



UNITED STATES DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of: )  
 )  
Shell Island Boat Rentals, LLC, )  
d/b/a Blue Dolphin Tours, and )  
Shaun K. Gunter )  
 )  
Respondents. )  
\_\_\_\_\_ )

Docket Number: SE 1301095

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**INITIAL DECISION AND ORDER**

**Date:** July 8, 2014

**Before:** Christine D. Coughlin, Administrative Law Judge, U.S. EPA<sup>1</sup>

**Appearances:** For the Agency:  
Duane R. Smith, Esq.  
Office of the General Counsel, Enforcement Section  
National Oceanic and Atmospheric Administration, U.S. Department of  
Commerce,  
1845 Wasp Blvd., Building 176  
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For Respondents:  
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<sup>1</sup> The Administrative Law Judges of the United States Environmental Protection Agency ("U.S. EPA") 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. *See* 5 U.S.C. § 3344; 5 C.F.R. § 930.208.

## **I. STATEMENT OF THE CASE**

The National Oceanic and Atmospheric Administration (“NOAA” or “Agency”) issued a Notice of Violation and Assessment of Administrative Penalty (“NOVA”), dated June 17, 2013, to Shell Island Boat Rentals, LLC, d/b/a Blue Dolphin Tours, and Shaun K. Gunter (operator) (collectively, “Respondents,” or respectively, “Respondent Shell Island” and “Respondent Gunter”). In the NOVA, the Agency alleged one count in which Respondents violated Section 102 of the Marine Mammal Protection Act (“Act” or “MMPA”), 16 U.S.C. § 1372(a)(2)(A), and implementing regulations at 50 C.F.R. § 216.11(b),<sup>2</sup> and sought to impose a total penalty of \$5,000 against Respondents for these violations.<sup>3</sup> Respondents timely requested a hearing before an Administrative Law Judge.<sup>4</sup>

On August 8, 2013, Chief Administrative Law Judge Susan L. Biro issued a Notice of Assignment of Administrative Law Judge, and Order to Submit Preliminary Positions on Issues and Procedures (PPIP) (“PPIP Scheduling Order”). In the PPIP Scheduling Order, Judge Biro set forth various prehearing filing deadlines and procedures, and ordered the Agency to file its PPIP on or before September 13, 2013, and Respondents to file their PPIPs on or before September 27, 2013. On August 27, 2013, Judge Biro issued an Order of Redesignation, in which I was designated to preside over this proceeding. On September 13, 2013, the Agency filed its PPIP.<sup>5</sup> On September 27, 2013, Respondents, through joint counsel, filed a joint PPIP.<sup>6</sup>

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<sup>2</sup> At the time of the alleged violation, August 24, 2012, the applicable Code of Federal Regulations, or C.F.R., was the 2012 edition. It is this edition that I have utilized throughout this decision.

<sup>3</sup> In accordance with 15 C.F.R. § 904.207(a), NOAA subsequently amended the NOVA by charging Respondents “jointly and severally” and by including in Count I the phrase “or attempt to feed” (referring to the alleged violative conduct of feeding or attempting to feed a wild marine mammal). Notice of Amendment One to Agency’s Pleadings (received by the Office of Administrative Law Judges (“OALJ”) on November 18, 2013).

<sup>4</sup> Both requests were received by NOAA on July 12, 2013. Respondent Shell Island requested a hearing through its counsel of record, and Respondent Gunter requested a hearing acting on his own behalf (pro se). Memorandum from Duane R. Smith to EPA (July 14, 2013) (NOVA and hearing requests are attached to this document). Thereafter, by correspondence dated July 19, 2013, counsel for Respondent Shell Island notified the OALJ that he also represents Respondent Gunter.

<sup>5</sup> I note that NOAA electronically submitted its PPIP on September 13, 2013, and pursuant to 15 C.F.R. § 904.3(b), filing became effective on the date of electronic transmission, even though the stamped receipt date of the filing is September 16, 2013.

<sup>6</sup> Respondents, through joint counsel, submitted their joint PPIP electronically on September 27, 2013, and pursuant to 15 C.F.R. § 904.3(b), filing became effective on the date of electronic transmission, even though the stamped receipt date of the filing is September 30, 2013.

On October 17, 2013, I issued a Hearing Order setting filing deadlines and scheduling the hearing to commence on December 10, 2013, in Panama City, Florida. Based on representations by the parties that the hearing was expected to conclude in one day, I issued a Revised Hearing Order on November 13, 2013, scheduling the hearing for December 11, 2013, and specifying the time and location of the hearing.

I conducted a hearing in this matter on December 11, 2013, in Panama City, Florida. The Agency presented Agency's Exhibits ("AE") 1 through 10, which were admitted into evidence. Although the Agency offered proposed AE 11 into evidence, I denied its admission but afforded the Agency the opportunity to make an offer of proof pursuant to 15 C.F.R. § 904.251(b)(2), which was made and included in the record. The Agency also presented the testimony of three witnesses: Laura Engleby, NOAA, Chief of the Marine Mammal Branch; Special Agent Elizabeth Nelson, NOAA, Office of Law Enforcement; and Investigator Shelby Williams, Florida Fish and Wildlife Conservation Commission. Respondents presented Respondents' Exhibits ("RE") 2 through 5, which were admitted into evidence. Respondents also presented the testimony of three witnesses: Edward ("Ted") Davison,<sup>7</sup> co-owner of Respondent Shell Island; Respondent Gunter; and Tomasue Weber, a patron of Respondent Shell Island's dolphin tours. The parties also submitted a Joint Set of Stipulated Facts and Exhibits as Joint Exhibit ("JE") 1, which was admitted into evidence.

The docket clerk of this Tribunal received the certified transcript of the hearing in this case on January 6, 2014. Copies of the transcript were sent to the parties on January 8, 2014.<sup>8</sup> On January 9, 2014, I issued an Order Scheduling Post-Hearing Briefs, which set the following deadlines: January 24, 2014, as the deadline for any motions to conform the transcript to the actual testimony; February 7, 2014, as the deadline for the Agency's Initial Post-Hearing Brief; February 21, 2014, as the deadline for Respondent's Initial Post-Hearing Brief; and March 10, 2014, as the deadline for any reply briefs the parties wished to submit.

On January 24, 2014, a staff attorney from the OALJ sent a letter to NOAA's enforcement attorney in this matter, Duane Smith, Esq., with a copy to Respondents' counsel, Clifford Sanborn, Esq., explaining that upon review of the transcript and exhibits, I had discovered that the proffered exhibit, marked for identification as AE 11, but excluded from evidence, was not delivered to the Hearing Clerk with the transcript and exhibits from this proceeding. As a consequence, Mr. Smith was asked to reproduce the proffered exhibit so it could be included in the official case record and to certify that the reproduction was a true and accurate copy of the exhibit proffered at the evidentiary hearing. Mr. Smith complied with this request on January 24, 2014. Also on January 24, 2014, the Agency filed a Motion to Conform Transcript to Actual Testimony. On February 5, 2014, I issued an Order on Agency's Motion to Conform Transcript, granting the Agency's motion.

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<sup>7</sup> The record reflects that although Mr. Davison's legal name is Edward Davison, he refers to himself as Ted Davison. Tr. 162-163; AE 2, Page 12.

<sup>8</sup> Citations herein to the transcript are made in the following format: "Tr. [page]."

On February 6, 2014, the Agency filed its Initial Post-Hearing Brief (“Agency’s Initial Br.”), and on February 21, 2014, Respondents filed their Initial Post-Hearing Brief (“Respondent’s Initial Br.”). On March 10, 2014, the Agency filed its Reply Post-Hearing Brief (“Agency’s Reply Br.”). Respondents elected not to file a reply brief.

## **II. STATEMENT OF THE ISSUES**

### **A. Liability**

The sole issue in dispute is whether Respondents, who have been charged jointly and severally, violated the Act and its implementing regulations by feeding or attempting to feed a wild marine mammal on August 24, 2012.

### **B. Civil Penalty**

If liability for the charged violations is established, then I must determine the amount of any imposed civil penalty that is appropriate. To this end, I may evaluate certain factors, including the nature, circumstances, extent, and gravity of the violation(s); Respondents’ degree of culpability and any history of prior violations; and such other matters as justice may require.<sup>9</sup>

## **III. FACTUAL BACKGROUND**

The following is a recitation of the facts I have found in this matter based on a careful and thorough review of the evidentiary record. Where material conflict(s) existed in the evidence, I found facts based on the evidence I deemed credible, with the rationale for any material conflict resolution articulated in the Analysis section of this decision.

Respondent Shell Island, “a Florida Profit Corporation headquartered in Florida,” and Respondent Gunter, “a United States citizen residing in Florida,” are each a “person” for purposes of the MMPA. JE 1 ¶¶ 1, 2. Respondent Shell Island conducts dolphin tours, including an opportunity for patrons to swim with wild dolphins, using as many as four vessels currently within its operation, and it draws from a pool of eight to sixteen captains it employs to operate its vessels. Tr. 165-166; RE 2, 4. Respondent Gunter is one of the vessel captains Respondent Shell Island employed from approximately 2010 through 2012 to operate its dolphin tours. Tr. 233-234. Prior to a dolphin tour, participants undergo a quick orientation led by the captain, which includes a safety-related discussion. Tr. 167. Captains are also expected to discuss with tour participants the laws against feeding dolphins. Tr. 174-175, 235-236; RE 4. In addition to the information provided by the captain prior to a dolphin tour, Respondent Shell Island displays various literature about the area and prohibited behavior, posted on an 8-foot by 8-foot hut from which it conducts business. Tr. 168-173; RE 2. One piece of literature it has displayed is a pamphlet entitled “Protect Dolphins,” copies of which it also has available to hand out to its patrons. Tr. 171-172; RE 2. A dolphin tour consists of a maximum of six people, plus the captain on the vessel. Tr. 167.

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<sup>9</sup> While “ability to pay” is another factor that may be considered when determining penalty, Respondents did not raise such a claim in this case. See 15 C.F.R. § 904.108.



Respondents agree that feeding wild dolphins, including the wild dolphins found in the vicinity of Shell Island near Panama City, Florida, is harmful to the animals. JE 1 ¶¶ 6, 7. Respondents agree that such feeding causes the dolphins to lose their natural wariness of humans or boats; become conditioned to receive handouts; associate humans with food; change their natural behaviors, including feeding and migration; and be put at serious risk when items fed to them are contaminated. JE 1 ¶ 7; AE 8; Tr. 37, 39, 41-42, 44-46, 54-56. NOAA's marine mammal expert, Laura Engleby ("Engleby"),<sup>10</sup> explained:

[T]he ultimate effect of feeding is, it alters their [dolphins'] natural behavior. They then learn to associate people with food, and this has a serious cascading effect in many ways. It puts them at risk of interaction with commercial and recreational fisheries, lethal entanglements and ingestion of gear or inappropriate items. They may get hit by boats because they're not paying attention or they get so comfortable around the boats. And then they also might suffer from retaliation from humans that might not like them approaching their boat, particularly if a fisherman has caught a fish and wants to keep his fish.

Tr. 39; *see also* Tr. 46-49, 52, 55; AE 8.

Feeding wild dolphins has been a problem in the Panama City, Florida area ("Panama City") for years and is considered by NOAA to be a "hot spot" for such problems. Tr. 70-71, 94-97; AE 8. Consequently, NOAA has engaged in "a tremendous amount of targeted outreach specific to this community" over decades in an, albeit unsuccessful, attempt to combat the persistent problems of wild dolphin feeding in Panama City. Tr. 71-73, 76; AE 8, Page 39.

According to Engleby, excursions in Panama City that offer an opportunity to swim with wild dolphins (sometimes referred to as "swim with" activities) are "facilitated by and capitalized on by illegal feeding." Tr. 68-69, 90-91, 95. As Engleby explained, "normal wild dolphins won't really stick around when you try to swim with them. You might see them swim by and they're gone. But they're not really going to hang around, stick around, unless there's a food incentive or some sort of reward incentive. It would be highly unusual." Tr. 69; *see* Tr. 90-91. Noting the number of vessels and participants in the area, Engleby opined that the swim-with activities in Panama City would not be feasible without feeding wild dolphins. Tr. 90-91.

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<sup>10</sup> NOAA presented the testimony of Engleby, who has extensive experience with marine mammals and who currently is employed by NOAA as Chief of the Marine Mammal Branch for the Southeast Region. AE 7; Tr. 31. Respondents did not object to Engleby's qualifications as an expert; rather, they challenged the relevance of her offered expert testimony because Respondents had stipulated to the harm associated with feeding wild dolphins. Tr. 28-30; *see* JE 1 ¶ 7. I deemed Engleby's testimony relevant to the proceedings, particularly as it related to a potential issue of penalty and the factors I must consider in assessing any penalty, and I allowed her testimony over Respondents' objection. Tr. 28-30.

The illegal feeding of wild dolphins, “sometimes with fish and sometimes with things that look like fish,” is often conducted in a discreet manner and in a variety of different ways. Tr. 69-70. Engleby testified that the combination of feeding wild dolphins and swim-with activities can lead to aggressive behavior by dolphins, noting that in 2012, local tour operators in Panama City reported to NOAA escalating aggression by dolphins in the area. Tr. 61-63.

On August 24, 2012, Respondent Shell Island was operating one of its vessels in the vicinity of Shell Island, near Panama City, Florida, the waters of which are under the jurisdiction of the United States for purposes of the Act. JE 1 ¶¶ 3, 5. Respondent Shell Island’s employee, Respondent Gunter, was the only tour operator conducting a dolphin tour on behalf of Respondent Shell Island on August 24, 2012. JE 1 ¶ 4; AE 1; AE 2, Pages 4-5, 11-12.

On that particular day, Special Agent Nelson (“Nelson”) and Investigator Williams (“Williams”), each from different government agencies, were working collaboratively and undercover in Panama City while investigating reports of dolphin feeding and harassment. As part of their investigation, Nelson and Williams posed as a couple and customers of a particular jet ski tour operation, about which such reports had been made. During the course of this investigation and during their jet ski tour, Nelson and Williams encountered Respondent Shell Island’s dolphin tour, led by Respondent Gunter. Tr. 104, 106-107, 113-114, 116-117, 126-127, 130.

At the time of the encounter with Respondents, Williams had just climbed onto the jet ski that he and Nelson had been using as part of their jet ski tour. While on the jet ski, awaiting Nelson to board from the water, Williams observed Respondent Shell Island’s vessel, operated by Respondent Gunter, approach the immediate area where approximately five dolphins were present and feeding from fish that had been thrown into the water by the jet ski tour operator. Tr. 127-131, 153-157. As soon as Respondent Shell Island’s vessel approached the area, Williams observed the tour customers disembark from the starboard side of the vessel and get into the water. The vessel and tour customers were within approximately ten feet of the dolphins. Tr. 131-133, 153-157. At about the same time, Williams observed the behavior of Respondent Gunter<sup>11</sup> as follows: “reach up onto the center console . . . and remove something from under his shirt, immediately to the gunnel, down the side, look around, and I saw his hand in the water, back up to the center of the console.” Tr. 131. At this time, Williams was unable to see what was in Respondent Gunter’s hand. However, he did observe that Respondent Gunter’s fist was initially in a clenched, or closed, position as he was kneeling down and reaching into the water, and that his fist changed to an open position once Respondent Gunter arose from kneeling after having reached over the gunnel (gunwale) of the vessel and into the water. Tr. 131-132.

Next, Williams observed Respondent Gunter engage in the following behavior:

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<sup>11</sup> At the time of the encounter, Williams did not know the identity of the vessel’s captain. Respondent Gunter was later identified as the vessel captain on the date of this encounter. Tr. 134-136; JE 1 ¶ 4.

After that, after he stood up, he went back to the center console. And at this time, he did the same thing. Center console, on the top dash, come back. And when he turned to make his walk to the gunnel again, the side of the boat, that's when I noticed the half-moon-shaped tail portion of what appeared to be a cigar minnow. Down to [his right] knee, over the starboard side of the boat, over the gunnel, into the water.

Tr. 132; see Tr. 149-150, 156; AE 2, Page 10. Williams recognized the tail of the fish in Respondent Gunter's hand to be a cigar minnow because he is an "avid fisherman" and independently familiar with cigar minnows. Tr. 154-155. Williams observed that nothing remained in Respondent Gunter's hand once he stood up after reaching into the water. Tr. 132-133. During this encounter, the tour customers who were in the water, as well as the dolphins that were present, remained within approximately ten feet of the vessel. Tr. 131-133, 155, 157, 159. As Williams was observing Respondent Gunter's actions, he contemporaneously remarked to Nelson, who was still in the water, what he was observing. According to Nelson's recollection, the exchange was as follows:

[H]e [Williams] said, I just saw the captain pull something off of the center console and feed it to the dolphin. Then he [Williams] said, he just did it again, I saw it. He [Williams] saw the fin or the tail of it. And he [Williams] said it was a fish.

Tr. 122. However, by the time Nelson boarded the jet ski from the water and began looking in the direction of Respondent Gunter, she saw no further activity. Tr. 114-115, 122, 158-160.

During the encounter, Williams's view of Respondent Shell Island's vessel and Respondent Gunter was clear and unobstructed, and his observations of Respondent Gunter's actions took place from a distance of approximately fifty yards. Tr. 133-134, 154. Williams relied on his skills as an "avid hunter" in approximating this distance. Tr. 134-135.

Contrary to Williams's perception of the events on August 24, 2012, Respondent Gunter denied feeding or attempting to feed wild dolphins during this encounter. Tr. 241-242. He further denied ever carrying any fish onboard Respondent Shell Island's vessels. Tr. 243. Although Respondent Gunter had no alternative explanation for Williams's account of the events that transpired, he surmised that, among other "numerous things," he "could have been eating a bag of potato chips, rinsing my hands off in the water"; that he "could have been kneeling down to tell my customers to come to the back side of the boat away from the motor"; or that he "could have been rinsing my sunglasses off."<sup>12</sup> Tr. 243.

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<sup>12</sup> As reflected above, Williams's observations of Respondent Gunter while operating Respondent Shell Island's vessel are in conflict with the testimony offered by Respondent Gunter as to his behavior and conduct on August 24, 2012. The conflict is material, as it relates to the factual determination of whether Respondents fed or attempted to feed a wild marine

Thereafter, Nelson conducted an investigation of Respondents and the events of August 24, 2012, culminating in an investigative report that she completed on April 15, 2013. Tr. 106-112; AE 1; AE 2. The Agency subsequently issued the NOVA that is the subject of this proceeding.

#### **IV. PRINCIPLES OF LAW**

##### **A. Liability**

Congress enacted the Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361 *et seq.*, as amended, based upon findings 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” and that “they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management.” 16 U.S.C. §§ 1361(1), (6); *see* Pub. L. No. 92-522, § 2, 86 Stat. 1027, 1027 (1972). To accomplish this objective, Section 102 of the MMPA and the implementing regulations provide, in pertinent part, that it is unlawful “for any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States.” 16 U.S.C. § 1372(a)(2)(A); 50 C.F.R. § 216.11(b). Definitions relevant to these provisions follow.

The term “person” includes any private person or entity. 16 U.S.C. § 1362(10). “Marine mammal” encompasses any mammal, including Cetacea (whales, dolphins, and porpoises), that is morphologically adapted to the marine environment. 16 U.S.C. § 1362(6); 50 C.F.R. § 216.3. The Act defines “waters under the jurisdiction of the United States” to mean:

(A) the territorial sea of the United States; [and] (B) the waters included within a zone, contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State, and the other boundary is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

16 U.S.C. § 1362(15).

Under the Act and its implementing regulations, the term “take” means “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” 16 U.S.C. § 1362(13); 50 C.F.R. § 216.3. Agency regulations further define “take” to include “feeding or attempting to feed a marine mammal in the wild.” 50 C.F.R. § 216.3. “Feeding” is defined in Agency regulations as “offering, giving, or attempting to give food or non-food items to marine mammals in the wild.” 50 C.F.R. § 216.3. The term also includes operating a vessel or providing other platforms from which feeding is conducted or supported. 50 C.F.R. § 216.3.

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mammal, in violation of federal law. I found the testimony of Williams more credible than that of Respondent Gunter and provided the rationale for resolving this conflict below.



The Act defines “harassment” as any act of pursuit, torment, or annoyance that either has the potential to injure a marine mammal or marine mammal stock in the wild (referred to as “Level A harassment”), or has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including migration, breathing, nursing, breeding, feeding, or sheltering (referred to as “Level B harassment”). 16 U.S.C. § 1362(18)(A), (C), (D). Agency regulations provide definitions of Level A Harassment and Level B Harassment that mirror the language of the Act; however, Agency regulations further provide that Level B harassment “does not have the potential to injure a marine mammal or marine mammal stock in the wild.” See 50 C.F.R. § 216.3.

## **B. Standard of Proof**

To prevail on its claims that Respondents violated the Act and the regulations, the Agency must prove facts constituting the violations by a preponderance of reliable, probative, substantial, and credible evidence. 5 U.S.C. § 556(d); *Cuong Vo*, 2001 NOAA LEXIS 11, at \*17 (NOAA Aug. 17, 2001) (citing *Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100-03 (1981)); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). This standard requires the Agency to demonstrate that the facts it seeks to establish are more likely than not to be true. *John Fernandez III & Dean V. Strickler*, 1999 NOAA LEXIS 9, at \*8-9 (NOAA Aug. 23, 1999) (citing *Herman & MacClean v. Huddleston* (459 U.S. 375, 390 (1983))). To satisfy this burden of proof, the Agency may rely upon either direct or circumstantial evidence. *Cuong Vo*, 2001 NOAA LEXIS 11, at \*17 (citing *Reuben Paris, Jr.*, 4 O.R.W. 1058 (NOAA 1987)).

There is no presumption in favor of the penalty proposed by the Agency, and an Administrative Law Judge is not “required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document.” *Tommy Nguyen & William J. Harper*, 2012 NOAA LEXIS 2, at \*21 (NOAA Jan. 18, 2012) (“*Nguyen & Harper*”); see 15 C.F.R. § 904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631 (June 23, 2010). The Administrative Law Judge must independently determine an appropriate penalty “taking into account all of the factors required by applicable law.” 15 C.F.R. § 904.204(m); see 15 C.F.R. § 904.108 (enumerating factors that may be considered in assessing a penalty).

## **C. Civil Penalty**

The Act provides that any person who violates any provision of the Act or implementing regulation may be assessed a civil penalty not to exceed \$10,000 for each such violation. See 16 U.S.C. § 1375(a)(1). However, the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990), as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996), led to an increase of the maximum civil penalty available under the MMPA to \$11,000 per violation. Civil Monetary Penalties; Adjustment for Inflation, 73 Fed. Reg. 75,321, 75,322 (Dec. 11, 2008) (codified at 15 C.F.R. § 6.4(f)(10)). No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. 16 U.S.C. § 1375(a)(1).

To determine the appropriate amount of civil penalty to assess, the regulations that govern this proceeding, found at 15 C.F.R. Part 904 (“Rules of Practice”), 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 violations, and ability to pay; and such other matters as justice may require.

15 C.F.R. § 904.108(a).

For enforcement cases charged on or after March 16, 2011, the Agency utilizes the “Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions” (“Penalty Policy”) to calculate a civil penalty.<sup>13</sup> 76 Fed. Reg. 20,959 (Apr. 14, 2011), *available at* [http://www.gc.noaa.gov/documents/031611\\_penalty\\_policy.pdf](http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf). Under the Penalty Policy, penalties are based on two criteria:

(1) A “base penalty” calculated by adding (a) an initial base penalty amount . . . reflective of the gravity of the violation and the culpability of the violator and (b) adjustments to the initial base penalty . . . upward or downward to reflect the particular circumstances of a specific violation; and (2) an additional amount added to the base penalty to recoup the proceeds of any unlawful activity and any additional economic benefit of noncompliance.

Penalty Policy at 4. As mentioned above, the “initial base penalty” amount consists of two factors, collectively constituting the seriousness of the violation: “(1) the gravity of the prohibited act that was committed; and (2) the alleged violator’s degree of culpability” (assessing the mental culpability in committing the violation). *Id.* The “gravity” factor (also referred to as “gravity of the violation” or “gravity-of-offense level”) is comprised of four or six (depending upon the particular statute at issue) different offense levels, reflective of a continuum of increasing gravity, taking into consideration the nature, circumstances, and extent of a violation.<sup>14</sup> *Id.* at 6-8. Thus, offense level I represents the least significant offense level and offense level VI represents the most significant offense level. *Id.*

The “culpability” factor (also referred to as “degree of culpability”) is comprised of four levels of increasing mental culpability: unintentional activity (such as an act that is inadvertent,

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<sup>13</sup> The Agency’s Penalty Policy was admitted into evidence as AE 5.

<sup>14</sup> Where a violation and corresponding offense level are not listed in the Penalty Policy, the offense level is determined by using the offense level of an analogous violation or by independently determining the offense level after consideration of the factors outlined in the Penalty Policy. Penalty Policy at 7-8.

unplanned, and the result of accident or mistake); negligence (such as carelessness or a lack of diligence); recklessness (such as a conscious disregard of substantial risk of violating conservation measures); or an intentional act (such as a violation that is committed deliberately, voluntarily, or willfully). Penalty Policy at 6, 8-9.

These factors are depicted in a penalty matrix, with the “gravity” factor represented by the vertical axis of the matrix and the “culpability” factor represented by the horizontal axis of the matrix. Penalty Policy at 6. The intersection point from the levels used in each factor then identifies a penalty range on the matrix. *Id.* at 7. The midpoint of this penalty range determines the “initial base penalty” amount. *Id.* Once an “initial base penalty” amount is determined, “adjustment factors” are considered in order to move up or down (or not at all) from the midpoint of the penalty range, or to move to an altogether different penalty range. *Id.* at 10. The “adjustment factors” are as follows: an alleged violator’s history of non-compliance; whether the alleged violator’s conduct involves commercial or recreational activity; and the alleged violator’s conduct after the violation. *Id.* After the application of any adjustment factors, the resulting figure constitutes the “base penalty.” *Id.* at 5. Next, the proceeds gained from unlawful activity and any additional economic benefit of non-compliance to an alleged violator are considered and factored into the penalty calculation (such as the gross value of fish, fish product, or other product illegally caught, or revenues received; delayed costs; and avoided costs). *Id.* at 12-13.

## **V. ANALYSIS**

### **A. Parties’ Arguments**

The Agency argues that the facts adduced at hearing through the testimony of Williams establish that on August 24, 2012, Respondent Gunter, operator of Respondent Shell Island’s tour boat, fed or attempted to feed wild dolphins “by taking a fish and putting it into the water in close proximity (within 10 feet) of the vessel’s paying customers and the wild dolphins.” Agency’s Initial Br. at 2. The Agency asserts that although Williams identified Respondent Gunter as the operator of the tour vessel from driver’s license photos of all of Respondent Shell Island’s tour vessel captains, his identification was independently confirmed by Respondent Shell Island’s operating manager, Ted Davison (“Davison”), as the only captain operating a dolphin tour on August 24, 2012. Agency’s Initial Br. at 2-3.

As to the penalty, the Agency contends that there are “many harmful effects that result from feeding or attempting to feed wild dolphins,” as was explained during the evidentiary hearing by NOAA’s marine mammal expert, Engleby, and is uncontested by Respondents. Agency’s Initial Br. at 3; Tr. 35-73. Consequently, the Agency suggests that the gravity of “level III” attributed to such a violation by the Agency’s Penalty Policy is supportable. Agency’s Initial Br. at 3. As to the degree of culpability, the Agency argues that the actions of Respondent Gunter were intentional in that he:

[B]rought fish on board the Blue Dolphin Tours vessel, brought that vessel to an area where wild dolphins were present for the specific purpose of having his tour group interact with them, and

intentionally fed or attempted to feed the wild dolphins to further his and Respondent Shell Island Boat Rentals' commercial purposes.

Agency's Initial Br. at 4. Further, Respondent Shell Island, as the owner of the vessel and Respondent Gunter's employer, "benefited from the profits generated by Respondent Gunter and is responsible for his actions taken in furtherance of Blue Dolphin Tours' business." Agency's Initial Br. at 4. The Agency notes that, in following its Penalty Policy to calculate a proposed penalty, the mid-level range for an intentionally committed level III offense is \$5,000, but the Agency also asserts that an Administrative Law Judge is not bound by the Agency's policy and may assess a higher penalty. Agency's Initial Br. at 4. The Agency urges that in assessing a penalty in the present proceeding, I "pay particular attention to the need for general deterrence," noting an existence of a large number of businesses in Panama City "whose business model is predicated on swimming with or otherwise interacting with wild dolphins, and this activity only occurs in the way it does because of the illegal feeding that occurs there and the 'addiction' to handouts that illegal feeding has created in a subset of the local dolphin population." Agency's Initial Br. at 5.

Respondents argue that the Agency's case "rests entirely on the observations and perceptions of investigator Shelby Williams," and that the Agency "does not come close to satisfying its burden of proof." Respondents' Initial Br. at 1. Respondents also note that they fully endorse laws against dolphin feeding and that Respondent Shell Island has helped "organize and promote 'Bad to Feed', an organized effort to educate and discourage tour operators from feeding dolphin." Respondents' Initial Br. at 1.

Observing that the written reports prepared by Nelson and Williams were not contemporaneous—Williams prepared his report nearly three months after the alleged incident and Nelson prepared her report nearly eight months after the alleged incident—and that they were written based solely on their memories of the events in question, Respondents argue that the "substantial delay in the preparation of the reports compromised their accuracy." Respondents' Initial Br. at 2. In particular, Respondents note that Nelson initially identified an incorrect date of the alleged incident, which she later corrected in a supplemental report. Respondents' Initial Br. at 2. Further, Williams inaccurately recorded in his written report that he saw the captain (later identified as Respondent Gunter) twice remove cigar minnows and lower them into the water, but under oath at the evidentiary hearing, he acknowledged that he had only once actually seen a portion of a cigar minnow lowered into the water by Respondent Gunter. Respondents' Initial Br. at 2.

Respondents argue that they were harmed by the Agency's delays, both in preparing these reports and in charging Respondents nearly ten months after the alleged incident, because potential witnesses from the tour in question could not be identified to testify at the hearing and corroborate Respondents' position that Respondent Gunter did not feed or attempt to feed a wild dolphin on August 24, 2012. Respondents' Initial Br. at 2. Respondents did, however, produce one witness, Tomasue Weber ("Weber"), who has been on Respondent Shell Island's dolphin tours in the past and who confirmed that during those tours dolphin feeding did not occur. Respondents' Initial Br. at 7. Further, Respondents note that testimony adduced at the evidentiary hearing revealed that Williams and Nelson previously toured with Respondent Shell



Island's dolphin tour in 2010, under the direction of another captain, but found no evidence of illegal dolphin feeding, which they assert exonerates them from any wrongdoing. Tr. 117-118, 126; Respondents' Initial Br. at 6-7.

Respondents also challenge Williams's claimed ability to perceive the events that transpired on August 24, 2012. Specifically, Respondents assert:

Williams and Nelson were attempting to avoid detection, the captain (Gunter) was in motion, and Nelson was climbing onto the back of the wave runner. Investigator Williams would have had only a brief second at best to observe what the captain was holding in his closed hand from a distance of approximately 50 yards. Under no circumstances would investigator Williams have had a clear view of exactly what Mr. Gunter was holding when he put his hand in the water. Recalling the exact movements of what he observed three months later when he prepared his report and 15 months later when he testified at trial would be difficult at best.

Respondents' Initial Br. at 3.

Additionally, Respondents suggest that the Agency's photographic documentary evidence does not support the claimed observations by Williams. In particular, Respondents note that all of the tourists aboard Respondent Shell Island's vessel were back on board the vessel when the photograph at AE 2, Page 16, was taken, even though, according to Williams, the tourists had been in the water minutes earlier while Respondent Gunter allegedly fed or attempted to feed wild dolphin. Respondents' Initial Br. at 4. Respondents also argue that Nelson's testimony regarding when she took the photograph at AE 2, Page 16, changed throughout her testimony. They point out that initially Nelson testified that she took the photograph as she was climbing on the jet ski and "right after" Williams informed her of his observations, but later she testified that she had taken the photograph a minute or two after she had already climbed on the jet ski and then later estimated that four minutes had transpired before she took the photograph. Respondents' Initial Br. at 4-5. Regardless, Respondents argue, "none of those time estimates would allow sufficient time for the . . . tourists to re-board the vessel as they had done before the photo . . . was taken." Respondents' Initial Br. at 5. Respondents further claim that Respondent Shell Island's vessel was positioned in between the dolphin and Williams and that any attempts to lure the dolphin with food would have taken place on the opposite side of the vessel (closer to the dolphin) than that claimed by Williams. Respondents' Initial Br. at 5. They note that in the only photo taken at the time of the alleged incident, the "tourists are clearly perched on the boat, and they are not looking at fish on the side of the boat where Williams and Nelson are located." Respondents' Initial Br. at 6.

Respondents also allege inconsistencies in the testimony offered by Williams. They note that Williams initially testified that he observed "the half moon shaped tail portion of what appeared to be a cigar minnow" in Respondent Gunter's hand but later testified that he observed four to five inches of the lower half of the fish. Respondents' Initial Br. at 5-6.

Lastly, Respondents argue that the Agency's use of expert testimony in this case was unnecessary, reiterating that Respondents stipulated to the illegality of feeding wild dolphin and the harm associated with such activity. They assert that if the Agency:

[H]ad convincing evidence to support its claim that [Respondent Gunter] fed a dolphin on August 24, 2012, it would not need to have Laura Engleby testify about all of the problems experienced in Panama City. [Respondent Shell Island] is not responsible for the policies and practices of other tour operators in the area. The conduct of other tour operators should have no influence on the evaluation of the evidence against [Respondents] at the specific time alleged, August 24, 2012.

Respondents' Initial Br. at 8. Respondents highlight Respondent Gunter's interest in and enthusiasm for marine life, particularly dolphins, and assert that he had no motivation to violate the law. Respondents' Initial Br. at 8. Additionally, Respondent Shell Island's co-owner, Davison, has worked in the area in the marine life industry for many years and has been cooperative with law enforcement efforts in Panama City. Respondents' Initial Br. at 8. Based upon the foregoing arguments, Respondents urge that I find no liability for the charged violation in this case. Respondents' Initial Br. at 9.

In reply, the Agency asserts that it has met its burden by presenting the credible testimony of Williams concerning his eyewitness observations of Respondent Gunter's actions on August 24, 2012. Agency's Reply Br. at 2. The Agency argues that the fact that Williams did not report any violations while on a prior dolphin tour with Respondent Shell Island only adds to his credibility here "when he clearly and convincingly described seeing Respondent Gunter feed or attempt to feed wild dolphins on August 24, 2012." Agency's Reply Br. at 3. Contrary to Respondents' assertions, the Agency contends, the testimony of Respondent Gunter was not credible and he did have motivations to feed wild dolphins and deny his misconduct, such as the potential financial incentive for doing so characterized by the expression "If you liked your ride, tip your guide" (which was printed by the bow of the tour vessel),<sup>15</sup> fear of termination from employment, and the risk of imposition of a civil penalty and damage to his personal reputation now magnified by the operation of his own business. Agency's Reply Br. at 2. In further challenging Respondent Gunter's credibility, the Agency notes a moment during the evidentiary hearing when he "attempted . . . to cast doubt on whether he was even present on the day of the offense in question" in spite of joint stipulations to the contrary. Agency's Reply Br. at 2. Additionally, the Agency asserts that while the "exact amount of time that transpired between when Investigator Williams saw Respondent Gunter feed or attempt to feed the dolphins and when Nelson took the picture documenting the presence of [Respondent Shell Island's] vessel is uncertain," the testimony of Williams "support[s] the conclusion that when the pictures were taken, the vessel and the jet ski had maneuvered to different positions relative to one another from that when the feeding took place." Agency's Reply Br. at 3.

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<sup>15</sup> Tr. 248; RE 3, Pages 1-2.

## B. Liability

As previously discussed, the Act and its implementing regulations provide that it is unlawful for any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States. 16 U.S.C. § 1372(a)(2)(A); 50 C.F.R. § 216.11(b). In this case, all but one of the elements of liability is undisputed. Specifically, Respondents have stipulated, for purposes of the Act, that they are each a “person,” that the alleged prohibited activity occurred within waters of the United States, and that dolphins are marine mammals. JE 1. What remains in dispute is whether Respondents engaged in the “taking” of a marine mammal on August 24, 2012, in violation of the Act and Agency regulations.

The term “take” means “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” 16 U.S.C. § 1362(13); 50 C.F.R. § 216.3. Agency regulations further define “take” to include “feeding or attempting to feed a marine mammal in the wild.” 50 C.F.R. § 216.3. “Feeding” is defined in Agency regulations as “offering, giving, or attempting to give food or non-food items to marine mammals in the wild.” 50 C.F.R. § 216.3. The term also includes operating a vessel or providing other platforms from which feeding is conducted or supported. 50 C.F.R. § 216.3.

As a threshold matter, I note that while the violative behavior alleged in this case relates to the actions of an employee, namely Respondent Gunter, Respondent Shell Island, as his employer, is subject to liability for the violations of its employees under the theory of respondeat superior. Though not specifically addressed by the parties, it is a well-established principle “that an employer may be vicariously liable for its employee’s acts committed in the scope of employment while furthering the employer’s business.” *Nguyen & Harper*, 2012 NOAA LEXIS 2, at \*13; *see United States v. Kaiyo Maru Number 53*, 503 F. Supp. 1075 (D. Alaska 1980), *aff’d*, 699 F.2d 989 (9th Cir. 1983) (owner vicariously liable for violations of captain and crew); *Joseph F. Raposa*, 1995 NOAA LEXIS 43 (NOAA App. Aug. 31, 1995) (upholding determination that operator was the owner’s agent and owner could be held liable under respondeat superior); *Charles P. Peterson*, 6 O.R.W. 486 (NOAA 1991) (finding owner and operator of vessel were engaged in a joint venture and therefore each was vicariously liable for the violations of the other); Restatement (Third) of Agency § 7.03(2) (2006). Nothing in the record supports a deviation from this principle in the present proceeding. Consequently, Respondent Shell Island, as the employer of the captains who operate its vessels, is subject to liability for the actions of its employees, including Respondent Gunter, in the scope of their employment.

Additionally, while I have considered Respondents’ arguments that they were harmed by the Agency’s delay in charging them because the ten months that elapsed between the date of the alleged incident and the issuance of the NOVA precluded them from identifying potential witnesses from the August 24, 2012 tour, thereby making it difficult to defend themselves in this action, I do not find such claims to be sufficient to defeat liability. The Agency filed the NOVA well within the five-year statute of limitations imposed upon actions brought by the United States, as prescribed by 28 U.S.C. § 2462 (“Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary

or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . .”). Further, tribunals have consistently held that the defense of laches is not available in proceedings such as the instant one. *See, e.g., Tom Amalfitano*, 2006 NOAA LEXIS 2, at \*9 (NOAA Jan. 30, 2006) (“Generally, ‘the defense of laches is not available against the government, state or national, in a suit by it to enforce a public right or to protect a public interest.’”) (quoting 30 C.J.S. Equity § 131 (1992)); *Mervin J. Ledet, Jr.*, 7 O.R.W. 36, 42 (NOAA App. 1993) (“[T]he doctrines of laches and staleness of claims do not apply to actions brought by the government to enforce its rights.”); *Salvatore Patania*, 3 O.R.W. 212, 215 (NOAA 1983) (“Laches does not usually run against the Government.”). Lastly, based on the testimony of Davison, Respondent Shell Island’s co-owner, Respondents maintain no contact information for the customers of its dolphin tours, making it unlikely, if not impossible, that Respondents would have been able to locate anyone from the August 24, 2012 tour to testify on their behalf regardless of the amount of time that elapsed before the issuance of the NOVA. Tr. 180-181, 224-228. Consequently, I find the ten-month lapse of time between the date of the alleged incident and the issuance of the NOVA to be neither excessive nor prejudicial to Respondents’ case.

Turning to the disputed element of liability, the evidence presented in this case as to whether Respondents engaged in the violative behavior of feeding or attempting to feed a dolphin on August 24, 2012, is in conflict. The determination of whether Respondent Gunter fed or attempted to feed a dolphin during the tour he led on August 24, 2012, hinges on the credibility of Respondent Gunter and Williams, each of whom provided varying accounts of what transpired on that day.<sup>16</sup> Various factors are appropriate to consider when evaluating a witness’s credibility. Such factors may include the witness’s opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; any internal inconsistency of the witness’s statements; the witness’s bias, or lack thereof; the contradiction of the witness’s version of events by other evidence or its consistency with other evidence; the inherent plausibility of the witness’s version of events; any inaccuracies or falsehoods in the witness’s statements; and the demeanor, candor, or responsiveness of the witness. *See Oshodi v. Holder*, 729 F.3d 883, 891 (9th Cir. 2013); *Phillip G. Hillen*, 35 M.S.P.R. 453, 458 (MSPB 1987). After a thoughtful and thorough review of the evidence presented in this case, I have determined the testimony offered by Williams to be more credible and reliable than the

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<sup>16</sup> In an attempt to bolster their position, Respondents also presented the testimony of Weber, who testified that she had taken approximately 14 dolphin tours with Respondent Shell Island from 2007 through November 2013, that she never observed any captain or other employee of Respondent Shell Island feed a dolphin on those tours, and that she was consistently instructed while on the tours not to engage in any dolphin feeding. Tr. 13-15. Weber did not know or recall the names of the captains who led the tours she took, including whether Respondent Gunter led any of those tours. Tr. 23-24. It is undisputed, however, that Weber was not a tour participant on August 24, 2012. Tr. 13. Additional testimony elicited from Weber revealed that Respondent Shell Island’s co-owner, Davison, is a personal acquaintance and that Weber receives discounts on occasion when she takes dolphin tours. Tr. 16. Given the fact that Weber was not in attendance on the August 24, 2012 tour with Respondent Gunter and that her testimony did not establish any prior familiarity with his tours, I afforded limited weight to her testimony.



testimony offered by Respondent Gunter. Consequently, I have resolved the conflicts presented in the evidence in favor of the Agency. My rationale for such conflict resolution and analysis of Respondents' credibility arguments follows.

First, Respondents challenge Williams's ability to perceive the events that transpired on August 24, 2012, from a 50-yard distance. They argue that, at the time of those events, Williams and Nelson were attempting to avoid detection, that Nelson was in the process of re-boarding the jet ski, and that Respondent Gunter was "in motion," all of which, when combined, compromised Williams's ability to "have a clear view of exactly what [Respondent Gunter] was holding when he put his hand in the water." Respondents' Initial Br. at 3. However, the preponderance of the evidence suggests otherwise. While it is true that during undercover work, as the term implies, Williams and Nelson try to "keep as inconspicuous as possible," their efforts not to draw attention to themselves do not equate to an inability to perceive events as they unfold. On the contrary, Williams candidly testified that "[a]nytime I go on a tour . . . my head is on a swivel to watch what else is going on" in an effort to document any witnessed violations. Tr. 140-141, 143. The evidence also revealed that Williams is an "avid hunter" of animals and fish. Tr. 134, 154. Given the skills associated with being an "avid hunter," it is reasonable that Williams would be adept at identifying targets, judging distances, and perceiving his surroundings. The evidence also does not support Respondents' suggestion that Williams may have been distracted by Nelson re-boarding the jet ski. Rather, the independent accounts of both Williams and Nelson demonstrate that Williams was already on the jet ski observing Respondent Gunter's behavior and focused on that activity while Nelson was swimming closer to the jet ski and climbing on board the water craft. Tr. 114, 122, 144-145, 152-153, 156, 160. For example, Williams consistently testified that he remained focused on his observations of Respondent Gunter and was not preoccupied with Nelson. Tr. 152-153 ("I'm zeroed in on what's occurring and watching, not paying attention . . . to what she's doing. I'm keeping the ski steady and keeping my train of sight on what I'm witnessing or what I've witnessed."); Tr. 156 ("I don't recall how long it took her [to board the jet ski]. I was paying attention to what was going on in front of me."). As to the distance between himself and Respondent Gunter, Williams testified that by his estimate he was *less than* fifty yards away from Respondent Gunter during the encounter and that he relied on his skills as an "avid hunter" when approximating that distance. Tr. 134. Further, Williams repeatedly and convincingly testified that he was able to clearly observe Respondent Gunter's actions. Tr. 134-135 ("Q: Were you able to clearly see his [referring to Respondent Gunter] actions? A: Yes. Yes."); Tr. 150 ("Q: But are you positive of what you saw? A: I am positive of what I saw."); Tr. 154 ("Q: Were there any obstructions at all . . . from your vantage point . . . from your view? A: No, ma'am, I had a clear line of view.").

Respondents also challenge the consistency of Williams's version of events on August 24, 2012, by citing differences between statements offered by Williams in his written report – which Respondents describe as not being contemporaneous with the alleged violation and as being inaccurate – and the sworn testimony offered at the evidentiary hearing. Specifically, in the investigative report, Williams stated:

I observed the Captain [later identified as Respondent Gunter] reach up on the center console and get a cigar minnow and then immediately lower it over the side of the boat into the water. . . .I

observed [Respondent Gunter] remove a cigar minnow twice from atop the center console and ease it over the side of the boat into the water with the dolphins.

AE 2, Page 10. At the evidentiary hearing, however, Williams testified under oath that he saw what he believed to be a cigar minnow only once in Respondent Gunter's hand when Respondent Gunter, for the second time, retrieved an object from the center console of the vessel and then lowered his clenched fist into the water. Tr. 131-134. In explanation of the discrepancy, Williams testified that because Respondent Gunter had on both occasions reached toward the same location on the vessel – the center console – and returned with a clenched fist that he then lowered into the water where dolphins were present, Williams assumed that Respondent Gunter had retrieved a cigar minnow on both occasions.<sup>17</sup> Tr. 134. His contemporaneous remarks to Nelson at the time of the incident were based on the same assumption. Tr. 122. Given the repetitive behavior of Respondent Gunter – reaching into the center console of the vessel, retrieving an object, moving toward the side of the vessel, kneeling down on one knee, reaching over the gunwale (or side of the boat), and lowering his closed fist into the water while dolphins were present – it was not unreasonable for Williams to assume that Respondent Gunter had retrieved a cigar minnow from the center console of the vessel on both occasions, even though he saw the “half-moon-shaped tail portion,” or about “4 or 5 inches of the lower half of the fish,” only on the second occasion.<sup>18</sup> Tr. 132, 150. While I recognize the discrepancy that Respondents point out, I have not found it to be a material alteration sufficient to discredit Williams's credibility as a witness or the reliability of his written report. Williams candidly explained his thought process and the assumptions he drew from the witnessed behavior to account for the discrepancy between the report and his sworn testimony, and I find his explanation reasonable given the set of circumstances. The candor of Williams's explanation and clarifying testimony only add to his credibility as a witness.

In a related challenge, Respondents also argue that Nelson's investigative report, like that of Williams, was not contemporaneous and is inaccurate. Specifically, they cite the fact that Nelson originally “had the wrong date on her report,” which she later corrected in a supplemental report.<sup>19</sup> While it is true that Nelson explains in her supplemental report the need for the date correction in the earlier investigative report due to “a repeated typographical error regarding the

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<sup>17</sup> Respondents are charged with a single count of violative behavior such that, apart from the credibility issues discussed, whether Williams observed a fish in Respondent Gunter's hand once or twice is inconsequential.

<sup>18</sup> I note that Respondents also challenge the consistency of Williams's description of the amount of the fish that he observed – “half-moon-shaped tail portion” and “4 or 5 inches of the lower half of the fish.” However, I do not find the terms mutually exclusive. Given Williams's approximation, based on his experience as a fisherman, of the size of cigar minnows ranging from five to twelve inches in length, reference to the tail portion of a fish, particularly a larger cigar minnow, could also conceivably be described as four to five inches of the lower half of the fish.

<sup>19</sup> See AE 1.

date of the offense,” a typographical error alone does not cast doubt on the reliability of her report. AE 1. Moreover, I note that an attachment to the investigative report containing e-mail exchanges from November 2013 between the parties clearly refer to the correct incident date of August 24. See AE 2, Page 12.

Respondents next contend that the photographic documentary evidence in the record – namely, the photograph taken by Nelson around the time of the incident at AE 2, Page 16 – does not support Williams’s claimed observations on August 24, 2012. The photograph in question depicts multiple vessels, and the words “Blue Dolphin” are discernible on the starboard side of the vessel in the foreground. AE 2, Page 16. At least three individuals appear to be onboard the vessel, and at least one of these individuals appears to be facing the port side of the vessel, or away from the photographer. *Id.* Citing this photograph, Respondents argue that all of the tourists are back on the vessel, even though, according to Williams, they had been in the water moments earlier when the alleged feeding occurred. Respondents’ Initial Br. at 4. They also argue that Respondent Shell Island’s vessel “was between [Williams] and the dolphin” and assert that anyone “attempting to lure dolphin to the boat . . . would put the bait in the water on the side of the boat where the dolphin are swimming.” Respondents’ Initial Br. at 5. Yet, the “tourists . . . are not looking at fish on the side of the boat where Williams and Nelson are located.” Respondents’ Initial Br. at 5-6.

Respondents’ arguments related to the photograph are based on an assumption that it was taken just after Williams observed Respondent Gunter’s conduct. However, the preponderance of the evidence presented does not support that assumption. Williams testified that the photograph in question does not accurately represent the circumstances that existed at the time he observed Respondent Gunter attempt to feed the dolphin. Tr. 146-147, 150, 152-153. For example, unlike the depiction in the photograph, when Williams observed Respondent Gunter’s actions from the vessel, there were no other boats near it. Tr. 146-147. In addition, the vessel was positioned differently than as shown in the photograph. Williams characterized the position of the vessel in the photograph relative to the camera as “broadside” or “full starboard,” whereas at the time he witnessed Respondent Gunter attempt to feed a dolphin, the vessel was in a “rear starboard” position, meaning that the vessel was angled such that he was facing the rear of the vessel with the bow “cantered at a 1:00 position.” Tr. 146-147, 150-152; Order on Agency’s Motion to Conform Transcript. Further, all of the tour participants were in the water and only the captain, Respondent Gunter, remained on the vessel, unlike the representation in the photograph. Tr. 152-153.

Testimony also revealed that Nelson, who took the photograph from the jet ski, did not immediately board the jet ski after Williams and that she was not aboard the jet ski at the time Williams observed Respondent Gunter’s actions. See Tr. 144 (“She [Nelson] was having a hard time getting on, so it kind of took her a little bit of time to get up on the ski.”); Tr. 156 (Q: “[Y]ou mentioned in your testimony that Special Agent Nelson was having a little difficulty getting up on the jet ski?” A: “Yes, ma’am.”); Tr. 158 (“[W]e were in motion at the time I took the photos. So I wasn’t actually climbing up. It was shortly after we had both been onboard . . . But it wasn’t at the time he saw the feeding.”); Tr. 160 (Q: “[H]e [Williams] told you after he climbed on the jet ski that’s when he noticed the Blue Dolphin tour boat captain pick something out of the console and stick his hand in the water, right?” A: “He was on the jet ski and I was

not.”). In explaining why she did not observe any feeding activity by Respondent Gunter, Nelson testified:

I was in the water. We were sharing a jet ski. He [Williams] had already climbed onto [the] jet ski, the first seat. So he was kind of eye level with a boat, where I was below the boat, so I would have to be looking up. Plus I was swimming.

Tr. 114. Even after Nelson boarded the jet ski, there were “a lot of people in the water” between the jet ski and Respondent Shell Island’s vessel, unlike the depiction in the photograph. Tr. 159.

The precise time when Nelson took the photograph at AE 2, Page 16, cannot be ascertained from the record. Nelson herself was uncertain as to precisely when she took the photograph, as Respondents have pointed out. Tr. 158 (“Maybe a couple minutes, maybe a minute. But it wasn’t at the time he saw the feeding.”); Tr. 159 (After both Williams and Nelson were on the jet ski, “we had the brief conversation about the feeding. . . . I looked around. We had another brief conversation about [a prior alleged violator]<sup>20</sup> being in the area. . . . So four minutes maybe after we reboarded the jet ski.”). However, the preponderance of the evidence presented demonstrates that the photograph at AE 2, Page 16, does not depict the conditions that existed when Williams observed Respondent Gunter’s actions, and could not have been taken at or close enough to the time of the attempted feeding to be useful in evaluating Williams’s credibility. Consequently, I find Respondents arguments to be unpersuasive.

In addition to the credibility factors addressed through Respondents’ specific arguments, I considered other factors. Specifically, I evaluated the demeanor, candor, and responsiveness of Williams and Respondent Gunter during the evidentiary hearing. I noted that on many occasions as Williams testified, he directly addressed me in answering questions and maintained eye contact. Respondent Gunter did not. Williams exhibited a relaxed and calm posture throughout his testimony, whereas Respondent Gunter began his testimony with his arms crossed over his chest.<sup>21</sup> Williams was responsive to questioning and forthcoming in his answers. Respondent Gunter was less so. For example, in spite of the parties’ joint stipulation that Respondent Gunter was operating Respondent Shell Island’s tour boat on August 24, 2012, as shown in AE 2, Pages 15 and 16 (and, in fact, was the only captain operating on August 24, 2012, according to Respondent Shell Island), Respondent Gunter was repeatedly evasive in his responses to questions confirming his presence on that day. JE 2, ¶ 4; AE 2, Page 12; Tr. 242-243. Specifically, the examination was as follows:

Q: So you were operating the Blue tour that day on August 24<sup>th</sup>, right? A: I’m not sure. I was—like I said, I was a full-time captain. I ran four tours a day. Could have been. . . . Q: And, in fact, we’ve stipulated that you were operating the boat in the two pictures, the

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<sup>20</sup> Tr. 143.

<sup>21</sup> I recognize, however, that an investigator like Williams is likely to have more experience testifying in a formal hearing than a lay witness like Respondent Gunter.



joint exhibit? . . . A: Page 15 is not me. The guy is too big. Q: So it wasn't you and you weren't there. Is that your testimony? A: Like I said, I could have been there. I don't know if that's me. From my knowledge, from my body, that guy on page 15 doesn't look like me.

Tr. 242-243.

I also considered the factor of bias in evaluating credibility. It is unrefuted that Williams had no prior dealings with Respondent Gunter and had no reason to single him out. Williams bore no animosity toward and did not personally know either of Respondents. Tr. 135-136, 244. He had no reason to suspect Respondents would be engaged in dolphin feeding on August 24, 2012. Rather, he was present on that day investigating another tour operation and it was by mere happenstance that he was present to witness Respondents' activity. Tr. 135-137. The evidence reveals no motivation for Williams to lie about his observations of Respondent Gunter. Williams and Nelson's undercover operation had already been successful, so to speak, with regard to the jet ski operation that was the target of their investigation. Tr. 130. Further, there is no evidence to suggest that Williams would have derived any personal gain or that he had any vested interest in charging Respondents with the violation at issue. The same cannot be said for Respondent Gunter. Respondent Gunter stood to gain financially, by way of receiving tips from customers, by creating a successful dolphin tour experience for his customers, namely, a tour that would involve not only seeing but also being able to swim with wild dolphins. Notably, words imprinted on the bow of the tour vessel and in plain view of the customers, "If you liked your ride, tip your guide," reinforces this point. Tr. 231, 247-248. Further, the evidence shows that if Respondent Gunter ever admitted to feeding dolphins during his employment with Respondent Shell Island, his employment would have been immediately terminated. Tr. 174. Though he is no longer currently employed by Respondent Shell Island, such an admission, even now, could compromise his reputation, especially in light of having recently started his own business offering dolphin excursions. Tr. 232-233.

In consideration of the discussed factors and my evaluation of the totality of the evidence presented, I found the testimony offered by Williams to be more credible, and thus more reliable, than that offered by Respondent Gunter. Accordingly, I resolved the conflicts in the evidence as to the events that transpired on August 24, 2012, in favor of the Agency. Therefore, I have concluded that the preponderance of the evidence presented establishes that Respondents engaged in attempts to feed wild dolphin on August 24, 2012, in violation of the Act and Agency regulations.

### **C. Civil Penalty Assessment**

Having determined that Respondents are liable for the charged violation, I must next determine the appropriate amount, if any, to impose as a civil penalty for the violative behavior. As previously stated, there is no presumption in favor of the penalty proposed by the Agency, and as the Administrative Law Judge presiding in this matter, I am not "required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document." *Nguyen & Harper*, 2012 NOAA LEXIS 2, at \*21; see 15 C.F.R. §

904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631 (June 23, 2010). Rather, I must independently determine an appropriate penalty “taking into account all of the factors required by applicable law.” 15 C.F.R. § 904.204(m); *see* 15 C.F.R. § 904.108 (enumerating factors that may be considered in assessing a penalty). Thus, in assessing a penalty, I have considered the factors set forth in Agency regulations at 15 C.F.R. § 904.108(a).<sup>22</sup> These factors include the nature, circumstances, extent, and gravity of the violation(s); the respondent’s degree of culpability, history of prior violations, and ability to pay; and such other matters as justice may require.<sup>23</sup>

*i. Nature, Circumstances, Extent, and Gravity of the Alleged Violation*

Feeding wild dolphins is harmful, a fact to which both parties have stipulated. *See* JE 1, ¶ 7. They agree that such feeding causes the dolphins to lose their natural wariness of humans or boats, to become conditioned to receive handouts, to associate humans with food, to change their natural behaviors, including feeding and migration, and to be put at serious risk when items fed to them are contaminated. JE 1, ¶ 7; AE 8; Tr. 37, 39, 41-42, 44-46, 54-56. Given such stipulations, Respondents objected to the Agency’s presentation of a marine mammal expert, Engleby, at the evidentiary hearing. Although Respondents did not object to Engleby’s qualifications as a marine mammal expert, they objected to the relevance of her testimony in light of the aforementioned stipulations in this case. As stated previously in footnote nine, I deemed the testimony of Engleby relevant to the issues in this case, particularly with regard to the assessment of any penalty. Tr. 28-30. In assessing any penalty, I must consider all of the factors required by law, including the nature, circumstances, extent, and gravity of the violation and other matters as justice may require, to which Engleby’s testimony is pertinent. 15 C.F.R. §§ 904.204(m), 904.108(a).

Extensive evidence was presented in this case to illustrate how feeding wild dolphins is harmful. Engleby explained that when illegal dolphin feeding occurs, the animals “learn to associate people with food, and this has a serious cascading effect in many ways.” Tr. 39; *see also* Tr. 46-49, 52, 55; AE 8. Such a cascading effect is revealed through, for example, lethal entanglements with or ingestion of fishing gear, serious injuries or mortalities from boat strikes, ingestion of contaminated food or foreign objects, retaliation toward dolphins, and aggressive behavior by the dolphins. Tr. 46-49, 52-56, 59-63. On this last point, Engleby offered that the combination of feeding wild dolphins and swim-with activities can lead to dolphin aggression. Notably, in 2012, local tour operators in Panama City reported to NOAA escalating aggression by dolphins in the area. Tr. 61-63.

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<sup>22</sup> The Act does not specify factors to be considered when assessing a civil penalty.

<sup>23</sup> As previously stated, while “ability to pay” is a factor that may be considered when determining penalty, Respondents did not raise such a claim in this case. *See* 15 C.F.R. § 904.108.

Engleby's compelling testimony revealed that feeding wild dolphins has been an ongoing problem in Panama City for decades. Consequently, the Agency considers Panama City a "hot spot" for such feeding and, in response, has conducted much outreach to the community over the years to, albeit unsuccessfully, combat the problem. Tr. 70-73, 76, 94-97; AE 8, Page 39. Engleby opined that "swim with" activities, like the dolphin tours offered by Respondents, are "facilitated by and capitalized on by illegal feeding." Tr. 68-69; *see also* Tr. 90-91, 95. Contrary to Respondent Gunter's lay opinion – that wild dolphins, prevalent in Panama City, are curious by nature and need not be fed to encourage interest<sup>24</sup> – Engleby opined that "[i]t would be highly unusual" for wild dolphins to swim with individuals or "hang around, stick around, unless there's a food incentive or some sort of reward incentive." Tr. 69. Engleby further opined that the swim-with activities in Panama City would not be feasible without feeding wild dolphin. Tr. 68-69, 90-91, 95.

As demonstrated by the above discussion, the nature, circumstances, extent, and gravity of the violation in this case are significant, which has been considered in my penalty assessment. Respondent Gunter's actions of attempting to feed wild dolphins during the tour he led on August 24, 2012, provided the very type of incentive to which Engleby refers. His attempts to feed dolphin on this occasion contributed directly and significantly to harming the wild dolphin population in Panama City, a population that has been plagued with illegal interference for many years. While I recognize, as Respondents have argued, that Respondents are not "responsible for the policies and practices of other tour operators in the area,"<sup>25</sup> they are responsible and must be held accountable for their own actions, which contribute to the ongoing problems of dolphin feeding in Panama City.

*ii. Respondent's Degree of Culpability, Any History of Prior Violations, and Ability to Pay*

The Agency has asserted that Respondent Gunter's actions were intentional. I agree. The credible evidence presented in this case reveals that Respondent Gunter, while leading a dolphin tour with Respondent Shell Island's vessel, approached an area where approximately five dolphins had been feeding (from fish thrown into the water by another tour operator). Tr. 127-131, 153-157. As his customers quickly entered the water, Respondent Gunter promptly removed a fish from the center console area of the vessel and lowered it into the water, approximately ten feet from the dolphins and tour customers. Such action can only reasonably be construed as deliberate conduct to keep the dolphins close-by and to enhance the experience of his paying customers aboard the tour, thereby increasing the likelihood of his own financial gain (further illustrated by the very words imprinted on the bow of the vessel he used in his tours, "If you liked your ride, tip your guide.").

Respondents have suggested that the testimony elicited at the evidentiary hearing that Williams and Nelson previously toured with Respondent Shell Island's dolphin tour in 2010, under the direction of another captain, but found no evidence of illegal dolphin feeding,

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<sup>24</sup> *See* Tr. 236, 248.

<sup>25</sup> Respondents' Initial Br. at 8.

exonerates them from wrongdoing. While I disagree with the logic of such an argument – that a prior instance of compliance with the law leads to the conclusion that a subsequent violation did not occur – I have considered Respondents’ argument with regard to the penalty factor addressing any history of prior violations. The evidence presented establishes that Respondents have no prior history of violations, a point conceded by the Agency in its Penalty Assessment Worksheet. AE 6.

While the Penalty Policy that the Agency utilizes advises that a history of non-compliance may serve as a basis to increase a penalty, a number of administrative tribunals have found, conversely, that the absence of prior offenses may support the assessment of a lower penalty. *See, e.g., Pauline Marie Frenier & Daniel Joseph Rotoli*, 2012 NOAA LEXIS 11, at \*39-40 (NOAA Sept. 27, 2012) (“[T]he absence of any prior or subsequent offenses can serve as a mitigating factor and support the assessment of a lower civil penalty under certain circumstances. . . . For example, the absence of any prior or subsequent violations during an extensive career in the commercial fishing industry . . . is noteworthy.”); *Michael Straub & Steven Silk*, 2012 NOAA LEXIS 1, at \*24 (NOAA Feb. 1, 2012) (“The absence of prior offenses . . . tends to favor a low civil monetary penalty.”); *The Fishing Co. of Alaska et al.*, 1996 NOAA LEXIS 11, at \*43-44 (NOAA Apr. 17, 1996) (“In an industry that is so heavily regulated, this absence of prior violations by any of the Respondents has been taken into consideration as a mitigating factor in the penalty assessment.”). The fact that Respondents have no history of prior violations has been considered in my assessment of a civil penalty in this case.

As to the factor of “ability to pay,” the Rules of Practice state that if the respondent wants the presiding judge to consider his inability to pay the penalty, he must submit “verifiable, complete, and accurate financial information” to the Agency in advance of the hearing. 15 C.F.R. § 904.108(e). No evidence of Respondents’ inability or ability to pay was submitted at any time in this proceeding. As such, this factor shall not be considered.

### *iii. Such Other Matters as Justice May Require*

In this case, the evidence presented by Respondents revealed that, since 2012, Respondent Shell Island, through its co-owner Davison, has “helped organize and promote ‘Bad to Feed’, an organized effort to educate and discourage tour operators from feeding dolphin.” Respondents’ Initial Br. at 1. Davison spent between 100-200 hours of his time, without compensation, to assist with organizing the Bad to Feed program. Tr. 188. The impetus for organizing this effort – which serves as a type of self-policing among tour owners/operators and as an educational resource – was the recognition of problems with dolphin feeding in Panama City, as well as problems associated with jet ski tour operations in particular. Tr. 182-191. Part of the educational component consists of a free eight-hour course offered over a two-day period, the first of which took place in April 2013. Tr. 185-186, 188; RE 5. Davison “hosted” this first course at his own personal expense. Tr. 190. Though contacted, NOAA declined to participate in the organization in “what was initially presented as a certification program for not feeding dolphins in Panama City.” Tr. 84. While NOAA supported efforts to discourage feeding wild dolphin and the community’s interest in self-policing such violative behavior, it could not support the fact that many of the participating member operations offered “swim with” (referring to swimming with the dolphins) activities as part of its tours, which NOAA opposes because



“swim with” activities are “equally harmful and problematic to dolphins” and potentially “lead to harassment” of the dolphins. Tr. 84-85. Evidence presented at hearing revealed that prior to the first course taking place, some of the members of Bad to Feed were actually cited and found liable for feeding dolphins, contrary to the represented mission of the program. Tr. 190-191, 194-195; RE 5. In spite of such shortcomings, the evidence presented reveals that Respondent Shell Island, through Davison, had good intentions in the efforts to organize and promote Bad to Feed, and I have considered such efforts in the assessment of a penalty.

The evidence also reveals that Respondent Shell Island, through Davison, was cooperative in the investigation of this case. Specifically, Davison candidly disclosed the name of the captain, Respondent Gunter, who led the only dolphin tour on August 24, 2012, and expressed his willingness to be contacted if needed. AE 2, Page 12. Accordingly, I have considered Respondent Shell Island’s cooperative efforts in the assessment of a penalty.

Lastly, the Agency urges that I “pay particular attention to the need for general deterrence,” noting that the practice of feeding wild dolphins continues “despite decades of outreach and education targeting [Panama City].” Agency’s Initial Br. at 5. It further argues:

There are a large number of businesses in [Panama City] whose business model is predicated on swimming with or otherwise interacting with wild dolphins, and this activity only occurs in the way it does because of the illegal feeding that occurs there and the “addiction” to handouts that illegal feeding has created in a subset of the local dolphin population.

*Id.* I find that the Agency’s argument is persuasive and that ample support for the need for general deterrence exists in the record, namely through the expert testimony of Engleby. As discussed above, Engleby opined that “swim with” activities, like the dolphin tours offered by Respondents, are “facilitated by and capitalized on by illegal feeding” and that the swim-with activities in Panama City would not be feasible without feeding wild dolphins. Tr. 68-69, 90-91, 95. I have, therefore, considered the need for general deterrence in my penalty assessment.

Upon consideration of all of the foregoing and the penalty factors listed in 15 C.F.R. § 904.108(a), it is hereby determined that for one count of violation of the Act, a civil penalty of \$4,500 is appropriate.

## **VI. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Upon thorough and careful review of the evidence presented in this proceeding, I make the following ultimate findings of fact and draw the following conclusions of law:

1. Respondents are “persons” as defined by the Marine Mammal Protection Act and are subject to the jurisdiction of the United States. 16 U.S.C. § 1362(10); JE 1.
2. Respondent Shell Island Boat Rentals, LLC, owns and operates the Blue Dolphin Tour vessels, one of which was operated by its employee, Respondent Shaun Kasey Gunter, on

August 24, 2012, in the vicinity of Shell Island near Panama City, Florida, which are waters under the jurisdiction of the United States for purposes of the Marine Mammal Protection Act. 16 U.S.C. § 1362(15); JE 1.

3. Dolphins are marine mammals, and the dolphins found in the waters in the vicinity of Shell Island near Panama City, Florida, are in the wild. 16 U.S.C. § 1362(6); 50 C.F.R. § 216.3; JE 1.
4. On August 24, 2012, Respondents engaged in the “taking” of a marine mammal, as defined in the Marine Mammal Protection Act and implementing regulations, in the vicinity of Shell Island near Panama City, Florida. 16 U.S.C. § 1362(13), (18)(A), (18)(C), (18)(D); 50 C.F.R. § 216.3. Respondents’ “taking” of a marine mammal violated the Marine Mammal Protection Act and implementing regulations. 16 U.S.C. § 1372(a)(2)(A); 50 C.F.R. § 216.11(b).
5. Having violated the Marine Mammal Protection Act and implementing regulations, Respondents are liable to the United States for a civil penalty. 16 U.S.C. § 1375(a)(1).
6. In consideration of the penalty provisions of the applicable regulations, a civil penalty of \$4,500 is deemed appropriate. 16 U.S.C. § 1375(a)(1); 15 C.F.R. § 904.108(a).

## **VII. DECISION AND ORDER**

A total penalty of \$4,500 is hereby IMPOSED on Respondents Shell Island Boat Rentals, LLC, and Shaun Kasey Gunter for the violation upon which Respondents were found liable herein. Once this Initial Decision becomes final under the provisions of 15 C.F.R. § 904.271(d), you 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.

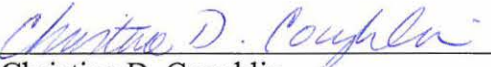
**PLEASE TAKE FURTHER NOTICE**, that any petition to have this Initial Decision reviewed by the NOAA Administrator must be filed with the Administrator within **30 days** after the date this Initial Decision is served and in accordance with the requirements set forth at 15 C.F.R. § 904.273. A copy of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

  
Christine D. Coughlin  
Administrative Law Judge  
U.S. Environmental Protection Agency

Dated: July 8, 2014  
Washington, DC

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

15 CFR 904.271-273

§ 904.271 Initial decision.

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

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

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

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

(4) A statement of further right to appeal.

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

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



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

(1) Otherwise provided by statute or regulations;

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

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

#### § 904.272 Petition for reconsideration.

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

#### § 904.273 Administrative review of decision.

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

(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse,

modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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