set, and a school association code of "6," again identifying the presence of a "live whale." Tr. 125-26; JX 17 at 205.

In Mr. Mamutu's trip journal, he wrote that two fish schools had been spotted that morning, one from the helicopter, and one from the Vessel. JX 18 at 211; Tr. 126-27. The helicopter-spotted school was "whale associated," was set upon, but the tuna escaped. JX 18 at 221; Tr. 127. The set "caught 2 balaen whales," which "stayed in the net until chased by an auxiliary boat used that they ripped the net and escaped alive." JX 18 at 211; Tr. 127-28.

On his Species of Special Interest Gen 2 form, Mr. Mamutu wrote that he identified the whales as "SIW," meaning Sei whales, and described them as having a "dark body, pointed dorsal fin located about 5m to fluke, one rostral ridge." JX 19 at 217; Tr. 129. Mr. Mamutu wrote that "the two whales were circled with the tuna school associated and trapped inside the net," and "they stayed inside the net set until ¾ net rolled onboard before an auxiliary boat was used, chased them that they finally escaped alive ripping net 2m below from cork line." JX 19 at 217; Tr. 130.

In Mr. Mamutu's Purse Seine Trip Report, a comprehensive report he completed at the end of the fishing trip (Tr. 130), he again described the Vessel's interaction with the whales during this set. JX 20 at 231; Tr. 130-31. "They were caught in the net but escaped alive after ripped [sic] the net when chased by an auxiliary boat used." JX 20 at 231; Tr. 131. Later in the document, Mr. Mamutu noted that "[i]t was unintentional." JX 20 at 251; Tr. 131. At the hearing, he clarified what he meant by that: "The fish master was trying to make a set" and "trying to avoid the whale, but the whale was finally caught in the net." Tr. 131.

Captain Moniz recorded a school association code of "2," indicating "feeding on baitfish," on the South Pacific Regional Purse Seine Logsheet entry for this set, and did not record the code for "live whale," "6." JX 23 at 275; Stip. ¶ 71.

There was no lethal taking of a whale in this set, nor did the Vessel land any fish from this set. Stip. ¶¶ 70, 72.

IV. RESPONDENTS' MOTION FOR RECONSIDERATION

At the hearing, Agency counsel questioned Mr. Virissimo and Mr. Freitas about an Initial Decision issued on August 23, 2013, by U.S. Coast Guard Administrative Law Judge Parlen L. McKenna in a case brought by NOAA against three of the four Respondents here and others, styled *Matthew James Freitas, et al.*, Docket No. PI-0904338 (consolidated cases) ("*Freitas*").[15] The respondents in that proceeding filed a petition for reconsideration of the Initial Decision on September 12, 2013, which was denied by order dated December 6, 2013. Those respondents then filed a petition for administrative review, which was denied by the Administrator on April 14, 2014. On May 8, 2014, the respondents filed an appeal of the Agency's final action with the U.S. District Court for the District of Columbia, which is currently pending. *Black, et al. v. Pritzker, et al.*, Civil Action No. 14-782 (D.D.C.).

In their Motion for Reconsideration of Use of Material from Stayed Initial Decision in Another Case ("Motion" and "Mot."), the Respondents here argue that it was improper for Agency counsel at the hearing, which took place on September 18, 2013, while the petition for reconsideration was still pending, to "offer[ ] certain findings of Judge McKenna as truthful, final conclusions . . . with respect to Mr. Freitas' credibility and the liability of Respondents when questioning Mr. Virissimo." Mot. 1. Agency counsel "knew, or should have known," that

[15] This decision is accessible at http://www.gc.noaa.gov/documents/2013/2013_%20ALJ_Freitas_ocr.pdf

the effectiveness of the *Freitas* decision was stayed when the petition for reconsideration was filed, and he violated his "duty of candor to bring this issue to the attention of the Court before he used the material in the stayed Initial Decision" because "this Court is new to" NOAA's Rules. *Id.* 1-2, 4 (citing the American Bar Association's Model Rules of Professional Conduct, section 3.3(a)(1), prohibiting the making of false statements, or failing to correct a false statement made, to a tribunal). Respondents add that the petition for reconsideration of the *Freitas* decision specifically disputes the manner in which Judge McKenna determined the credibility of the respondents' witnesses, which was partly at issue in the questioning at this hearing. *Id.* 2. Respondents request that the following testimony be stricken from the hearing transcript: Tr. 159 at 11 through 164 at 13; 204 at 9 through 207 at 21; and 209[16] through 210 at 3. *Id.* 5.

In the Agency's Reply to Respondents' Motion, the Agency first states it is unclear why Respondents are objecting to references made to the *Freitas* decision when it was Respondents who submitted a copy of the decision to the Tribunal. Reply 2. Second, Respondents could have filed a motion in limine if they objected to use of the decision in this proceeding. *Id.* Third, the Agency disagrees with Respondents' assertion that Agency counsel held out the decision as a final ruling. *Id.* The Agency argues that "[a]t no point . . . did agency counsel represent that the Initial Decision constituted the final agency action in the case," nor does the record reflect that the Court was or could be under that misapprehension. *Id.* 4-5. Further, the Agency argues that inquiring about the *Freitas* decision was "fair game for use in impeachment" of Messrs. Virissimo and Freitas because Respondents' counsel "opened the door" to issues related to that decision during his direct examination. *Id.* 5-8. Finally, as to Respondents' assertion that Agency counsel violated a duty of candor, the Agency "flatly disagrees," arguing that a party may assume that the court knows the law. *Id.* 9.

Respondents filed a Response to the Agency's Reply, wherein they assert that ultimately, there is no evidentiary basis for the testimony at issue. Response 1. Respondents only informed the Court of the decision by sending it to one of the Court's clerks "as background to a related case," and at that time, indicated that the decision had been stayed. *Id.* As a result of the petition for reconsideration, "*all* of [the decision's] findings and conclusions are suspended," therefore a motion in limine or objections at hearing to its use was unnecessary. *Id.* 2. Respondents further argue that the credibility of witnesses "must be challenged by substantial evidence," which the decision is not. *Id.* 3. Respondents also reiterate some of their other arguments in the Response.

At the hearing, Respondents' objections to the Agency inquiring about Mr. Virissimo's knowledge of the *Freitas* decision were overrruled. Overruling one such objection, this Tribunal observed that the Agency had not asked the witness a legal question related to Judge McKenna's findings, but instead merely inquired whether Mr. Virissimo was aware of the allegations and some other details of that prior case. Tr. 160-61. The extent to which Mr. Virissimo had knowledge of alleged prior violations may have been relevant to a penalty analysis; and therefore, the questions were allowed. Tr. 160, 162-64. In the rest of the testimony that

[16] This page range "209:210:3" appears to contain a typographical error. Mot. 5. Respondents likely intended to indicate a starting point of page 209 at line 22, as this is the first instance on page 209 of the transcript where the *Freitas* case was mentioned.

Respondents seek to be struck, Agency counsel asked Mr. Freitas about the credibility determinations that Judge McKenna made in that case about Mr. Freitas himself, and another witness. Tr. 204-207, 209-210. Respondents' counsel did not object during that examination.

Rules governing the admissibility of evidence in administrative proceedings before an ALJ differ from those in civil or criminal trials involving a jury. An ALJ's authority to rule on evidentiary matters in NOAA proceedings is governed by the procedural rules found at 15 C.F.R. Part 904 ("Rules"), and by Sections 554 through 557 of the Administrative Procedure Act ("APA").[17] The Rules provide: "All evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing." 15 C.F.R. § 904.251(a)(2). Section 556(d) of the APA provides for the liberal admission of evidence in administrative proceedings, except that "irrelevant, immaterial, or unduly repetitious evidence" shall be excluded. 5 U.S.C. § 556(d). This provision "recognizes the reality that rigorous exclusionary rules for the admission of evidence make little sense in hearings before an administrative agency where the ALJ acts as both judge and factfinder. When the judge is also factfinder, [s]he is equally exposed to evidence whether [s]he admits it or excludes it." *U.S. Steel Mining Co. v. Dir., Office of Workers' Comp. Programs*, 187 F.3d 384, 388 (4th Cir. 1999) (citing *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949-51 (4th Cir. 1997)). Consequently, the exclusionary rule in administrative proceedings is largely limited to relevance. *Id.*; *see also EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 898 (9th Cir. 1994) ("[I]n a bench trial, the risk that a verdict will be affected unfairly and substantially by the admission of irrelevant evidence is far less than in a jury trial."); *United States v. Preston*, No. 11-10511, 2013 U.S. App. LEXIS 4690, at *24 (9th Cir. Feb. 27, 2013) (stating that Rule 403 of the Federal Rules of Evidence, which provides for exclusion of evidence where it may lead to unfair prejudice, misleading the jury, or other issues, "is inapplicable to bench trials").

Simply because evidence is relevant and admissible does not mean it is of probative value or deserving of weight. Among the chief rationales for erring on the side of inclusion of evidence in administrative proceedings is the premise that an ALJ "is presumably competent to disregard that evidence which should be excluded or to discount that evidence which has lesser probative value . . . ." *Underwood*, 105 F.3d at 949; *see also Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994) ("For a bench trial, we are confident that the district court can hear relevant evidence, weigh its probative value and reject any improper inferences.").

The witness examination at issue met the evidentiary standard set by the APA and the Rules governing this proceeding, and whether counsel was successful in impeaching credibility or showing anything else worth consideration by his line of questioning, is properly a determination within my discretion. Furthermore, denying Respondents' Motion does not

[17] "The Judge has all powers and responsibilities necessary to preside over the parties and the hearing, to hold prehearing conferences, to conduct the hearing, and to render decisions in accordance with these regulations and 5 U.S.C. 554 through 557, including, but not limited to, the authority and duty to . . . [r]eceive, exclude, limit, and otherwise rule on offers of proof and evidence." 15 C.F.R. § 904.204; *see* 5 U.S.C. §§ 554-557.

unfairly prejudice them. There being no grounds to strike the testimony as Respondents request, their Motion is hereby **DENIED**.

V. DISCUSSION AS TO LIABILITY

A. Burden of Proof

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

Facts constituting the violation of law may be established by either direct or circumstantial evidence. *Watson*, NOAA Docket No. PI0900579, 2010 NOAA LEXIS 8, at *10 (ALJ, July 17, 2010) (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764-765 (1984)). The Administrator has recognized that the ALJ is in the "best position to make credibility determinations when faced with conflicting testimony." *Black*, NOAA Docket No. PI0904340, 2013 NOAA LEXIS 6, at *54-55 (ALJ, Aug. 22, 2013) (citing *F/V Twister, Inc.*, NOAA Docket Nos. NE0602397FM/V, NE0601409FM/V, 2009 NOAA LEXIS 11, at *12 (NOAA Nov. 24, 2009). The judge's responsibility is "to hear the testimony of the witnesses and determine credibility based on the facts and circumstances surrounding the proffered testimony as well as the witnesses' demeanor." *Barker*, NOAA Docket No. NE030107FM/V, 2004 NOAA LEXIS 11, at *10 (ALJ, Feb. 11, 2004) (quoting *Town Dock Fish*, 6 O.R.W. 580 (NOAA App. 1991)). Inconsistent and unsubstantiated testimony from witnesses detracts from their credibility, and the judge determines the weight to be afforded such evidence. *Id.*

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

B. Counts 1, 2, 3, 5, 6: Alleged Violations of the Marine Mammal Protection Act

To establish that Respondents violated the MMPA as alleged in Counts 1-3 and 5-6, the Agency must establish by a preponderance of the evidence that: (1) Respondents are subject to the jurisdiction of the United States; (2) Respondents engaged in the "take" of a marine mammal; (3) each "take" occurred on the "high seas"; and (4) each "take" was not authorized under Section 1387 as a permissible "incidental take" in the course of commercial fishing operations.

The parties have stipulated that each Respondent – Captain Freitas, Captain Moniz, Mr. Su, and Pacific Ranger – are persons subject to the jurisdiction of the United States.[18] Stip. ¶ 27. The parties have also stipulated that the activities giving rise to Counts 1-3 and 5-6 occurred on the high seas of the Pacific Ocean. Stip. ¶¶ 41, 46, 52, 63, 69. Respondents do not dispute that the species referenced in the MMPA Counts are marine mammals, nor do they dispute that their activities alleged in each MMPA Count met the statutory and/or regulatory definition of "take." Stip. ¶ 38.[19] Only the last element of the MMPA violation regarding the incidental take exception is contested. At all times relevant to these Counts, the Vessel was authorized, pursuant to Section 1387 of the MMPA, to "incidentally take" marine mammals in the course of commercial fishing operations. Stip. ¶¶ 8, 29; 16 U.S.C. § 1387. Ultimately, the parties disagree about what constitutes an "incidental take."

The Agency contends that for each set in question in these MMPA counts, Respondents saw the whale or whales prior to setting the net, and *then, still* set the net, knowingly, on the whales, which, the Agency argues, does not pass as "incidental taking."[20] NOVA (as amended) at 1-3; AB 1, 24. In brief, the Agency asserts that "incidental" means "by accident," and that the record shows that the sets in this case were not accidental. The Agency summarizes its position as follows: "Respondents' actions – including the knowing targeting of schools associated with whales during the investigation stage of the fishing sets – were not covered by their incidental take authorization and are therefore violations of the MMPA." AB 24.

Respondents argue first that the Agency failed to prove that Respondents "knowingly set their purse seine fishing gear on a whale" during these sets, as the NOVA alleges. RB 6. In support, Respondents criticize the observers' testimony and records for containing assumptions and speculation. *Id.*; RRB 1-3, 5. Respondents also rely on evidence they say shows "that any setting on whales was never their intent," and that there are other reasonable explanations for the whales getting caught in the net, for example, "unpredictable animal behavior in the midst of

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[18] Though jurisdiction is not challenged by any Respondent, a principle of customary international law may be noted, as it is articulated in the United Nations Convention on the Law of the Sea ("UNCLOS"), which is that "[s]hips shall sail under the flag of one State only and . . . shall be subject to its exclusive jurisdiction on the high seas." U.N. Convention on the Law of the Sea art. 92, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994). UNCLOS further commands each signatory State to "assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship." *Id.* art. 94. At all times relevant for the Counts alleged in the NOVA, the F/V Pacific Ranger was a vessel properly documented and flagged by the United States. Stip. ¶ 28; *see also* AB 2-3.

[19] Respondents make no argument that the Vessel's interactions with whales did not constitute a "take" as it is defined: to "take" is "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(13).

[20] Counts 1-3 and 5-6 of the NOVA allege that Respondents "knowingly set their purse seine fishing gear on a whale" in violation of the MMPA. NOVA (as amended) at 1-3.

normal fishing operations." RB 1, 6-7. "[A]t best, the evidence simply demonstrates that Respondents set on whales," not that they *knowingly* set on whales. RB 6.

Second, Respondents argue that their conduct during the Vessel's commercial fishing operations, which include various intentional "acts," are "purely intended to catch tuna" and not to "take" whales. RB 2, 13, 25. Therefore, the sets at issue were actions incidental to commercial fishing, and therefore permitted by Respondents' Section 118 MMPA authorization. RB 25.

i. Did NOAA prove by a preponderance of the evidence that Respondents knowingly set upon the whales at issue in Counts 1, 2, 3, 5 and 6?

The MMPA imposes strict liability for "taking" a protected marine mammal. *Creighton*, NOAA Docket No. SW030133, 2005 WL 1125361 (ALJ, Apr. 20, 2005) ("Marine Mammal Protection Act is a strict liability statute, and no specific intent is required . . . . Whether a respondent appreciates the consequences of his or her actions is irrelevant since voluntary actions are sufficient to constitute a violation of the MMPA."). However, NOAA is asserting in the NOVA that Respondents "knowingly" set their fishing gear upon whales. "The term 'knowingly' has been construed . . . to require only the commission of voluntary acts which cause or result in the violation." *Simmons*, NOAA Docket No. SE1104779, 2013 NOAA LEXIS 10, at *20 (ALJ, Aug. 30, 2013); *Kuhn*, 5 O.R.W. at 414 (finding that a knowing violation results from an affirmative act when the consequences of that act are foreseeable, even if not intended); *Huber*, NOAA Docket No. 133-285, 1994 WL 1246350 at *3 (ALJ, April 12, 1994) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 588 (1971), which held that "knowingly" related to knowledge of the facts not the law); *United States v. Jonas Bros. of Seattle, Inc.*, 368 F. Supp. 783 (D. Alaska 1974) (requiring only a showing that the acts involved were voluntary and intentional)). Thus the Agency must show that Respondents voluntarily intended to cause the act of setting the net on whales.

It is well established "that an employer may be vicariously liable for its employee's acts committed in the scope of employment while furthering the employer's business." *Tommy Nguyen,* NOAA Docket No. SE0801361FM, 2012 NOAA LEXIS 2, at *13 (ALJ Jan. 18, 2012); see Restatement (Third) of Agency § 7.03(2) (2006). "The doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency" is commonly known as respondeat superior. Black's Law Dictionary 1313 (7th ed. 1999); *see James Chan Song Kim*, NOAA Docket No. SW010208A, 2003 NOAA LEXIS 4, at *27 (ALJ Jan. 7, 2003). "NOAA has repeatedly utilized the doctrine of respondeat superior to impose joint and several liability on a vessel's owner and/or operator, if the violation occurred within the scope of [a] crewmember's duties." *Song Kim*, 2003 NOAA LEXIS 4, at *28 (citing *Corsair Corp.*, NOAA Docket No. NE950364FM/V, 1998 NOAA LEXIS 2 (ALJ Feb. 27, 1998); *Blue Horizon, Inc.*, 6 O.R.W. 467 (NOAA 1991)); *Shawver*, 2 O.R.W. 301 (NOAA, Dec. 10, 1980) (imposing joint and several liability under the MMPA). Here, no Respondent disputed the application of joint and several liability to any proven violation.

Respondents do not dispute that the Vessel, "by and through its crew and officers," made purse seine sets on whales on August 21, 2010 (Set 4), August 23, 2010 (Set 6), and August 25,

2010 (Set 10). RB 32 at ¶ 33; 33 at ¶ 41; 34 at ¶ 48. They do dispute, however, that "the crew and officers of the Vessel, knew about the whale prior to the set." *Id.*

Counts 1-3

Mr. Tada was a credible witness at hearing, appearing sincere and precise. Though his English was difficult to understand at times at the hearing and in the written record, his notes were written clearly and were organized, and his meaning came through at the hearing. He is an experienced purse seine fishery observer, and, before the fishing trips at issue, had received training on species identification, FAD closure, data collection, and record keeping. Tr. 23-26. During the fishing trip at issue, Mr. Tada observed a total of thirty-two purse seine fishing sets by the Vessel between August 14, 2010, and September 6, 2010. *Id.* On the days of the alleged MMPA violations in Counts 1-3, Mr. Tada took contemporaneous notes of his observations. Tr. 32-33. For each of those fishing trips, he used those notes to later that day complete various forms, as outlined above in Factual Background, including the PS-2 Daily Log form, Gen-2 Species of Special Interest form, and his Trip Diary. Tr. 32, 35-37 (Count 1); Tr. 43-45 (Count 2); Tr. 48-49, 51 (Count 3). Everything he recorded in those documents was based on the notes he took contemporaneous to his observation of the fishing sets at issue. Tr. 32, 34, 37 (Count 1); Tr. 41 (Count 2); Tr. 48, 51 (Count 3). Mr. Tada also compiled a comprehensive Purse Seine Trip Report. Tr. 53; JX 10.

Prior to Set 4 (Count 1), Mr. Tada was on the chopper deck when he "clearly" saw the whale 10-20 meters away from the Vessel. Tr. 30-31, 69. He asserted in some of his paperwork that the whale was seen by the Vessel helicopter during the investigation stage of the fishing operations. JX 5 at 17; JX 6 at 33. The whale was "diving in and out around the school." Tr. 69-70. Approximately 10 minutes passed after Mr. Tada spotted the whale before the Vessel let the skiff go, thereby beginning the set. Tr. 71. In that 10 minutes, the whale surfaced "around four or five times." *Id.* At the end of the set, Mr. Tada spoke to the helicopter pilot and the mechanic, and the pilot said he saw a whale. Tr. 73-74. Approximately 18 months after the set at issue in Counts 1, in March, 2012, Mr. Tada provided a statement to a NOAA official about what he had observed. JX 9. In that statement, Mr. Tada asserted that before Set 4, the whale was visible to the fishing master (Mr. Su), the captain (Captain Freitas), the helicopter pilot (Jiz Ronaldo), and the helicopter mechanic (Mr. Angelito, Jr.). JX 9 at 98-99; *see* Tr. 38-39. Mr. Tada based this conclusion on his assumption that Captain Freitas is "always on the wheel house," and Mr. Su is the only person controlling the investigation of schools, and the Vessel investigated for a few minutes before setting. JX 9 at 98; *see* Tr. 38-39. Mr. Tada also asserted at hearing that some of the crew might have seen the whale, too, and that "usually" when the helicopter flies off to investigate a school, "he sends a message back to the vessel to the fishing master." Tr. 39, 67.

Prior to Set 6 (Count 2), Mr. Tada was on the quarterdeck, the fish master was "in the bridge authorizing the crew to stand by for the set," and another crewman was in the crow's nest. Tr. 40. The latter two had access to binoculars. Tr. 40-41. Mr. Tada asserted in some of his paperwork that a whale was detected by the Vessel helicopter during an investigation of fish. JX 5 at 18; JX 6 at 38. The whale was "swimming among the fish," in and out, and "diving." Tr. 75-76. Approximately 18 months after Set 6, in March, 2012, Mr. Tada asserted in his statement

to the NOAA official that before the Vessel set, the whale was visible to Captain Freitas, the helicopter pilot (Mr. Ronaldo), and the mechanic (Mr. Angelito). JX 9 at 99-100; *see* Tr. 45-46. Mr. Tada does not explain how he knows the helicopter team saw the whale, except for his testimony that "usually" when the helicopter flies off to investigate a school, "he sends a message back to the vessel to the fishing master." Tr. 67. Mr. Tada reasoned that Captain Freitas saw the whale "because he's [typically] in the wheel house," and that Mr. Su saw the whale because he is the person who is generally in control of the Vessel, the fish investigation, and who authorizes set activity. JX 9 at 100; *see* Tr. 45-46. Mr. Tada asserted at hearing, "[o]f course" some of the Vessel's crew saw the whale. Tr. 46.

Prior to Set 10 (Count 3), Mr. Tada was on the helicopter deck, Mr. Su was "in the bridge," and a crewman was in the crow's nest. Tr. 47. While the Vessel was investigating a school, Mr. Tada saw one or two whales from a distance of approximately 20-30 meters away, and was not using binoculars. Tr. 48, 78-79. He asserted in some of his paperwork that two whales were seen by the Vessel helicopter during the investigation phase of operations. JX 5 at 19; JX 6 at 43. Mr. Tada confirmed that he saw a whale before the skiff was let go. Tr. 79. Approximately 18 months after the set, Mr. Tada asserted in his statement to the NOAA official that during Set 10, the whale was visible to everyone on board the Vessel, including the fishing master, Mr. Su, who Mr. Tada asserts was the person who authorized the work boat to chase the whale out of the net. JX 9 at 101; *see* Tr. 52-53. He assumed the captain saw the whale, too, because he oversees the operations, and at hearing he testified that "usually" when the helicopter pilot flies off to investigate a school, "he sends a message back to the vessel to the fishing master." Tr. 67; JX 9 at 101. After the helicopter pilot and mechanic landed, Mr. Tada said that he asked them if they saw the whale after they landed, but Mr. Tada was not asked to repeat their response on the record. Tr. 82. At hearing, Mr. Tada stated that "all the crew were there watching the seine during the pursing," so everyone saw the 7-meter long whale. Tr. 53. "It's easy to see," he stated. *Id.*

As the fishing trip concluded in early September 2010, Mr. Tada recorded in his Purse Seine Trip Report his observations in response to a variety of inquiries, ranging from the use of electronics on board, safety and accommodations issues, the presence of FADs, etc., during the fishing trip. JX 10. One of the prompts in the Report is for "Other-Monitoring Observations," where Mr. Tada wrote:

> WHALE SETTING
>
> Well, according to the other monitoring observations, so far and along the trip, one of the monitoring activity sometimes normally been involved is making a set on tuna freeschool which associat[ed] with alive species of special interest whales. Beside the vessel [alwaysly [sic] (Mr. Tada read it as "obviously" at hearing)] really intended to do it when it comes along without double thinking. [sic]

JX 10 at 142; *see* Tr. 54. According to his explanation at hearing, it appears that Mr. Tada meant "without thinking twice," when he said "without double thinking." Tr. 54. It also appears that

he was referring to the fishing master's decisions to set upon the whales at issue in Counts 1-3. *Id.*

In order of persuasiveness, Mr. Tada's immediately contemporaneous notations in the forms and in his journal, his credible testimony and refreshed recollections at hearing, his timely Purse Seine Trip Report reflections, and his written statement months later to the NOAA official, together are sufficient evidence that Respondents knew a whale was present prior to the set, and then knowingly set the net on the whale during the sets in question in Counts 1, 2 and 3. Respondents' attempts to rebut the evidence will be discussed below, after the analysis for the next two alleged MMPA violations, Counts 5 and 6.

Count 5

Mr. Siau was a credible witness at hearing, and his testimony and records displayed a slightly higher fluency in English than those of Mr. Tada. He has significant experience as a purse seine observer. Tr. 99. Mr. Siau had received training as a fishery observer on purse seine fishing operations, data collection and recordkeeping, and species identification. Tr. 99-101. During the fishing trip at issue for this Count, Mr. Siau observed a total of 39 purse seine fishing sets by the Vessel between October 7, 2010, and October 30, 2010. Stip. ¶ 36. While engaged as an observer on the Vessel, Mr. Siau maintained observer reports, including his PS- 2 Daily Log form, PS-3 Set Details form, Gen-2 Species of Special Interest form, a Trip Diary, and a Purse Seine Trip Report, which documented the events that he observed while on board the Vessel. JX 11, 12, 13, 14. Mr. Siau completed the PS-2 Daily Log form, PS-3 Set Details form, Gen-2 Species of Special Interest form, and Trip Diary for the day of the alleged violation on the same day as the relevant fishing set. Tr. 102, 105-110. His reports were based on notes he took contemporaneous to the relevant fishing sets during which he was the observer. *Id.*

Prior to Set 16, which occurred on October 18, 2010, and which is the set at issue for Count 5, Mr. Siau was at the bridge, and watched the Vessel helicopter take off to search. Tr. 102. The fishing master was also on the bridge, there was a crewman up in the crow's nest, and Captain Freitas was "on the upper deck." Tr. 103-104. After a few minutes, Mr. Siau "heard the pilot and the chopper man[;] they radioed back to the bridge reporting that they found a school of fish associated with the whale." Tr. 102-103. Mr. Siau stated: "I heard the pilot mention a whale," and clarified that the pilot was speaking English at the time. Tr. 103, 113. He also asserted in some of his paperwork that a whale was detected by the Vessel helicopter and was associated with one live whale. JX 11 at 146; JX 13 at 166. Mr. Siau first saw the whale after he heard about it from the pilot, when the whale was approximately .2 nautical miles away from the boat. Tr. 104, 113. The whale was approximately 3 meters in length. Tr. 111. During the investigation of the school, "the vessel was moving along the way the whale moved . . . because when the whale moved . . . it scared the school of tuna, so the vessel tried to throw its nets right at the school of tuna to get them inside the net." Tr. 116-17. Mr. Siau reported that the species was feeding, and the "setting was done around it." JX 14 at 193. Approximately 7 months later, in May 2011, Mr. Siau asserted, in a statement recorded by a NOAA official, that he had used the Vessel binoculars to observe the whale during this set, that the whale had escaped "over the net cloaks," and that both the "captain and the fishing master were aware of whale inside net" during the set. JX 15 at 199-200; Tr. 110-11. Mr. Siau concluded that Mr. Su "was aware of the

whale . . . because he is the one doing fishing, especially on settings," and he concluded that Captain Freitas saw the whale "during every sets, captain usually stand on the upper deck or on heli deck observing the set, both us and he should also saw what I saw on sets [sic]." JX 15 at 199-200; Tr. 111. When asked about the captain's reaction to setting on whales, Mr. Siau stated: "Captain always feel disappoint[ed] and angry when he saw whale inside net." JX 15 at 199. Mr. Siau recalled at hearing that during the investigation of the school, "most of the crews, they were on the deck watching;" "For sure they saw the whale." Tr. 111.

In order of persuasiveness, Mr. Siau's immediately contemporaneous notations in the forms and in his journal, his credible testimony at hearing, and his written statement months later to the NOAA official, together are sufficient evidence that Respondents knew a whale was present prior to the set and then knowingly set on the whale on October 18, 2010, the date at issue in Count 5. Respondents' attempts to rebut the evidence will be discussed below, after the analysis for the final alleged MMPA violation, Count 6.

Count 6

Mr. Mamutu was a credible witness at hearing. His testimony and written materials exhibit fluency in English, and his Trip Diary and Purse Seine Trip Report in particular are very clear and descriptive. JX 18, 20. He has been an observer for ten years, and before that was a purse seine fishing vessel crewman for one year. Tr. 118-19. Mr. Mamutu had training as a fishery observer on purse seine operations, data collection and recordkeeping, and species identification. Tr. 119-121. During the fishing trip at issue, Mr. Mamutu observed a total of 30 purse seine fishing sets by the Vessel between December 4, 2010, and December 26, 2010. Stip. ¶ 37. While Mr. Mamutu was aboard the Vessel, he maintained observer reports, including his PS-2 Daily Log form, PS-3 Set Details form, Gen-2 Species of Special Interest form, a Trip Diary, and a Purse Seine Trip Report, which documented the events he observed while on board the Vessel. JX 17, 18, 19, 20. Mr. Mamutu's PS-2 Daily Log form, PS-3 Set Details form, Gen-2 Species of Special Interest form, and Trip Diary for the day of the alleged violation were completed the same day as the relevant fishing set and were based on notes he took contemporaneous to the relevant fishing set he was observing. Tr. 41-45.

Prior to Set 10, on December 11, 2010, Mr. Mamutu was on the deck of the Vessel, along with most of the crew, except he didn't see the captain, Captain Moniz. Tr. 121-22; JX 21 at 263 (Captain Moniz was in his cabin during this set). Approximately three miles away, Mr. Mamutu saw "something blowing water out from the surface, and the school of tuna around the bait;" in his mind, he "knew it was a whale" and attested that everyone from the deck could see that. Tr. 122. The Vessel helicopter also detected the whale before the set, according to Mr. Mamutu's PS-2 form. JX 17 at 205; JX 18 at 211 ("The [school] seen from the chopper was whale associated."). The Vessel moved closer to the school and started circling it. Tr. 122. There was a crewman in the crow's nest, and Mr. Mamutu walked between the bridge, the deck, and the helicopter deck. *Id.* Mr. Mamutu recalled: "The fish master," who was on the bridge, "was trying to figure out how he can catch the school of tuna, so a couple minutes, circle around the school of fish, and then he let go and set the net." *Id.*; *see also* JX 19 at 217 ("the two whales were circled . . . and trapped inside the net"). Prior to the set, Mr. Mamutu only saw the water blowing from the surface of the water, and not the physical whales. JX 21 at 261. The set

"caught 2 balaen whales," Mr. Mamutu observed, both 12 meters in length. Tr. 129; JX 18 at 211; JX 21 at 262. "They stayed in the net set until chased by an auxiliary boat used that they ripped the net and escaped alive." *Id.* "The fishing master saw the whales," Mr. Mamutu stated, and "in my opinion he was optimistic the whales would escape alive as they did and went on to set them with the tuna school." JX 18 at 211; Tr. 127-28. In his Purse Seine Trip Report, which he completed at the end of the trip, Mr. Mamutu noted that the school associated with a whale was "targeted by the vessel," however, the setting on a whale "was unintentional." JX 20 at 231, 251; Tr. 130-31. At the hearing, he clarified: "The fish master was trying to make a set" and "trying to avoid the whale, but the whale was finally caught in the net." Tr. 131. As he concluded his Purse Seine Trip Report, Mr. Mamutu recorded that "the vessel continue [sic] to target whale associated schools. That had contributed to vessel's successes . . . ." JX 20 at 258; Tr. 132.

On February 16, 2011, two months later, Mr. Mamutu asserted, in a statement recorded by a NOAA official about the set in question, that:

> The fishing master said after that set that it was okay to set the whales if the mammals would not be killed. He said that other vessels also set on whales but always made not seriously hurt or killed. That was why he set on the whales then used the work boat (auxiliary boat) to chase them to escape.

JX 21 at 261; Tr. 133. About Captain Moniz' knowledge of the setting on whales, Mr. Mamutu reported:

> He did not mention any set made on whales. He found out later from me.
> [ ]
> He could only say that he was worried about the incident. Also one day later he told me that him and the fishing master were arguing about the set.
> [ ]
> When I told him that the whales were in the net he was speechless. Then later he kept saying, "Oh Nigel, I don't know this." He said that he had told the fishing master about setting on whales but he never listen[s].

JX 21 at 262-63. At hearing, Mr. Mamutu elaborated:

> Captain Joao came to me and he said oh man, this is no good. I told the fishing master not to set on the whales many times, but he still keeps setting on the whales. That's what he told me. [ ] [H]e told me they were arguing about the set. He talked to the captain – the fish master about the set we did that day on the whale.

Tr. 134-35.

In order of persuasiveness, Mr. Mamutu's immediately contemporaneous and descriptive notes and other entries, his credible and detailed testimony at hearing, and his written statement only two months later to the NOAA official, together are sufficient evidence that Respondents

knew whales were present prior to set and then knowingly set on them on December 11, 2010, at issue in Count 6.

Thus far, the Agency has proven by a preponderance of the evidence that the Vessel, by and through its crew and officers, knowingly set their fishing gear on live whales on the dates cited in Counts 1-3, 5 and 6. Respondents' arguments will be discussed below.

ii. Can Respondents' successfully discredit or rebut the Agency's prima facie case?

First, Respondents argue that the Agency failed to present any "first-hand evidence" that the captain or fishing master in each set actually saw the whales prior to the set. RB 6. All of the observers' testimony is "based on ***assumptions***," namely, the assumption that if the observer saw the whales prior to the sets, then the captain and fishing master must have also seen the whales prior to the sets. *Id.* (emphasis in original). Respondents accept that observers do not have a duty to inform the captains or crew about their whale sightings (although, they assert it is a "questionable practice that the observers would not even confirm" whether they saw the whales). RRB 2. However, without eliciting at the time any comment, confirmation or denial that the crewmembers also saw the whale, the observers' view that the crew must have known about the whale is "nothing but the observers' subjective belief." RB 8-11; RRB 2. With such insufficient evidence, Respondents argue, the Agency cannot show that they knowingly set on the whales. RRB 2. Some of Respondents' specific complaints are that for the set at issue in Counts 2 and 3, Mr. Tada and the fishing master were not in the same location on the Vessel. RB 9. For Count 5, Mr. Siau's testimony "merely shows they were 'watching' but there is not information as to what they were watching, what direction or if he even pointed out the whale to them." RB 11. And for Count 6, Respondents argue that Mr. Mamutu did not actually see the whale prior to the set, insisting that he only saw "*something* blowing water out from the surface and the school of tuna around the bait." *Id.* (citing Tr. 121-22).

The Agency does rely almost exclusively on the observations and record-keeping of the observers, who the Agency argues "have no motive to misrepresent what they observed . . . and everything to lose if any of them were found to have given false evidence." ARB 7. Most importantly to the Agency, the accounts of the three observers were memorialized "contemporaneously to the specific activity alleged," having been recorded at the time of the set, later that day, at the end of the fishing trip, and/or in the case of the interviews with NOAA agents, up to 18 months later. AB 23; *see* Factual Background and Count-specific Discussion, above. On the other hand, Respondents have not provided "any contemporaneous evidence to support their claims." AB 23. Instead, their defense consists "principally of self-serving [hearing] testimony" by Captain Freitas, "who had to rely on memories from events that occurred approximately three years earlier." *Id.* While he should not be faulted for being unable to recall much from the trip, his testimony should not be accorded much weight, the Agency argues. ARB 7.

There are many reasons to give great weight to the observers' assertions that members of the crew knew whales were associated with the school prior to the sets in Counts 1-3, 5 and 6. First, the observers were present on the Vessel, specifically tasked with observing the goings-on of the crew, the Vessel, and its fishing operations; they are each trained, experienced, and detail-

oriented, and took notes as they observed, in a setting where they could reasonably ascertain who else was present and what others could reasonably see. The observers are, by all accounts, neutral parties. At hearing, Mr. Tada and Mr. Mamutu confirmed that the duty of observers is to "just observe," collect data and keep records, not enforce the law or make arrests.[21] Tr. 25-26, 120-121. Captain Freitas and Captain Moniz did not report any problems with the three observers on their respective trips. JX 16 at 204; JX 22 at 267. Captain Freitas, years later, and without having read the observers' reports, could not recall any particular interactions with any whales during the sets at issue, however, he did recall seeing a lot of whales that year in the western central Pacific, where he spends an average of eight months per year fishing. Tr. 187, 190. He appears keenly aware that tuna schools and whales interact, particularly at the time of year when the alleged violation took place, and therefore, it appears reasonable that he and Mr. Su, while on a fishing trip, would be attuned to noticing when a whale associated with the school they intended to set upon. *Id.* During operations, he stated at hearing that he is generally on the bridge "looking at the schools of fish and everything else, the whole operation." Tr. 185. Captain Moniz stated to the NOAA investigator first that he could "not recall" setting on whales while on the Vessel, and then stated uniformly that that "the Pacific Ranger never set on whales" while he was captain. RRB 11 (quoting JX 22 at 67), however, this self-serving lack of memory and then blanket denial cannot be afforded much weight.

As stated above, the ALJ is empowered to "make credibility determinations when faced with conflicting testimony." *Black*, 2013 NOAA LEXIS 6, at *6. In this instance, I find that the observers' observations and experience, as established by their testimony and their contemporaneous records of what they saw before and during each set at issue, suffice as a basis from which to draw reasonable inferences as to whether the captains or the fishing master saw the whales.

Plus, there are other circumstantial factors that bolster the observers' assumptions, e.g., the Vessel was at sea to catch tuna and the sets were therefore of key interest to all on board; the investigations of the school, done by helicopter over several minutes, with the crew having the aid of binoculars and other tools, were closely watched by those in charge of the fishing and operations of the Vessel over a period of time sufficient enough that those watching would likely observe what the observer observed. It is reasonable to infer that the crewmembers focused their attention on the same tuna school that the helicopter was investigating. There is no evidence that during any of these sets an unexpected event or occurrence diverted the attention of all crew on deck just before a potential set. Further, given the observers' extensive experience and training, it is unlikely that they would mistake a whale for something else, or misidentify whale behavior, such as the spouting in Count 6. Ultimately, direct evidence of the captains' and Mr. Su's

[21] *See Black*, NOAA Docket No. PI0904340, 2013 NOAA LEXIS 6, at *54-55 (ALJ, Aug. 22, 2013) ("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.").

knowledge of the whales prior to the sets is not necessary because reasonable inferences can be made about what Respondents knew, or should have known, from the evidence and testimony presented.

Second, Respondents argue that the assumptions the observers made are contradicted by the Vessel's company "policy to not set on whales." RB 6. Respondents cite the testimony of Mr. Virissimo, who stated:

> Our instructions [to the fishing vessel captains] are if you can avoid them, avoid them. We don't want to purposely set on these. I mean, if you – there's going to be schools of fish without whales. There's going to be schools of fish where a whale is coming in on the same bait. You know, if it's right there and you know it's right there feeding at the same time, you are to avoid it. I mean, that's our policy: don't purposely set on these animals.

Tr. at 144–45. Captain Freitas described this policy, essentially, as his own practice:

> I always, always try to stay away from them.
> [ ]
> Well, if I see the bulls completely right there and right on, we'll change, try a different school or whatever. There's been cases where you come up on one school where the other school had whales and the whales came to this one, I mean, halfway around the school or whatever. [ ] If you see them beforehand and you set right when they're feeding and everything, that's wrong. That's for sure you're going to get them in your net. If . . . schools are running and they're traveling, you're going at a pretty good clip and these things are submerged, they're hard to keep track of.

Tr. 189-90.

Captain Freitas and Mr. Virissimo do appear to have the same understanding that knowingly setting on whales should be avoided. And at the hearing, they did not seem insincere. However, evidence in general of their company policy or vessel policy or ideal fishing conditions cannot overcome the strength of the three different independent observers' consistent testimony and records over a relatively short period of time of actual vessel operations indicating that on the dates and times in question, the Vessel knowingly set on whales, regardless of company policy.

Third, Respondents argue, had the captain for each set "been aware of the whale, he would have recorded the school association code for setting on live whale and not 'feeding on baitfish' in the vessel log book, which he did, that is submitted under penalty of perjury." RB 8.

This argument must fail. On the Regional Purse Seine Logsheets in the record that both Captains Freitas and Moniz completed and signed, there are eight choices of "School Association Codes," from which it appears only one may be selected and entered at a time, even if potentially more than one actually and factually applied. JX 23; JX 16 at 203; Tr. 143-45, 188. For

example, the code selected by Captains Freitas and Moniz for each time-of-set at issue in Counts 1-2 and 5-6 is for "feeding on baitfish," which all the parties would agree is accurate. Stip. ¶¶ 43, 49, 55, 66, 71. However, just because the tuna were feeding on baitfish does not mean that they were "Unassociated" (code 1), or that there was not also a "Drifting Raft" present (code 4), or that there was no "Live Whale" swimming around the school (code 6) as well. Thus, the fact that the captains did not choose the School Association Code 6 for these sets to indicate "Live Whale," does not mean that no live whale was present and associated with the school at the time.

Finally, whales' behavior is unpredictable, Respondents argue, and "[*i*]*t is possible* that even if the vessel is trying to avoid them, they could get into the net because a whale can stay submerged for [twenty] minutes." RB 7 (emphasis added). The Agency's position does not comport with "the reality of fishing in the open ocean," and "the agency presented no evidence as to how Respondents would have expected the whales to act vis-à-vis the vessel." RB 8; RRB 4. Respondents insist that "more evidence than that presented by the [A]gency should be required to find Respondents' actions were indeed intentional."[22] RRB 4. With whales "diving up and down and there is a lot of activity preparing for a set such that one person may not be looking in the exact spot as another when a whale pops up." *Id.*

Certainly, the record appears to show that purse seine fishing in the high seas is a difficult task, and marine mammals' behavior is unpredictable, and also mostly unseen as it occurs underwater. However, the evidence here is not that a set was made with no whale close in sight and one unpredictably popped up. Rather, the record shows that each net was set after the crew knew there were whales associated with the fish they intended to set upon. The substantial experience that Captain Freitas, Captain Moniz, and Mr. Su have fishing on purse seine vessels, as well as the company policy, suggests that they well knew that under those circumstances what could be reasonably expected to occur. As such, it is found that the Agency has offered sufficient evidence regarding the knowledge of the crew at the time the sets were made.

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

In their Post-Hearing Brief, Respondents state that "the agency's regulations erroneously apply the MMPA, which allows 'incidental, intentional' takes provided there is no lethal taking and no targeted species is involved." RB 14. In support thereof, they refer to the arguments set out in Respondents' [Pre] Hearing Memorandum; Marine Mammals Protection Act dated August 29, 2013 (hereinafter "Memorandum" or "Memo."). Therein, Respondents insist that "the MMPA is replete with . . . examples of Congressional intent to allow certain incidental, but intentional takings in commercial fishing operations." Memo. 11. Also, Respondents assert that

[22] In support of this proposition, Respondents cite to *Wilson*, NOAA Docket No. AK1100576, 2013 NOAA LEXIS 11 (ALJ, June 13, 2013), where this Tribunal found that evidence beyond a mere photo of the vessel within one hundred yards of a humpback whale was required to increase the culpability level from "reckless" to "intentional." That determination was made in the context of a culpability analysis for the penalty portion of that decision, not the liability portion. Indeed, in *Wilson*, I found that respondents knowingly harassed humpback whales. *Wilson*, 2013 NOAA LEXIS 11, at *21-22.

"NOAA's definition of the term 'incidental' in § 229.2 is inconsistent with other related regulatory definitions and contrary to the plain words of the statute." Memo. 17. Further, Respondents contend that the separate penalty provisions in the MMPA commercial fisheries regulations show that Congress only intended to forbid intentional lethal takes.[23] Memo. 17-18.

The term "take" includes harassment, capture, the temporary restraint or temporary detention of a marine mammal, and any intentional act that results in disturbing or molesting a marine mammal. 50 C.F.R. § 216.3. Respondent has not advanced the argument that the act of knowingly setting nets on the whales would not constitute a "take" as defined.

The regulations define "incidental" to mean, "with respect to an act, a non-intentional or accidental act that results from, but is not the purpose of, carrying out an otherwise lawful action." 50 C.F.R. § 229.2.

Respondents assert that because the "purpose" of their net setting was to catch tuna, and the whales ended up in the net only as a "result of" the lawful sets, and the whales were taken "incidentally." RB 7. Applying the MMPA as the Agency attempts to here, Respondents argue, "would prevent tuna fishing *altogether anytime* [ ] a whale was seen in the *same ocean* as a tuna school – an untenable result given whales and tuna coexist and neither can be controlled independently." *Id.* (emphasis added).

Respondent's interpretation of the Agency's position and regulations is both over dramatic and incorrect. As an exception to the moratorium, the MMPA allows for the "incidental taking of marine mammals in the course of commercial fishing." 16 U.S.C. § 1387(a)(1). The term "incidental" modifies the particular act of "taking," so substituting the term "take" for the generic term "act" in the definitional regulation, we can read the definition of "incidental" as follows to provide a framework for analyzing Respondents' actions

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

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

The regulatory history of the incidental taking exemption shows that this is a proper framework from which to analyze whether the takes here were "incidental." On August 30,

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[23] To the extent Respondents challenge the Agency's regulations as inconsistent with the statute, this Tribunal does not have the jurisdiction to render a ruling on that point and so those arguments are not discuss herein. 15 C.F.R. § 904.200(b); *Creighton*, 2005 WL 1125361, at *21 (Apr. 20, 2005) (citing *Lobster Co., Inc., et al.,* 2002 NOAA LEXIS 2 (NOAA Feb. 21, 2002); *O'Neil*, 1995 NOAA LEXIS 20 (NOAA June 14, 1995)). Additionally, because as indicated herein, it is found that the incidental take exemption regulations offer a clear definition of "incidental," it is not necessary to explore Congressional intent. Therefore, the discussion is limited to the question of whether Respondents' knowing sets on whales constitute "incidental takes" as those words are defined in the incidental take regulations.

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

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

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

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

Despite Respondents' concern that tuna fishing would be practically foreclosed if their incidental taking authorization were limited to truly accidental takes, it does not appear that such a restriction would be so debilitating. The observers were present for dozens of successful sets, over months of fishing on the Vessel, and only a handful were investigated where a whale was present and set upon. There is no testimony in the record showing that if commercial fishermen, or Respondents specifically, follow the Rule as NOAA interprets it, that is, avoid knowingly setting the net on a whale-associated school, that they will be forced to go out of business, stop fishing, experience a significant decrease in profits, fish a shorter season, have to change protocols or equipment, or experience any other serious injury or setback. To the contrary, the testimony of the Respondents suggest that is already their accepted standard practice and policy.

In conclusion, the Agency has shown by a preponderance of the evidence that Respondents, through the actions of the crew of the Vessel, knowingly set purse seine fishing gear on whales on the dates at issue for Counts 1, 2, 3, 5, and 6. These takes of marine mammals were not accidental, but instead were intentional takes not permitted under Respondents' Section 118 authorization to incidentally take pursuant to their commercial fishing operations, and therefore, Respondents are hereby found liable for those five Counts of violating the MMPA.

C. Count 4: Alleged Violation of Western and Central Pacific Fisheries Convention Implementation Act

To establish that Respondents violated the WCPFCIA, 16 U.S.C. §§ 6901-6910 and 50 C.F.R. § 300.223(b), on September 1, 2010 (August 31, 2010 UTC time), as alleged in Count 4, the Agency must establish by a preponderance of the evidence that: (1) Respondents are "persons" under the Act and were "owners, operators and crew" of a fishing vessel of the United States at the time; (2) that the Vessel was in the Convention area during a FAD closure period; and (3) the Vessel set a purse seine net around a FAD or within one nautical mile of a FAD.

The parties have stipulated that Captain Freitas, Mr. Su, and Pacific Ranger are persons subject to the jurisdiction of the United States, and that the Vessel was a U.S.-flagged fishing vessel. Stip. ¶¶ 27-28. At the time, Pacific Ranger was the owner of the Vessel, and Captain Freitas and Mr. Su were operators of the Vessel. Stip. ¶¶ 2-4. The parties have also stipulated that the activities giving rise to Count 4 occurred within the Convention area, which was subject to a FAD closure period from July 1 through September 30, 2010. Stip. ¶¶ 15, 58; 50 C.F.R. § 300.223(b). As such, only the last element of the violation as enumerated above remains contested.

NOAA maintains that it has proven by a preponderance of the evidence that Respondents "set on a manmade raft within 10 meters of a school of tuna" in violation of the WCPFCIA. AB 7. Respondents assert that the evidence "does not show it was more likely than not that the vessel improperly set on a FAD." RB 14. In support, they assert, inter alia, that the observer's testimony is unreliable and speculative and that the set was inconsistent with a typical FAD set. *Id.*

It has already been established that Mr. Tada has been a credible witness in this matter. As part of his observer training, Mr. Tada received instruction on the 2010 FAD closure. Tr. 24-25; 55-56. While engaged as an observer on the Vessel, Mr. Tada maintained multiple observer reports, which were discussed above. *See* JX 5, 7, 8. On the date of the alleged WCPFCIA violation in Count 4, Mr. Tada completed the PS-2 Daily Log form (JX 5), Trip Diary (JX 6), and the PS-3 form (JX 8) the same day as the relevant fishing set. Tr. 60, 63. He based his reports on notes he took contemporaneous to his observation of the fishing sets at issue. *Id.* Mr. Tada also worked on completing the purse seine trip report throughout the trip. Tr. 53; *see also* JX 10. Further, as has been established above, his assumptions about what the crew was aware of while investigating the set and conducting fishing operations may reasonably be deemed credible and reliable evidence.

Prior to Set 28 on September 1, 2010 (August 31, 2010 UTC time), Mr. Tada was on the helicopter deck, the fishing master was on "the bridge" of the Vessel, and a crewman was in the crow's nest. Tr. 56-57. During the investigation of the school, Mr. Tada recorded an association of a FAD, "drifting about 10 meters aside from the foamer school detected by the helicopter." JX 5 at 21; JX 10 at 117; Tr. 56, 60. The FAD was close enough for Mr. Tada to describe it: "Raft man material, net hanging down underneath, plus eight yellow floaters coiled together with a net plus a bamboo at the center and a GPS buoy is attache[d] but the numbers are not very clear, probably belong to another vessel." Tr. 60-61. At the start of the set, the FAD was still

there. JX 5 at 21. Mr. Tada drew a diagram of the FAD in his notebook while he was on the deck, then later, drew the diagram again in his Trip Diary. JX 6 at 66. Mr. Tada testified at hearing that it was his recollection that the fishing master told the crew to tie off the raft to the Vessel. Tr. 65. He particularly asserted: "Most of the crew saw it, the captain, the helicopter pilot, both of them saw the FAD too and they tie[d] it in front of the vessel." *Id.* So it was not caught in the net because "they drug it away from the net." Tr. 87. As the fishing trip concluded in early September 2010, Mr. Tada recorded in his Purse Seine Trip Report that "this is the first FAD we sighted on this FAD closure period and however we set on it." JX 10 at 117. Approximately 18 months later, in March, 2012, Mr. Tada asserted in a statement recorded by a NOAA official, that during this set, the fishing master "probably knew and saw the raft cause he was also there in the wheel house observing the school before authorizing the set#28." Tr. 64-65; JX 9 at 106. He also wrote that "the raft was seen very clearly just 10 meters away from the school, also he's the one authorizing the work boat to pull the raft and [tie it] in front or at the stern of the vessel while the set was in process." *Id.*

At the hearing, Captain Freitas could not recall anything about the alleged FAD interaction during Set 28. Tr. 193. He did say that he would have remembered the FAD being tied off, however, especially if it were only 10 meters away, and he would have written it down if that did, in fact, occur. Tr. 193-95. Although not the case during a closure period, typically when there is a FAD associated with a school, the Vessel will "bring them on board so they don't get caught in the bow thrusters or everything else when we are setting," he asserted. Tr. 194. FAD sets are usually in the early morning, Captain Freitas added, because they're "pretty tough to catch during the day." Tr. 195. Captain Freitas, not impressed by Mr. Tada's drawing of the FAD, testified that Mr. Tada could have drawn a picture of a FAD from the "20 of them things stacked on our decks." Tr. 210. In April 2012, Captain Freitas gave a statement to a NOAA special agent over the phone that "he was not aware of any FADs being present while onboard the F/V Pacific Ranger" during the fishing trip, but that he "did see an occasional 'raft and/or floating debris' but did not set on any of these during the FAD closure." JX 16 at 204. If any observer said otherwise, "'they were way off,'" he said. *Id.* He added that the fishing master on the fishing trip was "'tough and followed the rules,'" however, he could not remember his name. *Id.*

The Agency relies mainly on Mr. Tada's testimony and record-keeping to support Count 4. The Agency notes in further support that Mr. Tada's PS-3 Form states that 99% of the 40 metric ton catch from Set 28 consisted of "juvenile species" which included yellowfin tuna, "the very age-class and species of tuna that the FAD closure is designed to protect." ARB 10 (citing JX 8, the PS-3 Form, and JX 38, a copy of CM 2008-01). Finally, the Agency asserts that Captain Freitas's testimony that he "think[s he] would have remembered" fishing on FAD should be given little weight "when contrasted with Mr. Tada's detailed, contemporaneous description of the purse seine set and the associated FAD." Tr. 195; ARB 10-11. After all, in NOAA's 2012 interview of Captain Freitas, which occurred closer in time to the alleged violation, albeit not that close in time, he did admit to seeing the occasional raft and/or floating debris during the trip at issue. ARB 10; JX 16 at 204. Mr. Tada has "no motive to misrepresent what he observed . . . and everything to lose if he were found to have given false evidence." ARB 10-11. Finally, the Agency argues that it doesn't matter when the crew and officers became aware of the FAD for purposes of this alleged violation. ARB 11.

Respondents challenge Mr. Tada's "inconsistent statements or unsubstantiated assumptions," arguing that the Agency failed to meet its burden of proof for Count 4. RB 14; RRB 5. Specifically, Respondents cite Mr. Tada's testimony admitting that it would be hard to see a raft on top of the water from a mile away. RB 14. Also, Set 28 is inconsistent with a typical FAD set, where the vessel encircles the FAD, and it typically happens in the early morning, around 5:00 a.m., not at 8:35 a.m. when this set took place. RB 14; RRB 5. The Agency's claim that the size and species of fish caught is consistent with what size and species of fish would be caught during a FAD set is misleading, Respondents argue. RRB 5-6. Respondents also argue that Mr. Tada "provides no direct evidence" that the captain or fishing master saw the FAD, and that Mr. Tada admitted that he "was simply guessing" that someone tied off the raft to the Vessel. RB 14. Both Mr. Tada and Captain Freitas' testimony is based on their respective beliefs about what happened, without first-hand knowledge. RRB 6. Finally, Captain Freitas has no incentive to lie, Respondents propose. *Id.*

A FAD is "[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[.]" 50 C.F.R. § 300.211. Respondents did not advance the argument that an object matching the description provided by Mr. Tada, if found to be present, would not constitute a "FAD" as defined by the regulation.

Respondents' challenges to the Agency's prima facie case for Count 4 are not successful. As has been established for the MMPA counts above, Mr. Tada's assumptions about whether members of the crew saw the FAD are reasonable, and his first person account, recorded immediately, about the details of the FAD's appearance and its proximity to the school at first, and then the Vessel and school and the set, are credible. The record shows that it is highly unlikely that the crew was not aware of the FAD associated with the school that was being investigated. Further, the record shows that it is simply implausible that the crew did not see it when Mr. Su directed the crew to make the set and remove the FAD from the scene by tying it up to the Vessel, given that it was only 10 meters from the school, because of the managerial and observer role of Captain Freitas and Mr. Su, and the tools at their disposal, e.g., binoculars, reports from the helicopter pilot. Mr. Tada's admission that it would be hard to see a raft on top of the water from a mile away does not change the preponderance of the evidence that the FAD was seen and set upon once it was closer to the Vessel.

Also, while it might be true that typical FAD sets may occur earlier in the day than Set 28 occurred, and typically the net will be set to encircle the FAD, unlike here, the act of setting the net in proximity of the FAD during a closure period is illegal whether or not the open season FAD-setting rituals or habits are followed. The regulations prohibit setting a purse seine within one nautical mile of a FAD or by setting a purse seine in a manner intended to catch fish that have aggregated in association with a FAD. 50 C.F.R. § 300.223(b)(1)-(2). As to Respondents' other arguments advanced for Count 4, they are found to be meritless.

I find that the record shows that the Vessel more likely than not set on a FAD or within close proximity to a FAD on the date in question for Count 4. As was found with relation to the MMPA counts, Mr. Tada's contemporaneous records and recalled observations at hearing far outweigh Captain Freitas' lack of recollection and assertions that he would have remembered

such an event. Mr. Tada's records and testimony are especially persuasive in that they outline, in detail, the appearance of the FAD, which, in fact, was so close to the school that it is likely Captain Freitas and Mr. Su knew it was there before making the set.

The Agency has demonstrated by a preponderance of the evidence that, during Set 28, the Vessel's operators and crew set a purse seine net on or within one nautical mile of a FAD and/or set a purse seine in a manner intended to catch fish that have aggregated in association with a FAD, in violation of the WCPFCIA.

VI. DISCUSSION AS TO PENALTY

The MMPA provides, in pertinent part, that "[a]ny person who violates any provision of this subchapter or . . . regulation issued thereunder . . . may be assessed a civil penalty by the Secretary of not more than $10,000 for each such violation." 16 U.S.C. § 1375(a)(1). The WCFCIA incorporates by reference the civil penalty amounts and authorities of the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"). 16 U.S.C. § 6905(c). The Magnuson-Stevens Act provides for civil penalties of $100,000 per violation. 16 USCS § 1858(a). The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended by the Debt Collection and Improvement Act of 1996, Pub. L. 104-134, resulted in the Secretary increasing the maximum civil penalties to $11,000 per MMPA violation, and to $140,000 per WCPFCIA (and Magnuson-Stevens Act) violation. 15 C.F.R. §§ 6.4(f)(10), 6.4(f)(26) (2010).

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

> Factors to be taken into account in assessing a civil penalty, depending upon the statute in question, may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior violation, and ability to pay; and such other matters as justice may require.

15 C.F.R. § 904.108(a).[24] Similarly, the Magnuson-Stevens Act (the penalty provisions of which are incorporated into the WCPFCIA), requires that the Agency "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).

There is no presumption in favor of the penalty proposed by the Agency. 15 C.F.R. § 904.204(m); *see* Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631 (June 23, 2010). Rather, "the presiding Administrative Law Judge may assess a civil penalty de novo,

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

'taking into account all of the factors required by applicable law.'"[25] *Pauline Marie Frenier*, NOAA Docket No. SE1103883, 2012 NOAA LEXIS 11, at *11 (ALJ, Sept. 27, 2012) (quoting 15 C.F.R. § 904.204(m)). Also, the ALJ is not required to state good reasons for departing from the Agency's analysis. 75 Fed. Reg. at 35,631.

The Agency seeks the imposition of a total penalty of $144,250 against Respondents Pacific Ranger, Captain Freitas, and Mr. Su, jointly and severally, for the violations at Counts 1-5. NOVA at 3; AB 29. The Agency seeks the imposition of a total penalty of $5,000 against Respondents Pacific Ranger, Captain Moniz, and Mr. Su, jointly and severally, for the violation at Count 6. *Id.*

A. Violations of the Marine Mammal Protection Act: Counts 1-3, 5, 6

i. Agency's Arguments

For each set at issue in Counts 2 and 3, which yielded fish in an amount greater than the statutory maximum penalty, the Agency seeks the maximum $11,000 penalty for each. ARB 11; JX 37 at 338 (NOVA). For the sets in Counts 1 and 6, the Agency seeks a $5,000 penalty for each. *Id.* For the set in Count 5, the Agency seeks a $7,250 penalty. *Id.*

The Agency asserts, "there is no doubt that the large-scale purse seine fishery in the central and western Pacific Ocean is a high value fishery, and the catch from a single fishing set has the potential to be valued at tens, or even hundreds, of thousands of dollars." AB 24-25 (citing Stip. ¶¶ 48, 54, 60; Tr. 174). Consequently, the Agency asserts, the value of a single set on a whale has the potential to far exceed the $11,000 statutory maximum penalty under the MMPA. AB 25. The Agency points out that, even though two of the five sets from the MMPA Counts were "skunk" sets, the value of the catch from the three successful sets totaled $86,531, or $31,531 more than the maximum penalty allowed under the MMPA for all 5 Counts. *Id.* (citing Stip. ¶¶ 10, 42, 48, 54, 65, 70). Additionally, the Agency contends that in light of "a recent increase in this type of [MMPA] violation by the purse seine fleet, the Agency is concerned that even the statutory maximum is regarded as nothing more than an acceptable cost of doing business." *Id.*; ARB 12. The Agency argues that a penalty should, at a minimum, recover Respondents' economic gain to the greatest extent possible, and where there no fish caught, impose a significant penalty still, to deter would-be violators. ARB 12. The Agency concludes that its assessed penalties "reasonably reflect the gravity, nature and circumstances of the alleged violation." *Id.*; AB 25.

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

ii. Respondents' Arguments

Respondents argue generally that the Agency's proposed penalties are "out of line with the facts." RB 15. Regarding the MMPA violations, Respondents note that they have no prior violations and argue that they were engaged in otherwise lawful fishing. *Id.* Respondents further maintain that they did not seek out, chase, kill, or harm the whales. *Id.* (citing Stip. ¶¶ 44, 50, 56, 67, 72; Tr. 31, 50, 108). Respondents argue that the penalties sought "ignore the realities of purse seine fishing," in that tuna sets typically take between two and four hours, during which time the ocean conditions are "constantly changing and uncontrollable" and "much can happen." *Id.* (citing Stip. ¶ 32). Respondents further assert that, given their engagement in otherwise lawful fishing activity, assessing the "excessive" penalties proposed here would result in there being "nothing left to distinguish a case where someone intentionally and maliciously seeks out and/or kills the whales while setting on tuna." *Id.* Respondents dispute the Agency's justification for a high penalty based on its "back of the napkin' generalized over-estimation of the value of fishing trips," instead of the facts in this case. RRB 8. The Agency "provided no scientific evidence that it pays for Respondents to chase whales rather than chase fish." RRB 8. Respondents' challenge the Agency's assertion that a maximum penalty is needed to deter future violations and that Respondents will just factor the penalty into their "cost of doing business." *Id.* The opposite is true, they argue, as illustrated by their challenge to the NOVA here. *Id.* Finally, Respondents highlight the risk for vessels to knowingly set on whales due to the Dolphin Protection Consumer Information Act, reasoning that any tuna caught "as a result of an intentional set where a whale is injured or killed" must be labeled as "non-dolphin safe," which is less marketable and valuable than tuna not so labeled. RRB 8-9.

iii. Analysis

Nature, Circumstances, Extent, and Gravity of the Violations

The marine mammals involved in these multiple Counts were captured or at least restrained, albeit temporarily, by encirclement in the purse seine net. The evidence shows, additionally, that some of the whales were chased from the net by the Vessel's auxiliary boats, resulting in further harassment. The record also shows that the possible value of the catch associated with/in close proximity to these mammals is very high. Furthermore, the record shows that the Mr. Su and the captains were generally aware that intentional sets on marine mammals were unlawful or at least to be avoided in line with company policy, and at least Mr. Su did so anyway. In consideration thereof, I find that a substantial penalty is appropriate for these violations that are serious in nature, extent and gravity.

Economic benefit and deterrence are important considerations. In the five sets underlying the MMPA Counts at issue, Respondents landed $86,531.90 worth of tuna. Stip. ¶¶ 42, 48, 54, 65, 70. Even assessing the maximum penalty of $11,000 per violation against Respondents, for a total of $55,000, Respondents' unlawful actions will still have realized an economic benefit of $31,531.90, based on the facts before me. The benefit would be even greater had the five sets at issue not included two "skunk" sets, in which no tuna were landed. The appropriate penalty in this matter should not only remove or diminish Respondents' economic gain from violating the law, it should also act to deter future violations. The Rules at

Section 904.108 provide that a civil penalty may be increased for commercial violators in order "to make a civil penalty more than the cost of doing business." *See also Pesca Azteca, S.A. de C.V.*, NOAA Docket No. SW0702652, 2009 NOAA LEXIS 10, at *39 (ALJ, Oct. 1, 2009), *aff'd* 2010 NOAA LEXIS 3 (March 1, 2010) (Order by Administrator); *Silvia*, NOAA Docket No. NE030119FM/V, 2005 NOAA LEXIS 1, at *17-18 (ALJ, March 17, 2005). While this Initial Decision takes no position on whether Respondents in fact view potential MMPA penalties for setting on live whales as a "cost of doing business," the penalty in this matter must deter Respondents and others from adopting such an attitude. *See Churchman*, NOAA Docket No. SW0703629, 2011 NOAA LEXIS 2, at *60–61 (ALJ, Feb. 18, 2011) ("The deterrent effect of a monetary sanction can thus be accomplished in these cases by imposing a significant sanction against each Respondent that encompasses not only the value of the unlawful catch but also an additional amount. . . . [A] sanction amount should be large enough to alter the economic calculus that might lead Respondents and other participants in the fishery to simply account for any possible sanction as the cost of doing business.").

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

At hearing, it was established that the fishing master is wholly responsible for conducting the fishing activities, whereas the captain is "responsible for the whole vessel." Tr. 180. It was further established that it was "up to the [captain][ ] to let the fish[ing] master know what he can do and what he can't do" with respect to regulatory requirements. Tr. 180-181. Respondents do not assert that the company's whale avoidance policy was communicated to the fishing master, who required an interpreter to communicate with the captain. Indeed, Captain Freitas described Mr. Su as being "more aggressive than most I've seen" with respect to his approach to fishing, stating he would "turn on a dime for a different school." Tr. 220. Additionally, in an interaction between Captain Moniz and Mr. Mamutu, Capt. Moniz spoke of Mr. Su's habit of setting on whales and Mr. Su's belief that setting on whales was acceptable absent mortal injury. Tr. 133-134; JX 21 at 261. While these facts do not disprove the existence of a policy not to set on whales, taken together, they tend to suggest that any policy that was in place was either not communicated to the crew, haphazardly implemented, or simply not enforced. Mr. Mamutu testified that "Captain Joao [Muniz] came to me and said 'oh man, this is no good. I told the fishing master not to set on the whales many times, but he still keeps setting on the whales.'" AB 22 (quoting Tr. 134). If Mr. Su acted according to his own understanding of the MMPA, that fact cannot absolve the other Respondents from their obligations under the law, especially in light of the fact that all Respondents stand to gain financially from a successful set.

The Parties agree that Respondents have no record of violating the MMPA within the past five years, and that no whale was killed or seriously injured by the Vessel's interactions with the whales. Stip. ¶ 39. Nevertheless, in light of Respondents' repeated flouting of known MMPA requirements, yet disregard of the Agency's interpretation of the incidental take provision, and the need to both remove the economic benefit derived from Respondents' violations of the law and to deter future violations, I find that a penalty of $11,000 is appropriate for each of Counts 1, 2, 3, 5, and 6.

B. Violation of the Western and Central Pacific Fisheries Convention Implementation Act: Count 4

i. Agency's Arguments

The Agency seeks an $110,000 penalty for the WCFPCIA violation at issue in Count 5.

The Agency offers separate arguments for the nature, circumstances, extent, and gravity of the violation, as well as for Respondents' culpability, history of prior offenses, and other matters as justice may require. With respect to the nature of the violation, the Agency notes that the Commission adopted Measure 20008-01 because previous measures had been unsuccessful in reducing the fishing mortality of bigeye and yellowfin tuna to the level necessary to prevent overfishing of these stocks. AB 26 (citing JX 38 at 344). The Agency adds that the FAD closures of 2009, 2010, and 2011 were "central to this conservation measure." *Id.*

With respect to the circumstances of the WCPFCIA violation, the Agency refers to its previously articulated description of the violation and arguments in support thereof. AB 27 (referring to the Argument and Proposed Findings of Fact sections of its Post-Hearing Brief).

The Agency asserts that the extent of the WCPFCIA violation is significant, arguing that Respondents' activities were contrary to the express language of the FAD closure regulations and that Respondents "showed a blatant disregard for the law by setting on a FAD that was just 10 meters from a school." AB 27. The Agency notes that the FAD set resulted in a landing of 40 metric tons of predominantly juvenile tuna, resulting in a profit of $36,000. AB 27-28 (citing JX 8 at 92). Further, the Agency argues that "Respondents' actions were intentional and done with knowledge of the regulations." AB 27.

Regarding the gravity portion of the penalty analysis, the Agency asserts that Respondents' actions constitute "a grave violation indeed." *Id.* Because CMM 2008-01 was only a three-year conservation measure, "ignoring or minimizing a violation from any year diminishes the effectiveness of the FAD closure by a full 33%." *Id.* The Agency further argues that "[a]ny appropriate penalty must go beyond economic benefit received so that the unlawful activity is not rewarded, the penalty does not just become a cost of doing business, and Respondents' actions do not provide an unfair advantage over other fishers acting within the law." AB 28 (citing *Churchman*, 2011 NOAA LEXIS 2).

With respect to Respondents' culpability, history of prior offenses, and other matters as justice may require, the Agency argues that Respondents "clearly had actual knowledge" of both CMM 2008-01 and the corresponding regulatory requirements. AB 28 (citing Tr. 147-148). They also had "plenty of time" to implement compliance measures, because by the time of the violations, the rules has been in place for over two years. *Id.* If compliance measures were in place, Mr. Su did not abide. AB 29. The Agency acknowledges that Respondents do not have any prior WCFPCIA violations, but maintains that they engaged in significant misconduct by "knowingly and intentionally set[ting] on a FAD, despite knowledge of the FAD closure." *Id.*

The Agency urges the undersigned to adopt the formula used by ALJ McKenna in the *Freitas* Initial Decision, which is to start with a base penalty of $50,000 for violations where either yellowfin or bigeye tuna had been targeted in an illegal FAD set. ARB 13. This was "to account for harm to the specific resource at issue in Conservation Measure 2008-1." *Id.*; JX 38. Where neither of those species were targeted, the base penalty was set at $25,000. ARB 13. The Agency argues that the former base should be used here because of the yellowfin tuna targeted here, as well as the catch value of $36,000 for the set at issue in Count 4. *Id.*; Stip. ¶ 59. At the time of the violations in that decision, the Agency admits, the closure was new. ARB 13-14. Because the violation here took place one year after the *Freitas* decision, an increase in the $50,000 base penalty is appropriate. ARB 14.

ii. Respondents' Arguments

With respect to the FAD violation, Respondents argue the Agency's proposed penalty is "excessive and unconstitutional," and not appropriate for the facts of this case. RB 15-16. Respondents have no prior WCPFCIA violations, there is conflicting testimony about as to whether the FAD was seen in the first place, and the "relatively small amount of the catch" from the set does not justify a penalty of $110,000. RB 16. Furthermore, the FAD regulations were, at the time of the violation, "still new and confusing as to what activities were permitted." RRB 9. Countering the Agency's allegation that they should have known about the Agency's policy on whale-setting because of the *Freitas* enforcement action, Respondents state that the alleged FAD violation in this case "occurred barely two months after NOAA issued the NOVAs" in those cases. *Id.* Plus, as acknowledged by all parties, there was no decision in the *Freitas* case until nearly 3 years after the NOVA was issued in this case. RRB 10.

Finally, the penalty formula used by Judge McKenna should not be utilized here, Respondents argue, because that formula is novel, "has no basis in law, and which has not been accepted by any court." RRB 9. Plus, that analysis represents the ALJ's arbitrary assignment of a base penalty, which is not justified here, where there is "uncertainty and inconsistency of the evidence regarding the alleged FAD set." *Id.*

iii. Analysis

Nature, Circumstances, Extent, and Gravity of the Violation

The United States is a party to the WCPFC and has agreed to be bound by and implement domestically the measures adopted by the Commission. Stip. ¶ 11. These requirements are implemented through the WCPFCIA and its implementing regulations. Stip. ¶¶ 11-16. NOAA regulations promulgated to implement the requirements of WCPFC CMM 2008-01 articulated the FAD closure in clear, unambiguous terms. 50 C.F.R. § 300.223(b). Respondents violated those terms by setting a purse seine net within one nautical mile of a FAD.

With respect to the extent of the violation, Respondents' actions were in direct contravention to the clear text of the regulation at issue. From July 1 through September 30, 2010, it was unlawful for vessels fishing in the area to "Set a purse seine around a FAD or within one nautical mile of a FAD" and to "Set 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." 50 C.F.R. § 300.223(b) (2009). These regulations were published in the Federal Register on August 4, 2009, *see* 74 Fed. Reg. 38,544 (August 4, 2009) (to be codified at 50 C.F.R. part 300), and the violation at issue took place over a year later on September 1, 2010.[27] Stip. ¶ 57. According to Mr. Tada's credible testimony, the Vessel, by and through its crew and officers, set its purse seine net on a school that was only ten meters from a FAD, and behaved with a blatant disregard for the law and conservation measures by also handling the FAD. *See* JX 6 at 66; JX 8 at 92; JX 10 at 117; Tr. 56, 61-62.

The gravity of Respondents' FAD violation is significant. Respondents understood[28] the express language of a duly promulgated regulation, but ignored its prohibitions and, in so doing, were unjustly enriched by $36,000, and most likely gained a competitive advantage for setting near the FAD during a closure period that potentially would have been avoided by other vessels that would have not caught the associated tuna. The $36,000 value must be voided, and an additional penalty amount imposed in order to deter both Respondents and others that are similarly situated from committing such blatant violations in the future. *See Churchman*, 2011 NOAA LEXIS 2. Furthermore, given that CMM 2008-01 was only a three-year conservation measure, each violation of the FAD closure has the potential to significantly undermine the conservation goals of CMM 2008-01.

CMM 2008-01 was intended to improve the conservation and management of bigeye and yellowfin tuna. Stip. ¶ 13; JX 38 at 345-46. In the set at issue in Count 4, Respondents landed approximately one metric ton of yellowfin tuna and 39 metric tons of skipjack tuna.[29] JX 8 at 92. Therefore, only a small percentage of Respondents' catch actually undercut the measure's objective. However, that outcome was fortuitous, happening by chance rather than design. Respondents' violation of the FAD closure did risk catching the protected species of fish nonetheless, and the taking of such risks must be deterred.

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

Respondents' actions warrant a significant penalty. They understood, yet directly contravened the express language of a duly promulgated and crystal clear regulation, acquiring $36,000 worth of tuna as a result. Their culpability is high.

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[27] The activities underlying Count 4 took place at approximately 08:35 a.m. local time September 1, 2010, or approximately 21:30 UTC time on August 31, 2010. Stip. ¶ 57 (as amended, Tr. 5).

[28] *See* Tr. 147, 148, 195.

[29] The parties stipulated that 39 metric tons of yellowfin and 1 metric ton of skipjack were landed. Stip. ¶ 59. However, this appears to be in error, as the record indicates that the Vessel landed 39 metric tons of skipjack and one ton of yellowfin tuna. JX 6 at 67; JX 8 at 92; Tr. 88.

The parties agree Respondents have no prior violations of the WCPFCIA within the past 5 years. Stip. ¶ 39.

The formula applied by Judge McKenna need not be applied here. Instead, based upon the nature, circumstances, extent and gravity of the violation, and taking into account Respondent's high level of culpability, the utter implausibility that Mr. Su or Captain Freitas did not see or know about the immediately nearby FAD, Respondents' stipulated lack of prior history, and such other matters, an appropriate penalty for this violation is deemed to be twice as much as the profit the Vessel earned from the set, $72,000.

C. Conclusion

After weighing the factors outlined in 15 C.F.R. § 904.108(a) and 16 U.S.C. § 1858(a), it is hereby found that Respondents, as a result of violating the MMPA and WCPFCIA as alleged in Counts 1-6 of the NOVA, are liable for civil penalties as ordered below.

ORDER

For Count 1, a civil penalty of **$11,000** is assessed against Respondents Pacific Ranger, LLC, Matthew James Freitas, and Tien Shih Su, jointly and severally.

For Count 2, a civil penalty of **$11,000** is assessed against Respondents Pacific Ranger, LLC, Matthew James Freitas, and Tien Shih Su, jointly and severally.

For Count 3, a civil penalty of **$11,000** is assessed against Respondents Pacific Ranger, LLC, Matthew James Freitas, and Tien Shih Su, jointly and severally.

For Count 4, a civil penalty of **$72,000** is assessed against Respondents Pacific Ranger, LLC, Matthew James Freitas, and Tien Shih Su, jointly and severally.

For Count 5, a civil penalty of **$11,000** is assessed against Respondents Pacific Ranger, LLC, Matthew James Freitas, and Tien Shih Su, jointly and severally.

For Count 6, a civil penalty of **$11,000** is assessed against Respondents Pacific Ranger, LLC, Joao Moniz, and Tien Shih Su, jointly and severally.

THEREFORE:

A total penalty of **$116,000** is hereby **IMPOSED** on Respondents Pacific Ranger, LLC, Matthew James Freitas, and Tien Shih Su, jointly and severally; and

A total penalty of **$11,000** is hereby **IMPOSED** on Respondents Pacific Ranger, LLC, Joao Moniz, and Tien Shih Su, jointly and severally.

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

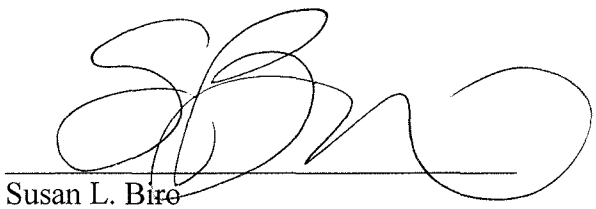
PLEASE TAKE NOTICE, that any petition for reconsideration of this Initial Decision must be filed with the undersigned within **20 days** after the Initial Decision is served. 15 C.F.R. § 904.272. Such petition must state the matter claimed to have been erroneously decided, and the alleged errors and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

PLEASE TAKE FURTHER NOTICE, that any petition to have this Initial Decision reviewed by the NOAA Administrator must be filed with the Administrator within **30 days** after the date this Initial Decision is served and in accordance with the requirements set forth at 15 C.F.R. § 904.273. A copy of 15 C.F.R. §§ 904.271-273 is attached.

PLEASE TAKE FURTHER NOTICE, that this Initial Decision becomes effective as the final Agency action **60 days** after service, unless the undersigned grants a petition for reconsideration or the Administrator reviews the Initial Decision. 15 C.F.R. § 904.271(d).

PLEASE TAKE FURTHER NOTICE, that upon failure to pay the civil penalty to the Agency within **30 days** from the date on which this decision becomes final Agency action, the Agency may request the U.S. Department of Justice to recover the amount assessed, plus interest and costs, in any appropriate district court of the United States or may commence any other lawful action. 15 C.F.R. § 904.105(b).

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency[30]

Dated: November 25, 2014
Washington, DC

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

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

15 CFR 904.271-273

§ 904.271 Initial decision.

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

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

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

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

(4) A statement of further right to appeal.

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

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

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

(1) Otherwise provided by statute or regulations;

(2) The Judge grants a petition for reconsideration under § 904.272; or

(3) A petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative under § 904.273.

§ 904.272 Petition for reconsideration.

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

§ 904.273 Administrative review of decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(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.