UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:	)	**DOCKET NUMBER**
	)	
Raymond L. Fournier,	)	**PI1100409**
Alfred Canepa and	)	**F/V Daniela**
AACH Holding Co., LLC,	)	
	)	
Respondents.	)	
	)	

INITIAL DECISION AND ORDER

Date: September 21, 2015

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

Appearances:

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

I. PROCEDURAL HISTORY

On May 31, 2011, the National Oceanic and Atmospheric Administration ("NOAA" or the "Agency") issued a Notice of Violation and Assessment of Administrative Penalty ("NOVA") to Raymond L. Fournier, Alfred Canepa, and AACH Holding Co., LLC ("AACH"), (collectively, "Respondents").[2] NOVA at 1. The NOVA charges Respondents in three counts with violating the Marine Mammal Protection Act ("MMPA"). NOVA at 1. Specifically, the Agency alleges that in regard to the fishing vessel ("F/V") Daniela, on or about March 28, 2010, April 20, 2010, and April 23, 2010, Mr. Fournier as the operator, Mr. Canepa as the fishing master, and AACH as the owner, knowingly set their purse seine fishing gear on whales, thereby "taking a marine mammal upon the high seas" in violation of 16 U.S.C. § 1372(a)(1) and 50 C.F.R. § 216.11(a). NOVA at 1–2. For the violations, the Agency proposed penalties totaling $24,375 be assessed jointly and severally against Respondents.[3] NOVA at 2, 4.

By letter dated December 13, 2012, Respondents, through counsel, responded to the NOVA by submitting a request for hearing.[4] More than a year later, on January 13, 2014, NOAA forwarded the NOVA and the hearing request to this Tribunal for assignment to an Administrative Law Judge.[5] By Order dated February 4, 2014, the undersigned was designated to preside over this matter and on February 12, 2014, issued an Order to Submit Preliminary Positions on Issues and Procedures (PPIP) ("PPIP Order"). The Agency filed its PPIP on March 14, 2014. The Respondents filed their initial PPIP on March 26, 2014, and an amended PPIP on November 26, 2014, requesting certain financial records produced therewith be retained "under seal."

On April 17, 2014, a Hearing Order was issued, which set forth certain prehearing filing deadlines and scheduled the hearing.[6] The parties filed a Joint Stipulation of Facts on May 27, 2014, and an amendment thereto on November 26, 2014.

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[2] This is one of three companion cases all of which involve AACH or a related company as a respondent and which were heard *seriatim*. The other two cases are *Wagner*, NOAA Docket No. PI1003559 and *DaSilva*, NOAA Docket No. PI1100830

[3] On November 18, 2014, the Agency amended the NOVA, reducing its proposed penalty for Count 3 from $8,375 to $5,000 and reducing the total penalties sought for the three violations to $21,000.

[4] The hearing request was submitted only on behalf of AACH. However, the applicable procedural rules codified at 15 C.F.R. Part 904 provide that "[a] hearing request by one joint and several respondent is considered a request by the other joint and several respondent(s)." 15 C.F.R. § 904.107(b).

[5] Respondents did not request a hearing within 30 days of the NOVA being issued. However, the Agency did not object to the timing of the hearing request, and any objection to its lateness is waived.

[6] The hearing, originally scheduled for June 2014, was postponed and rescheduled by Order dated June 2, 2014, due to certain concerns regarding the availability of funds under the

The hearing in this matter was held on December 10, 2014, in San Diego, California.[7] At the hearing, the Agency offered the testimony of two witnesses, Kevin Painter and Jino Suaki. Respondents did not call any witnesses. Four Joint Exhibits ("JE") and one Agency Exhibit ("AE 1") were admitted into the record.[8] Tr. at 6.

This Tribunal received the transcript of the hearing on December 29, 2014, and electronic copies thereof were e-mailed to the parties on January 7, 2015, by the Hearing Clerk. On January 8, 2015, the undersigned issued a Post-Hearing Scheduling Order, which set deadlines for the filing of motions to conform the transcript to the actual testimony and post-hearing briefs.

On February 20, 2015, the Agency filed its initial Post-Hearing Brief ("AB"). Respondents filed their initial Post-Hearing Brief ("RB") on March 6, 2015. On March 20, 2015, the Agency filed its Post-Hearing Reply Brief ("ARB"), and on April 3, 2015, Respondents filed their Post-Hearing Reply Brief ("RRB").

On August 18, 2015, the Agency filed a Notice of Supplemental Authority and attached an Order and Memorandum Opinion from *Black v. Pritzker,* No. 14-782, 2015 U.S. Dist. LEXIS 104694 (D.D.C. Aug. 10, 2015).

II. APPLICABLE LAW AND REGULATIONS

A. Liability

In 1972, Congress enacted the MMPA in response to the public's growing concern over the continued survival of marine mammals. Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. §§ 1361-1423).[9] Congress recognized that "certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities," 16 U.S.C. § 1361(1), and that "marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic," and "the primary objective of their management should be to maintain the health and stability of the marine ecosystem," 16 U.S.C. § 1361(6). As such, Congress imposed a permanent "moratorium" on the taking of marine mammals commencing from the effective date of the MMPA. 16 U.S.C. § 1371(a); *see also Safari Club Int'l v. Jewell*, 720 F.3d 354, 357 (D.C. Cir.

NOAA/EPA interagency agreement. It was then further rescheduled by Order dated October 1, 2014, upon motion of the Agency due to the unavailability of several of its key witnesses.

[7] Citations to the hearing transcript are in the following format: "Tr. at [page]."

[8] The parties identified the NOVA, and the amendment thereto dated November 18, 2014, as Joint Exhibits 1 and 2, respectively. Joint Exhibits 3 and 4 are respectively the parties' original and Amended Joint Stipulations of Fact. The stipulations are numbered sequentially and will be cited herein in the following form "Stip., __."

[9] Marine mammals are animals "which are morphologically adapted to the marine environment," and include whales, dolphins, and porpoises as well as seals and sea lions. 50 C.F.R. § 216.3.

2013) ("The MMPA establishes a 'stepwise approach' to the conservation of marine mammals. At step one, the statute imposes a general 'moratorium on the taking and importation' of all marine mammals, regardless of the species' scarcity or abundance.") (citations omitted). In particular, Congress declared it "unlawful— (1) for any person subject to the jurisdiction of the United States or any vessel or other conveyance subject to the jurisdiction of the United States to *take* any marine mammal on the high seas."[10] 16 U.S.C. § 1372(a) (emphasis added); Stip., ¶ 4.[11]

The term "take" as defined by the MMPA means "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(13); Stip., ¶ 5. The term is further defined in the regulations as follows:

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

50 C.F.R. § 216.3; Stip., ¶ 5. The MMPA defines "harassment" as:

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

16 U.S.C. § 1362(18)(A).

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[10] The phrase "high seas" is not defined in the MMPA, but the Magnuson-Stevens Fishery Conservation and Management Act defines "high seas" as "all waters beyond the territorial sea of the United States and beyond any foreign nation's territorial sea, to the extent that such sea is recognized by the United States." 16 U.S.C. § 1802(20).

[11] This prohibition is also contained in the MMPA's implementing regulation at 50 C.F.R. § 216.11 ("Except as otherwise provided in subparts C, D, and I of this part 216 or in part 228 or 229, it is unlawful for: (a) Any person, vessel, or conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas.").

The MMPA delineates certain limited "exceptions" to the imposed moratorium on the taking of marine mammals. 16 U.S.C. § 1371(a). Particularly relevant here is the exception under Section 118 of the MMPA that allows for the "incidental taking of marine mammals in the course of commercial fishing operations" by vessels of the United States and permitted fishing vessels.[12] 16 U.S.C. §§ 1371(a)(2), 1387(a)(1); Stip., ¶ 6. Congress further established a regulatory scheme within the MMPA for the application for and issuance of Section 118 "authorizations" by the Secretary of Commerce to properly permitted vessels engaged in specified commercial fisheries.[13] 16 U.S.C. § 1387(c)(2); Stip., ¶ 8. The MMPA then states:

> [i]f the owner of a vessel has obtained and maintains a current and valid authorization from the Secretary under this section and meets the requirements set forth in this section, including compliance with any regulations to implement a take reduction plan under this section, the owner of such vessel, and the master and crew members of the vessel, shall not be subject to the penalties set forth in this title for the incidental taking of marine mammals while such vessel is engaged in a fishery to which the authorization applies.

16 U.S.C. § 1387(c)(3)(D).

According to the regulations implementing this provision of the MMPA, set forth at 50 C.F.R. Part 229, "incidental" means, "with respect to an act, a non-intentional or accidental act that results from, but is not the purpose of, carrying out an otherwise lawful action." 50 C.F.R. § 229.2; Stip., ¶ 7.[14] The intentional, lethal take of any marine mammal is strictly prohibited

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[12] The other exceptions include, for example, the taking of a marine mammal in accordance with a permit for scientific research, public display, and photography purposes. 16 U.S.C. § 1371(a)(1).

[13] Although it granted this exception to the moratorium for commercial fishing operations, Congress indicated a clear intent for the exception *not* to undermine the overall purpose of the MMPA, stating immediately thereafter that "[i]n any event it shall be the immediate goal that the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate within 7 years after the date of enactment of this section [enacted April 30, 1994]." 16 U.S.C. § 1387(a)(1); *see also* 16 U.S.C. §§ 1371(a)(2), 1387(b)(1). Further, the MMPA goes on to direct the Secretary of Commerce to establish a program to monitor incidental mortality and serious injury of marine mammals during the course of commercial fishing. 16 U.S.C. § 1387(d). Specifically, the Secretary may place observers on vessels to obtain mortality and injury rate statistics that can be used to "identify changes in fishing methods or technology that may increase or decrease incidental mortality and serious injury." *Id.* Collection of this data provides a basis for "take reduction plans" to reduce incidental mortality or serious injury of marine mammals. *See* 16 U.S.C. § 1387(f).

[14] Congress delegated authority to the Secretary of Commerce to "prescribe such regulations as are necessary and appropriate to carry out the purposes" of the MMPA. 16 U.S.C. § 1382(a); *see*

"unless imminently necessary in self-defense or to save the life of a person in immediate danger." 50 C.F.R. § 229.3(f). *See also* 16 U.S.C. § 1387(a)(5); Stip., ¶ 9.

B. Penalty

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

The inflation adjustment procedures set forth by the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 892, as amended, resulted in the Secretary increasing the maximum civil penalty to $11,000 per MMPA violation. *See* 15 C.F.R. § 6.4(f)(10) (reflecting the increased maximum civil penalty for MMPA violations pursuant to these adjustment procedures).

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

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

15 C.F.R. § 904.108(a).

III. FACTUAL BACKGROUND

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

The F/V Daniela is a large-scale (196.1-feet long/1,231 gross ton), U.S. flagged (U.S. Reg. # 531005), tuna purse seine[15] fishing vessel, with a carrying capacity of 1,200 tons of fish

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also 16 U.S.C. § 1373(a) (establishing the procedures for promulgating regulations to carry out the purposes of the MMPA).

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

and an operating crew of 23. AE 1 at 3, 12, 14, 16; Stip., ¶¶ 16, 19; Tr. at 13, 51. At all times relevant hereto, Respondent AACH was the vessel's owner, Respondent Raymond Fournier was its Captain, and Respondent Alfred Canepa was its fishing master.[16] Stip., ¶¶ 2, 3, 24. All three Respondents are "persons" subject to the jurisdiction of the United States under the MMPA. Stip., ¶ 15; *see also* 16 U.S.C. § 1362(10) (defining the term "person" for purposes of the MMPA). Although it hails from Seattle, Washington, the vessel generally operates out of Pago Pago, American Samoa, and is licensed to fish in the Western Pacific Ocean region in accordance with the Treaty on Fisheries between the Governments of Certain Pacific Island Countries and the United States. AE 1 at 3, 14, 17; Stip., ¶¶ 18, 19. The vessel possessed a High Seas Fishing Permit and an authorization issued pursuant to Section 118 of the MMPA that allowed for the incidental taking of a marine mammal in the course of commercial fishing operations. Stip., ¶ 17; *see also* 16 U.S.C. §§ 1374, 1387 (addressing MMPA authorization for the incidental taking of marine mammals during commercial fishing operations).

Under federal regulations, purse seine vessels operating in the western and central Pacific Ocean in 2010 were required to carry "fishery observers" on all fishing trips. Stip., ¶ 21. Fishery observers are impartial and tasked with collecting scientific data and documenting fishing activities aboard the vessel. Stip., ¶ 21; AE 1 at 4. NOAA uses fishery observers provided by the Pacific Islands Forum Fisheries Agency ("FFA"), an intergovernmental agency of seventeen Pacific Island nations created to facilitate regional cooperation and coordination between those nations in regard to marine fishery policy and management. Stip., ¶ 22.

At all times relevant to the alleged violations, the FFA observer onboard the Daniela was Jino Suaki, a citizen of Vanuatu. Stip., ¶ 23; Tr. at 34. The relevant fishing trip undertaken by the Daniela from March 4, 2010 to April 27, 2010, was Mr. Suaki's first aboard a purse seine vessel as an observer, and during the trip he observed a total of 43 purse seine fishing sets. Stip., ¶ 23; Tr. at 56. Prior to sailing with the Daniela, Mr. Suaki underwent two month-long training programs to learn to properly serve as an observer on purse seiners and other vessels, including being trained on how vessels operate, the type of fish caught, risk identification, and proper completion of required reports documenting the vessel's fishing activities. Tr. at 35-36. Before his training, Mr. Suaki was familiar with recreational reef fishing from canoes, which is a part of his culture. Tr. at 60-61.

During the fishing trip, Mr. Suaki recorded his contemporaneous observations on various standard SPC/FFA forms for regional purse seine observers provided as part of the standard

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encircling net that is closed by means of a drawstring threaded through rings attached to the bottom of the net."). *See also* Stip., ¶ 20; Tr. at 23.

[16] The fishing master (also known as the "fishing captain") is responsible for directing the crew and equipment during purse seine fishing operations under the supervision of the U.S. Captain (on a U.S. flagged vessel), who is the titular head of the vessel and bears ultimate responsibility for it and its crew. Stip., ¶ 24; Tr. at 14-15.

"Observer Workbook."[17] AE 1 at 16; Tr. at 16-17, 40-41. Those forms include a "Daily Log" (Form PS-2) documenting general vessel activity day by day (AE 1 at 19-75); "Set Details" (Form PS-3) recording the "catch details" for each set made by the vessel (AE 1 at 76-118); "Species of Special Interest" (Form GEN-2) recording observed species of special interest (AE 1 at 122-25); and "Vessel Trip Monitoring Record" (Form GEN-3) documenting any "compliance issues" (AE 1 at 126). Tr. at 16-17, 42-44. In addition, Mr. Suaki completed a Purse Seine Trip Report, which consists of a written summary of the entire trip (AE 1 at 135-173), and maintained a handwritten daily narrative log of events (AE 1 at 174-234). Tr. at 17, 44-47. Observers are trained and instructed in the importance of creating contemporaneous and accurate data. Tr. at 36, 45.

Of the 43 sets made by the F/V Daniela from March 28, 2010 to April 27, 2010, three are the basis for the MMPA violations alleged here. The parties have also agreed that there was no lethal taking of a whale associated with any of the three sets. Stip., ¶¶ 33, 39, 45.

IV. BURDEN OF PROOF

To prevail on its claim against Respondents, the Agency must prove facts supporting each of the alleged violations by a preponderance of "reliable, probative, and substantial evidence." *Creighton*, 2005 NOAA LEXIS 2, at *35-36 (NOAA Apr. 20, 2005) (citing 5 U.S.C. § 556(d); *Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 276 (1994); *Steadman v. S.E.C.*, 450 U.S. 91, 98 (1981)); *see also* 15 C.F.R. § 904.251(a)(2) (addressing admissibility of evidence). This standard requires the "trier of fact to believe the existence of a fact is more probable than its nonexistence." *Creighton*, 2005 NOAA LEXIS 2, at *36 (citing *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993)).

Facts constituting violations of law may be established by either direct or circumstantial evidence. *Watson*, 2010 NOAA LEXIS 8, at *10 (NOAA July 17, 2010) (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764-65 (1984)). The Administrator has recognized that the ALJ is in the "best position to make credibility determinations when faced with conflicting testimony." *Black*, 2013 NOAA LEXIS 6, at *6 (NOAA Aug. 22, 2013) (citing *F/V Twister, Inc.*, 2009 NOAA LEXIS 11 (NOAA App. Nov. 24, 2009)). The ALJ's responsibility is "to hear the testimony of the witnesses and determine credibility based on the facts and circumstances surrounding the proffered testimony as well as the witnesses' demeanor." *Barker*, 2004 NOAA LEXIS 11, at *10 (NOAA Feb. 11, 2004) (quoting *Town Dock Fish*, 6 O.R.W. 580 (NOAA App. 1991)). Inconsistent and unsubstantiated testimony from witnesses detracts from their credibility, and the ALJ determines the weight to be afforded such evidence. *Id.* (quoting *Reidar Rasmussen Fishing Corp.*, 1995 NOAA LEXIS 11, at *14 (NOAA Apr. 25, 1995); *Tepley*, 1995 NOAA LEXIS 5, at *3 (NOAA App. Jan. 31, 1995)).

"[A]fter the Agency proves the allegations contained in the NOVA by a preponderance of reliable, probative, substantial, and credible evidence," the burden shifts to the respondent to

[17] "SPC" refers to the Secretariat of the Pacific Community. The United States, 22 Pacific island countries, and others make up the Pacific Community. *See* http://www.spc.int/en/about-spc/history.html.

produce evidence to rebut or discredit the Agency's evidence. *Watson*, 2010 NOAA LEXIS 8, at *10 (citing *Steadman v. S.E.C.*, 450 U.S. 91, 101 (1981)).

Here, the Agency has alleged three violations of 16 U.S.C. § 1372(a)(1) and 50 C.F.R. § 216.11(a). As indicated above, that statutory provision states that "[e]xcept as provided in section[ ] . . . 118 . . . it is unlawful – (1) for any person subject to the jurisdiction of the United States or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas." 16 U.S.C. § 1372(a).[18] Section 118, in turn, provides for grant of authorization upon application to a vessel engaged in commercial fishing that "shall allow the incidental taking of marine mammals." 16 U.S.C. § 1387(c)(2)(A), (c)(2)(C). Further, subsection (c)(3)(D) of Section 118 provides, in pertinent part::

> If the owner of a vessel has obtained and maintains a current and valid authorization from the Secretary under this section and meets the requirements set forth in this section, including compliance with any regulations to implement a take reduction plan under this section, the owner of such vessel, and the master and crew members of the vessel, shall not be subject to the penalties set forth in this title for the incidental taking of marine mammals while such vessel is engaged in a fishery to which the authorization applies.

16 U.S.C. § 1387(c)(3)(D).

As such, to establish that Respondents violated the MMPA as particularly alleged in each of the three counts, it is undisputed that the Agency bears the burden of establishing, by a preponderance of the evidence, that: (1) Respondents are "persons subject to the jurisdiction of the United States;" (2) Respondents engaged in a "take" of a marine mammal; and (3) the take occurred on the "high seas." However, at hearing there was discussion regarding the further extent of the Agency's burden to prove the take was "*not* incidental" and thus impermissible under the Respondents' Section 118 permit. Tr. at 7-10, 66. NOAA's position is that it has no such additional burden, and that once it meets its burden of introducing a prima facie case that a take occurred, then Respondents could raise as a defense that the take was incidental (although it would not necessarily be an affirmative defense).[19] Tr. at 7-8. Respondents' position is that

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[18] The regulations reiterate the statutory requirement: "Except as otherwise provided in subparts C, D, and I of this part 216 or in part 228 or 229, it is unlawful for: (a) Any person, vessel, or conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas." 50 C.F.R. § 216.11(a).

[19] An "affirmative defense" is distinguishable from a negative or rebuttal defense in that an affirmative defense raises new matters that, assuming the allegations in the complaint to be true, constitute a defense to the action and have the effect of defeating the plaintiff's claims on the merits; a negative defense simply seeks to refute an essential allegation of the plaintiff's case. 61A Am Jur 2d Pleading § 276. If proving that the take was "incidental to permitted commercial fishing activities" is a defense on which Respondents bear the burden, rather than an element of

because the Agency acknowledges they had a permit, the Agency must prove the taking was inconsistent with the permit, *i.e.* that it was not "incidental." Tr. at 8-10, 69. The parties were offered the opportunity to address this issue in their post-hearing briefs, but neither chose to do so. Tr. at 10.

There is a dearth of legal guidance on this specific issue. However, the Agency's position is generally supported by the holding in *U.S. Fish and Wildlife Service v. Burnham*, 5 O.R.W. 247, 1988 NOAA LEXIS 20, at *12-13 (ALJ, 1988). *Burnham* is a Department of Interior administrative civil penalty proceeding alleging a take of marine mammals in violation of the MMPA moratorium and involving the exception thereto for takes by Native Americans creating native handicraft.[20] *See* 16 U.S.C. § 1371(c)(1988) (restated and recodified as 16 U.S.C. § 1371(b)). Noting that the MMPA does not specify who bears the burden of proof in such cases, the Administrative Law Judge ("ALJ") in *Burnham* looked to the MMPA's "hardship exemption" allowing the Secretary to exempt a person from its provisions upon application.[21] *Burnham*, 1988 NOAA LEXIS 20, at *12-13 (citing 16 U.S.C. § 1371(c)). Based thereon, the respondents had the burden to prove the take fit within the terms of the exemption. *Id.* at *13. The ALJ further noted that this burden allocation was also consistent with the Administrative Procedures Act (under which administrative penalty proceedings are generally held). *Id.* (citing 5 U.S.C. § 556(d) ("[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.")); *see also United States v. Eller*, 2007 U.S. Dist. LEXIS 41255, *10-

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the Agency's case, then it would be an affirmative defense because it would require proof of a valid permit and evidence of the fishing activities.

[20] During the pendency of the administrative action, the *Burnham* respondents unsuccessfully challenged in federal court the validity of regulation implementing the exception as being inconsistent with the statute. *Burnham*, 1988 NOAA LEXIS 20, at *6. As stated by the administrative decision, the court held that

> the MMPA's principal purpose was to establish a moratorium on the taking of marine mammals. The court also noted the MMPA provided the Secretary broad power with which to protect marine mammals. Despite finding that the MMPA's legislative history was not particularly insightful, the court concluded the MMPA's purpose was to protect traditional ways rather than to provide a means of initiating commercial exploitation of marine mammals by Alaska Natives.

Id. at *7 (discussing *Katelnikoff v. U.S. Department of the Interior*, 657 F. Supp. 659 (D. Alaska 1986)). As such the court upheld the regulation. The Respondents here make a similar argument asserting NOAA has "overregulated" the incidental issue with a regulation interpreting the term to mean "nonintentional," which is inconsistent with the statute. Tr. at 8-9, 69. As evidenced in *Burnham*, that issue is beyond the authority of this Tribunal.

[21] The regulations did not require Native Americans to obtain a permit to secure the benefit of the exemption. *Burnham*, 1988 NOAA LEXIS at *3-4.

13 (N.D. Cal. May 25, 2007) (holding defendant in MMPA taking case failed to establish factual basis for "defense pursuant to the 'Good Samaritan' provisions of 16 U.S.C. § 1371(d)").

On the other hand, the Respondents' position appears consistent with *United States v. Omiak*, 1994 U.S. App. LEXIS 17212 (9th Cir. 1994).[22] *Omiak* is a 1994 federal criminal proceeding alleging violation of the MMPA moratorium on taking and the statutory exemption therefrom for native Alaskans' non-wasteful subsistence hunting. *Omiak,* 1994 U.S. App. LEXIS 17212, at *2-3 (citing 16 U.S.C. § 1371(b)). Reviewing the burden of proof *de novo*, the Ninth Circuit held that jury instructions provided during the trial clearly stated the government's burden to prove the Alaskan defendants' hunting was done in a "wasteful manner," *i.e.*, that the meat they failed to recover from the walruses they killed "was usable." *Id.* at *6.

In this case, *Burnham* is more persuasive and applicable. The general rule, well established by numerous decisions of the U.S. Supreme Court, is that the one claiming the benefit of an exception to a statutory prohibition bears the burden of proof on it. *United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967); *Dickinson v. United States*, 346 U.S. 389, 395 (1953) ("[S]ince the ministerial exemption is a matter of legislative grace, the selective service registrant bears the burden of clearly establishing a right to the exemption."); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) ("[T]he general rule of statutory construction [is] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits . . . ."). *See also Deaton v. United States DOC*, 1989 U.S. Dist. LEXIS 19159, at *23-24 (S.D. Fla. Jan. 21, 1989) (A party claiming the benefit of a regulatory exception due to exigent circumstances to permit requirement under the Marine Protection Research and Sanctuaries Act, 16 U.S.C. 1431 *et seq.*, has the burden of proof that its activities fall within that exception.).

Further, unlike *Omiak*, this is an APA administrative proceeding, not a criminal trial. Under the APA, the proponent of a rule or order has the burden of proof.[23] 5 U.S.C. § 556(d). This provision has been relied upon in a variety of administrative actions to place the burden of proving the prima facie elements of the rule violated on the Agency, and the exception relied upon in defense on the accused party. 4-24 Administrative Law § 24.02 ("[I]n proceedings instituted by the Environmental Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act, once the agency makes an allegation that a product subject to the Act is unsafe or misbranded, the burden of proof of safety or proper labeling is on the manufacturer." *S. Nat'l Mfg. Co., Inc. v. EPA*, 470 F.2d 194 (8th Cir. 1972)). The rationale behind allocating the burden of proof in this manner is that the burden of coming forward with evidence is placed upon the party in the best position to have knowledge of a fact. 4-24 Administrative Law § 24.02.

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[22] This decision is unpublished. 1994 U.S. App. LEXIS 17212 at *1.

[23] The MMPA does not necessarily require an APA hearing before an ALJ, only that "[n]o 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). However, NOAA itself has chosen to impose the APA standards upon these penalty proceedings. *See* 15 C.F.R. § 904.2, ("Judge means Administrative Law Judge."). "Administrative Law Judge" is a term of art for adjudicators appointed under the APA, 5 U.S.C. §§ 556(b), 3105.

In this case, the Respondents are claiming the benefit of an exception to a statutory prohibition, specifically the right to incidental takes while engaged in commercial fishing despite the MMPA moratorium. They are in the best position to come forward with evidence proving they possessed a valid permit and that the take was "incidental" to their lawful activities. As such, it is reasonable to impose upon them the burden of proof on this issue, while the Agency continues to bear the burden of persuasion that the violations occurred. However, given that this is a somewhat gray area, the Tribunal will assume solely for the sake of argument in this action that NOAA bears the burden of proving the Respondents' take was not incidental.

The parties have stipulated that all three Respondents – AACH, Mr. Fournier, and Mr. Canepa – are persons subject to the jurisdiction of the United States under the MMPA. Stip., ¶ 15. They have further stipulated that the three sets at issue all occurred on the "high seas." Stip., ¶¶ 28, 35, 43. At the time the sets were made, the Daniela possessed an authorization issued under the MMPA that permitted the incidental taking of marine mammals in the course of commercial fishing operations. Stip., ¶ 17; *see also* 16 U.S.C. § 1387(a)(1) (establishing authorization for taking of marine mammals incidental to commercial fishing operations). Therefore, there are two issues remaining to be determined for each count: whether a "take" of a marine mammal occurred during the set and, if so, whether the take was a permissible "incidental take" in the course of commercial fishing operations. *See* 16 U.S.C. §§ 1371(a)(2), 1387. The Tribunal will assume, without deciding, that the Agency has the burden of proof on both issues.

V. WHETHER A TAKING OF MARINE MAMMALS OCCURED

A. Evidence of Respondents' Engaging in "Taking" of Marine Mammals

Count 1

Count 1 of the NOVA alleges that on or about March 28, 2010, "Respondents knowingly set their purse seine fishing gear on a whale, in violation of applicable law." NOVA at 1; Stip., ¶ 12. As the parties have stipulated, on March 28, 2010, at 11:54 a.m., while on the high seas in the Pacific Ocean, the F/V Daniela made a purse seine set, Set No. 14, on a school of tuna. Stip., ¶¶ 27-28. The set resulted in a landing of approximately 50 metric tons of skipjack tuna and 27.2 metric tons of yellowfin tuna, with an ex-vessel value of not less than $80,000. Stip., ¶¶ 29-30.

In support of this allegation, NOAA called as a witness Jino Suaki, the FFA observer aboard the ship. Observer Suaki's workbook indicated that at the time of the set the school of tuna were associated with a "live whale." Stip., ¶ 32. Mr. Suaki also testified as follows:

> We came across a school of fish and with the school of fish there was about four whales associated. And I was standing at the port bridge with Mr. Raymond Fournier and we were investigating the fish. At that time all of us noticed that there were whales with the school of fish, and Mr. Raymond asked me…if we did make a

> set on the school of fish, am I as an observer going to write it down that we made a set on a school of fish with whales. And I replied to him that, yes, I'm going to write it down.
>
> * * *
>
> . . . after that, Mr. Canepa, who was up on the crow's nest, gave the order for the skiff to be let go, and that's the start of a set. And there was one whale inside with the fish during the setting.
>
> And after the setting, after the setting and pursing and during hauling, the hauling process, Mr. Alfred Canepa came down from the mast and approached me and he told me that I will not write down anything on my report that we made a set on a whale and he told me that he didn't want to go to jail.

Tr. at 38-39.

Mr. Suaki further explained that when he said the whales were "associated" with the fish, he meant "the whales are with the school of fish, not one or two miles" off from them. Tr. at 39-40. Mr. Suaki also testified that there was no chance of confusing the tuna and the whales. Tr. at 40. The whales, he stated, are "much bigger than the tuna," "black," and "sometimes you can see the whales spout from the whale." Tr. at 40. He recalled that he could see the whales in the ocean from the ship because they come up to the surface to breathe. Tr. at 40. Additionally, he stated that he was certain Mr. Canepa was "serious" rather than joking when he warned him not to record setting on whales, "because at that time all of us saw the whale with the fish," and "he was not smiling when he was telling me." Tr. at 58-59.

The reliability of Observer Suaki's hearing testimony is buttressed by his handwritten entries contemporaneously made during the voyage as part of his official duties, including the relevant pages from his observer's workbook, daily log, and various other official forms, all of which were offered into the record. Tr. at 40-48; AE 1 at 4, 15-243. For example, in his "trip diary" for March 28, 2010 – Day 25 of the voyage – Mr. Suaki recorded by hand as follows:

> Vessel continued on searching after set # 13 and at 1142 Hours about 4 whales were sighted and there was baitfish alongside the whales with tuna associated.
>
> The fishing master asked me if whether I would put in my report if a set is made on the whales and [I] replied yes.
>
> Set # 14 made on one of the whales and I could see it clearly in the middle of the net.
>
> As the hauling process was going on, the Captain came over to me and said, qoute [sic] "No whales observer, no whales. Please don't put down that we made a set on whales. I don't want to get into jail." I told him that I wouldn't mention anything of it.
>
> About 55mT caught for this set and fortunately, the whale escaped out. Identification of whale unknown though I figure it to be around 7 metres.

AE 1 at 200-201, 242-243.

On the form GEN-2 Species of Special Interest, Mr. Suaki similarly recorded for March 28, 2010, that four adult whales and three juvenile whales of unknown species were sighted 50 meters from the vessel while it was searching for tuna. AE 1 at 122, 238. The adult whales were 7 meters in length and the juveniles were 3 meters, and they were feeding on fish alongside the tuna. AE 1 at 122, 238. Further, "[t]here were several whales with the tuna associated. When set # 14 was made, one whale was left on which the set was made upon. However as hauling began it got away by breaking a part of the net." AE 1 at 122, 238. At hearing, Mr. Suaki elaborated on this report stating that the whale's successful escape from the net as it was being hauled upon the vessel caused a "big rip" and a "big hole" in it. Tr. at 47.

On the Daily Log Form (PS-2) for March 28, 2010, Mr. Suaki similarly wrote in the comments section "Live whale with fish feeding on baitfish" and "Set # 14 on whale." AE 1 at 44, 236. Similarly, in the Set Details form (PS-3) he noted the "set made on whale." AE 1 at 89. Further, at hearing the observer pointed out that on his Form GEN-3 used to memorialize "infringements," "I recorded on the 28th of March 2010 when the captain [Mr. Canepa] ordered me not to mention on a trip report that we made a set on a whale." Tr. at 43-44; AE 1 at 126 ("28/03/10 – the captain odered [sic] me not to mention/report that set # 14 was made on a whale."). Observer Suaki testified that while he ostensibly capitulated to the Captain's demand that he not document the vessel setting on whales in his official reports, in fact, he did document it, because such reporting was a required part of his official duties. Tr. at 46. *See also* AE 1 at 167 (Purse Seine Trip Report, section N, "Request that an event not be reported") ("Set # 14 on the 28th of March 2010 was made on school of fish with whale associated. The Captain came over to me and told me not to report/mention that the set was made on a whale. . . . The actual incident is recorded in my diary, page 27 and 28."); AE 1 at 171 (Purse Seine Trip Report section 13.0 "Problems Encountered") (same).

Count 2

Count 2 of the NOVA alleges that on or about April 20, 2010, "Respondents knowingly set their purse seine fishing gear on a whale, in violation of applicable law." NOVA at 1-2; Stip., ¶ 13. As the parties have stipulated, on April 20, 2010, at 5:25 p.m., while on the high seas in the Pacific Ocean, the vessel made a purse seine set, Set No. 34. Stip., ¶¶ 34-35. The set resulted in the landing of no fish. Stip., ¶ 36.

Observer Suaki's workbook indicated that at the time of the set, the tuna were associated with a "live whale." Stip., ¶ 38. With regard to the basis for this count, Observer Suaki testified: "When I first investigated the school of fish, the whale was not with the school of fish. But later it came within – among the school of fish and the set was made when the whale and fish were both together." Tr. at 50. Further, he explained that when he first observed the whales, Mr. Fournier was standing with him on the port side of the vessel and Mr. Canepa was in the crow's nest. Tr. at 50-51. The visibility that day was good, and Mr. Suaki believed they also clearly

saw the whales, and was sure they saw them, as he did, prior to the set being made.[24] Tr. at 51-52. Mr. Suaki contemporaneously recorded by hand in his trip diary that "[t]he third school was investigated at 1710 Hours and fifteen minutes later, set # 34 was made. I noticed there was a whale among the fishes, though I couldn't identify its species." AE 1 at 225, 255. *See also* Tr. at 48. He also completed a form GEN-2 Species of Special Interest for that day, documenting that a false killer "[w]hale was with free school when set was made. It escaped during pursing[,]" and noting the whale interacted with the vessel's gear during setting.[25] AE 1 at 123, 253; Tr. at 48. Observer Suaki contemporaneously recorded this basic information in his Daily Log form as well, commenting that during the time the free school was being investigated, there was a "whale associated." AE 1 at 68, 251; Tr. at 48-49. Mr. Suaki explained that he identified the tuna on the same form using code 2 – as "feeding on baitfish," rather than code 6 – associated with "live whale," because the tuna were "feeding on baitfish and then the whale just came after that. But a set was made on a whale with the fish." Tr. at 49.

Count 3

Count 3 of the NOVA alleges that on or about April 23, 2010, "Respondents knowingly set their purse seine fishing gear on a whale, in violation of applicable law." NOVA at 2; Stip., ¶ 14. On April 23, 2010, at 2:10 p.m., while on the high seas in the Pacific Ocean, the vessel made a purse seine set, Set No. 38. Stip., ¶ 42-43. The set landed no fish. Stip., ¶ 44.

At hearing, Observer Suaki described the circumstances of this event as similar to what occurred on April 10, 2010: "[W]e investigated a school of fish and the whale came in later with the fish and the set was still made on the whale and fish, both of them together." Tr. at 54. Specifically, he recalled that when the ship first came upon the school of tuna, there were no whales about. Tr. at 54. However, before they made the set, he clearly saw the whales arrive, noting, "I could easily tell that it was a whale and not a tuna because whales are much way bigger than the tuna and black." Tr. at 55. At the time he saw the whales, Mr. Fournier was in the port wing bridge and Mr. Canepa was in the crow's nest. Tr. at 55. There was good visibility that day and he could see the whales without binoculars, using his "bare eyes," although binoculars were available to the crew for their use. Tr. at 55-56. Nothing prevented Respondents Fournier and Canepa from seeing the whales as well, he suggested. Tr. at 55. For this day, he recorded in his narrative log: "When set # 38 was made I could clearly see three whales ( ) inside with the school of fish. They were still inside the net when pursing began but escaped out of the net." AE 1 at 229, 262; Tr. at 52-53. At hearing, Mr. Suaki stated he left blank the parenthesis in his report because at the time he was "trying to figure out the species" and "left it to check it out later." Tr. at 53. Subsequently, he determined that the whale species he saw that day was the false killer whale also known as the "orca." Tr. at 53. He also completed a Species of Special Interest form for the day indicating that during setting there were three "6-7 m[eters] in Length, dorsal fin located in mid-back," "whales feeding on fish alongside

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[24] Mr. Suaki reported that "[d]uring the entire trip, the general weather condition was fine with seas ranging from calm to slight." AE 1 at 151.

[25] Mr. Suaki's Set Details form also identifies set 34 was a "skunk set on freeschool." AE 1 at 109. A "skunk set" means that no fish were caught. Tr. at 64

tuna," "when set was made," which "escaped during pursing." AE 1 at 125, 260. His Daily Log form documented "3 whales with school."[26] AE 1 at 71, 258.

At hearing, Observer Suaki stated that he was interviewed in person by NOAA Special Agent Kevin Painter on July 12, 2010 in Pago Pago, American Samoa, with regard to entries in the official reports he had submitted regarding the vessel setting on whales. Tr. at 52. *See also* Tr. at 18; AE 1 at 264-69. Agent Painter contemporaneously recorded his responses in a written Memorandum, which he then signed. Tr. at 18-19, 52; AE 1 at 264-269. In those responses, he indicated that Respondent Canepa was the person on the vessel responsible for making the decision as to when to make a set. AE 1 at 265. He very generally reiterated his experiences in regard to the three sets which are the subject of the NOVA, specifically that whales were associated with the tuna at the time the nets were set. AE 1 at 265-269. He also memorialized his reaction to Mr. Canepa instructing him not to include in his report that the vessel had set upon whales, stating: "I was a bit scared, so I told him I would not report the whale." AE 1 at 268

NOAA also offered into evidence the testimony of Special Agent Painter. Tr. at 11. For more than 18 years, Agent Painter has conducted civil and criminal investigations of violations of marine resources law. Tr. at 11. Before that, he held a command grade position with the Coast Guard. Tr. at 12. Agent Painter explained that observer reports are collected by NOAA as the vessels pull into American Samoa and passed on to him or his partner for review. Tr. at 12. The report in this case suggested a potential violation of the MMPA, so Mr. Painter interviewed Observer Suaki. Tr. at 12-13; AE 1 at 6. He found Mr. Suaki's report "fairly accurate," so he then interviewed, via e-mail, Mr. Canepa and Mr. Fournier and created a report of his investigation. AE 1 at 1-10; Tr. at 13, 20-21. In the unsworn memorandum memorializing his interview, dated October 6, 2010, and February 1, 2011, Mr. Canepa acknowledged being the "Fish Captain" on the Daniela from March 4, 2010, to April 27, 2010, an experienced captain, and familiar with U.S. Marine Mammal regulations. AE 1 at 276; Tr. at 21. However, he responded "Do not recall," to each of Agent Painter's direct inquiries into the circumstances of the three sets on whales as reported by Observer Suaki. AE 1 at 7, 276-77. Additionally, Mr. Canepa stated, "I do not recall this event, and to my knowledge it never happened," when asked whether he ever told Mr. Suaki not to report the ship setting on whales. AE 1 at 7, 277. Finally, under "additional comments" Mr. Canepa stated the following:

> This trip on the Daniela there was in fact 1 set I made were [sic] a whale popped up in the net after I set the net and got to the skiff. Before I set or during my set I did not see the whale at all. I do not remember what date this was or set number. I do remember there were allot [sic] of whales in the area, some near and some far from schools. I will not make a set on a school that I see a whale on it. I know this is not permitted and is against the law. Like I said

[26] Mr. Suaki's Set Details form reported that set 38 was a "skunk set on freeschool of YFT [yellow fin tuna]." AE 1 at 113.

> this 1 incident happened without me seeing the whale until to [sic] late.

AE 1 at 277.

Similarly, Respondent Fournier in his unsworn interview Memorandum, dated January 2011, acknowledged being the "licensed captain" of the Daniela on the subject trip, an experienced captain, and familiar with U.S. Marine Mammal regulations. AE 1 at 273; Tr. at 20-21. Nevertheless, his consistent responses to the Agent's inquiries regarding the three sets being made on whales were also "Don't Recall." AE 1 at 273-74. Further, Mr. Fournier stated he was unaware of any conversation wherein Mr. Canepa requested the observer not to report "the whale set." AE 1 at 274. He added as an additional comment that "During this Trip. There was alot [sic] of whales in the fishing area. But, to my knowledge I Do Not Remember sitting [sic] on or having whales inside the 'Net' and the observer 'Never' Bought [sic] any of these Reports to my attention!"[27] AE 1 at 274.

Neither Mr. Fournier nor Mr. Canepa testified at hearing. In fact, the Respondents called no witnesses and did not offer any documentary evidence on their own behalf.

B. <u>The Arguments of the Parties on whether an unlawful "taking" occurred</u>

The MMPA, the Agency asserts, provides for a "limited exception" to the general take prohibition allowing for "incidental taking of marine mammals in the course of commercial fishing" by those issued an authorization certificate by NOAA. AB at 2 (citing 16 U.S.C. § 1387(a)(1)); *see also* ARB at 2. The Agency argues that in each count, Respondent engaged in a "taking" because a purse seine net around a marine mammal "has the potential to injure," the MMPA defines acts with the potential to injure as "harassment," and harassment is a taking, even if the encircled mammal is not injured or killed. ARB at 2 (citing 16 U.S.C. § 1362(18)(A), (C)-(D)). Further, the Agency contends the takings were not "incidental" to their commercial fishing activity because that term is defined by regulation as "a *non-intentional or accidental act* that results from, but is not the purpose of, carrying out an otherwise lawful action." ARB at 2 (citing *inter alia* 40 C.F.R. § 229.2). Here, the Agency alleges, Respondents knowingly set their purse seine gear on whales in the process of capturing tuna, so their actions were not subject to the exception to the general take prohibition. ARB at 3-4. Any contrary argument is "illogical, contrary to the purposes of the Act, and cannot be correct," NOAA asserts. ARB at 3.

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[27] In reference to this comment, Agent Painter notes in his report that "[t]he observers are sent out to observe[ ], and record fishing activity, not to discuss the legality of the activity with the captain and/or crew. They are not enforcement agents or officers, and have no authority." AE 1 at 7. *See also* Tr. at 56 (Suaki testified that his position as an observer was "not to play the role of the investigating officer but just be the eyes and ears of the Fisheries monitor."). Although familiar with observers, the record indicates Mr. Fournier was specifically made aware of Observer Suaki's limited role on the ship during a placement meeting held prior to embarking. AE 1 at 136. As such, his indignation here seems, at best, insincere.

In their Post-Hearing Briefs, Respondents make a three-pronged argument that the Agency has failed to establish a *prima facie* case that they violated the MMPA. RB at 1-2. First, they state, their actions fall within the exemption to the MMPA because their authorization to incidentally take marine mammals in the course of permitted fishing operations "includes both negligent and even intentional acts," and the whales were not lethally taken or "harmed in any way," nor were they listed as an endangered, threatened, or depleted species. RB at 1; *see also* RRB 1-2 (MMPA authorization "authorizes Respondents to set on whales" and permits "certain 'knowing' or 'not unexpected acts'"). Second, "when applying the regulations as a whole," Respondents contend their conduct did not violate the MMPA. RB at 1. Third, they argue that NOAA failed to demonstrate that Respondents deliberately targeted or chased the whales to catch the tuna; rather, the whales just incidentally "show[ed] up alongside the tuna in the area together."[28] RB at 2, 9 (citing Tr. at 58).

C. Did NOAA prove by a preponderance of the evidence that Respondents engaged in a taking by knowingly setting their fishing gear upon the whales?

As discussed above, the definition of "take" in the MMPA encompasses actions "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(13). The regulations implementing the MMPA specify that the definition of "take" includes "the restraint or detention of a marine mammal, no matter how temporary." 50 C.F.R. § 216.3. Further, the term "harass" is defined by the MMPA as

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

16 U.S.C. § 1362(18)(A).

The MMPA imposes strict liability for civil violations, such as the unlawful "taking" of a protected marine mammal. *See Creighton*, 2005 NOAA LEXIS 2, at *39 ("[T]he 'Marine Mammal Protection Act is a strict liability statute, and no specific intent is required' . . . . Whether a respondent appreciates the consequences of his or her actions is irrelevant since voluntary actions are sufficient to constitute a violation of the MMPA.") (quoting *Cordel*, 1994 NOAA LEXIS 15, at *7 (NOAA Apr. 11, 1994)). In the present matter, however, the Agency has alleged that Respondents violated the MMPA by "knowingly" setting purse seine fishing gear on whales. NOVA at 1-2. "The term 'knowingly' has been construed . . . to require only

[28] At various points in their Brief, Respondents refer to the vessel as the Isabella, a ship at issue in the companion case. *See e.g.*, RB at 2, 4. The undersigned recognizes this as a scrivener's error and that Respondents intended to refer to the Daniela, the vessel at issue in this case.

the commission of voluntary acts which cause or result in the violation." *Simmons*, 2013 NOAA LEXIS 10, at *19 (NOAA Aug. 30, 2013) (quoting *Huber*, 1994 NOAA LEXIS 35, at *9 (NOAA Apr. 12, 1994)); *see also Kuhn*, 5 O.R.W. 408 (NOAA 1988) (finding that a knowing violation results from an affirmative act when the consequences of that act are foreseeable, even if not intended).

The preponderance of the evidence shows that Respondents did knowingly "take" whales during the three sets at issue. The only eyewitness to the relevant events who testified at hearing and was subject to cross-examination was the observer, Mr. Suaki. Mr. Suaki's testimony made it clear that the Respondents knew there were whales associated with and among the tuna *before* they set their nets, and as such it was very likely that the whales could be restrained or detained or annoyed by their nets. Further, the whales were, in fact, restrained or detained, at least temporarily, by Respondents' nets and/or harassed by the Respondents' setting of the nets, an act of annoyance that could injure the whales or potentially disturb the whales by disrupting their behavioral patterns, including migration, breathing, and feeding. *See* Tr. at 23-25 (Agent Painter testifying that encirclement of whales in the net with the tuna disturbs their feeding, impedes their movement, and can cause death or injury in the process of escaping); *see also Balelo v. Baldridge,* 706 F.2d 937, 938 (9th Cir. 1983) (noting that when nets are pursed, capturing tuna and porpoises, the air-breathing porpoises sometimes are drowned or injured); *Comm. for Humane Legislation, Inc. v. Richardson*, 414 F. Supp. 297, 300 (D.D.C. 1976) (noting that when caught in a net, some porpoises, air-breathing mammals, drown as a result of shock, physical injury, or the refusal to abandon other porpoises entangled in the net.).

This Tribunal found Mr. Suaki's sworn testimony very credible, in that despite his imperfect English, he appeared to answer questions put to him sincerely from his present recollection and with a great expression of certainty. *See, e.g.*, Tr. at 55. Along with his testimony regarding setting on whales, he freely acknowledged the positives of the crew and the trip and the limitations of his knowledge. Tr. at 57, 59, 63. Further, the records of his observations which he created contemporaneously with the events in question significantly corroborate his testimony. Tr. at 45, 48. These records, created and submitted in the ordinary course of his work, before any issue was raised by NOAA as to any violation, are detailed, consistent and fair. While Mr. Suaki had no prior experience as an observer on a purse seine vessel, he had received training and as he acknowledged to Respondent's counsel, he was excited about his position and "ready and willing" to do his job. Tr. at 56-57. Respondents have suggested no motive for Mr. Suaki to have fabricated his observations and the Tribunal sees none in the record.

Respondents offered no evidence at hearing directly contradicting the truth of the particular allegations of fact made by Mr. Suaki in regard to the three sets on whales. As noted above, neither Mr. Canepa nor Mr. Fournier testified at trial, nor did anyone else on behalf of the Respondents. Further, Respondents did not introduce into evidence any contemporaneous records that directly contradicted Mr. Suaki's very detailed recollection of events.[29] The only

[29] Respondents raise an issue regarding being unfairly deprived of a contemporaneous opportunity to comment on the sets at issue by NOAA, in that they were interviewed months after the voyage, when they allegedly could no longer recall anything about the particular sets.

statements of the Respondents in the record regarding the events are their unsworn memoranda memorializing their interviews with Agent Painter. AE 1 at 273-274, 276-77. In those memoranda, made less than a year after the voyage, both Messrs. Fournier and Canepa explicitly represent that they "do not recall" what occurred on the particular set occasions at issue here. AE 1 at 273-274, 276-77. Further, to the extent the men recall anything relevant, their statements are inconsistent. Mr. Fournier states he "do[es] not remember" setting on any whales or "having whales inside the 'net,'" *at all* during the voyage.[30] AE 1 at 274. On the other hand, Mr. Canepa recalls that on some date and during a set number he "do[es] not remember," a whale did pop up in the net after he set and got to the skiff. AE 1 at 277. Moreover, while Mr. Canepa does affirmatively state in his memorandum that: "I will not make a set on a school that I see a whale on it. I know this is not permitted and is against the law," such an unsworn, generalized, self-serving denial cannot and does not outweigh the sworn, credible, detailed testimony of the observer and his contemporaneous records. Moreover, unlike the observer, Respondents have a motive for, at the very least, failing to recall the violations, as Mr. Canepa acknowledged to both Mr. Suaki on the ship and to Mr. Painter in his memorandum that he was aware that setting on whales "is not permitted and is against the law."[31] AE 1 at 277.

Respondents challenge what they characterize as mere "assumptions" that they saw the whales before making the sets, stating that the focus of the master and captain's attention was on "making the set and safely maneuvering the vessel rather than on lookout for whales that had not been seen prior," and it "does not follow that the captain and fishing master saw the same thing as the observer." RB at 9-10; *see also* RRB at 5. Citing Mr. Canepa's statement in his interview memorandum, Respondents argue that "they did not see the whales" before making the set; rather, they popped up in the net after the set was made. RB at 10 (citing AE 1 at 277). They also challenge the observers' characterization of the whales being "associated" with the tuna, stating, "did he mean that they were a mile away or swimming towards the tuna, away from the tuna, with the tuna, or otherwise acting in a predictable way such that Respondent would have known not to set on the tuna?" *Id.* at 10. On this basis, they claim there is no evidence that Respondents knowingly set on the whales. *Id.* at 10.

Tr. at 75-76. The Tribunal is not aware of any obligation on NOAA's part to more expeditiously interview the Respondents post-voyage and Respondents have cited none. No doubt NOAA has many investigations to conduct and limited resources to apply to them. Further, nothing precluded the Respondents from creating and retaining their own contemporaneous detailed documentation, written or audio/visual of the circumstances of the sets made, especially as they were well aware that documenting the sets was one of the purposes for which the observer was onboard. In fact, Mr. Painter testified at hearing that some captains do maintain their own personal records, in addition to the required ship's log sheets, although the captains here did not apparently do so. *See* Tr. at 28-29, 31-32.

[30] Consistent therewith, Mr. Fournier's logsheets also do not reflect that any sets were associated with a live whale. AE 1 at 279-282. *See also* Tr. at 21-22.

[31] Respondents Fournier and Canepa also have a motive for not passing up setting on whales associated with tuna, as they are paid $20-$45 per ton for the fish, and the faster they catch the fish, the sooner they can return to port and start the next trip. AE 1 at 138; Tr. at 63-64.

These arguments, however, are simply not supported by the weight of the evidence. As to the first set, the specific comments the Respondents made to the observer about not reporting their setting on whales, *before and after that particular set on whales*, powerfully demonstrates that, in fact, they both saw and knowingly set on the whales. In the second and third set incidents, Mr. Suaki testified that Mr. Fournier was standing *with him* on the port side of the vessel, in the port wing bridge, at the time he spotted the whales, and that Mr. Canepa was in the crow's nest. Tr. at 16, 50, 55; AE 1 at 6. Agent Painter testified that the port wing bridge extends out to the right and top of the ship, placing it close to the fish as the ship sets its net to port and giving those thereon "a very good view of the fish as they try to circle the school." Tr. at 15. Similarly, the crow's nest is a compartment at the top of the vessel's mast from which "you can get a very good view of the water, look for fish from up there," and so it is where the fishing master performs his duties. Tr. at 14. Mr. Suaki testified that visibility was good and the whales could be easily seen without the use of visual aids such as binoculars. Tr. at 51, 55-56. Given that it is the fishing master's responsibility to determine when to set the net to obtain the best catch, the evidence strongly suggests it is more likely than not that Mr. Canepa had as good a contemporaneous view of the water, the tuna, and the marine mammals associated with the tuna at the time of the second and third sets as the observer. *See* Tr. at 14; Stip., ¶ 24. Certainly, the evidence suggests that Mr. Fournier, who was standing right beside the observer, close to the fish, on a clear day, saw what the observer saw, including the whales near the tuna before the sets and in the nets during the sets. AE 1 at 6 (noting Mr. Fournier was standing in front of Mr. Suaki, near the steering controls, where "the person driving the vessel can keep his eye on the targeted school of tuna").

The preponderance of the relevant, material, reliable, and probative evidence shows Respondents knowingly set purse seine fishing gear on live whales on the three occasions as alleged in the NOVA and thus engaged in the "take" of marine mammals.

VII. WHETHER THE TAKING OF MARINE MAMMALS WAS "INCIDENTAL" TO RESPONDENTS' COMMERCIAL FISHING ACTIVITIES

In their Post-Hearing Brief, Respondents assert NOAA "misapplies the term 'knowingly' to mean the 'intentional' acts prohibited under the MMPA," RB at 5, when in fact, their "authorization to incidentally take marine mammals in the course of their permitted commercial fishing operations, [ ] includes both negligent and even intentional acts," RB at 1. "Simply because Respondents may have 'known' there were whales associated with the tuna schools," does not mean Respondents "'intentionally' set on the whales because their intent was purely to capture the tuna." RB at 5. Respondents assert that they "did not target or otherwise chase the whales in order to make the sets." RB at 5. Respondents allege that "the term 'intentional' requires some kind of *mens rea* for which there is no evidence here." RB at 6. A "not unexpected" taking of whales is allowed by the regulations, they claim, citing the Agency's definition of "incidental taking" as an "unintentional, ***but not unexpected***, taking." RB at 5. According to Respondents, the evidence shows that "at most" their intentional acts to secure tuna resulted in the unintentional, but not unexpected, taking of whales, which is a lawful "incidental taking" under NOAA's interpretation of the MMPA. RB at 6; *see also* RRB at 5 ("There is no

question that Respondents intentionally set on tuna," but there is no evidence Respondents intentionally targeted whales.).[32]

Further, Respondents argue that when read together as a "whole," the MMPA regulations evidence that they did not improperly target whales. RB at 6; *see also* RRB at 2. They assert that the regulations "are replete with various definitions of 'incidental'" and "intentional." RB at 7-8 (citing 50 C.F.R. §§ 216.3, 216.11(a), 229.3(a), 229.4(a)). Respondents argue that these definitions demonstrate that NOAA contemplated a difference between vessels that "intentionally" target and chase whales and those that do not. RB at 8 (quoting 50 C.F.R. § 216.3) ("The term 'intentional purse seine set' means that a tuna purse seine vessel or associated vessels chase marine mammals and subsequently make a purse seine set."). They suggest that in certain circumstances vessels intentionally chase and capture marine mammals to find and capture fish. RRB at 4 (citing 65 Fed. Reg. 30, 44 (Jan. 3, 2000)). Respondents argue that in this case, however, NOAA presented no evidence that Respondents intentionally targeted or chased marine mammals to catch tuna. RB at 9. All that was shown, they assert, was that they intentionally encircled fish with their nets, which "must be permitted regardless of whether whales happen to be in the vicinity given the unpredictable nature of whales and the potential for a 'not unexpected' encirclement of the whales." RRB at 5. "Any other interpretation of the law," Respondents proclaim, would render their authorization "meaningless." RRB at 5; *see also* Tr. at 71-72.

Respondents' interpretation of the regulations and the result from the Agency's position here is both incorrect and overdramatic. As an exception to the moratorium, the MMPA allows for only the "incidental taking of marine mammals in the course of commercial fishing."[33] 16

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[32] At hearing, Respondents' counsel indicated that it was their position that commercial fishing vessels can set their nets on tuna associated with whales, and whatever happens to the whales happens, "but as long as they're setting their net with the intent to catch tuna, it's okay." Tr. at 69. Further, counsel argued that the Congressional intent behind the MMPA "is not to protect each and every marine mammal from death, injury or harassment" but "to protect the stocks, to make sure the stocks are growing at the maximum extent possible in the circumstances." Tr. at 70.

[33] As indicated in footnote 13 above, while Congress granted this exception to the moratorium, it indicated a clear intent for the exception to be narrowly defined so as *not* to undermine the overall purpose of the Act, in that it stated immediately thereafter:

> *In any event* it shall be the immediate goal that the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations be reduced to insignificant levels *approaching a zero mortality and serious injury rate* within 7 years after the date of enactment of this section [enacted April 30, 1994].

16 U.S.C. § 1387(a)(1) (emphasis added). Respondents' reading of the exception to allow for them to intentionally and perpetually set nets on whales in the course of fishing is not consistent with reaching a "zero mortality and serious injury rate."

U.S.C. § 1387(a)(1). As the United States District Court for the District of Columbia recently noted, "the statute itself supports a definition of 'incidental' that excludes intentional conduct." *Black*, 2015 U.S. Dist. LEXIS 104694, at *53. The Court further explained:

> Indeed, while the statute expressly prohibits the "intentional lethal take of any marine mammal in the course of commercial fishing operations," 16 U.S.C. § 1387(a)(5), the Secretary was permitted to allow "incidental taking," *id.* at § 1387(c)(2)(C). However, the owner or operator of a commercial fishing vessel was required to report "all incidental mortality and injury of marine mammals in the course of commercial fishing operations." *Id.* at § 1387(e). As such, it is clear that Congress, by banning all "intentional" instances of mortality but requiring the reporting of all "incidental" incidents of mortality understood the terms to cover different conduct.

Id. Based on this statutory language, the Agency by regulation defined "incidental" to mean, with respect to an act, "a non-intentional or accidental act that results from, but is not the purpose of, carrying out an otherwise lawful action." 50 C.F.R. § 229.2. This definition interpreting the statute to permit the "incidental, but not intentional, take of mammals [is] both reasonable and consistent with the language, structure, and purpose of the MMPA." *Black*, 2015 U.S. Dist. LEXIS 104694, at *54-55.

Substituting the term "take" for the generic term "act" in the text of the regulation provides a framework for analyzing the facts in this case: "Incidental means, with respect to a [taking], a non-intentional or accidental [taking] that results from, but is not the purpose of, carrying out an otherwise lawful action[,]" *i.e.*, setting the net on a school of tuna. *See* 50 C.F.R. § 229.2. The regulatory history of the incidental taking exemption shows that this is a proper framework from which to analyze whether the takes here were "incidental." On August 30, 1995, the Agency published a Final Rule implementing the incidental take exemption. Taking of Marine Mammals Incidental to Commercial Fishing Operations, 60 Fed. Reg. 45,086 (Aug. 30, 1995). The Final Rule was designed "to implement the new management regime for the *unintentional taking of marine mammals* incidental to commercial fishing operations," as permitted under the MMPA. *Id.* at 45,086 (emphasis added). In response to a comment, the Agency wrote that a primary purpose of the Section 118 exemption is to ensure that commercial fisherman "may *accidentally* seriously injure or kill marine mammals incidental to their commercial fishing operations so long as the level of serious injury and mortality does not severely impact marine mammal populations." *Id.* at 45,088 (emphasis added).

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

> The proposed definition of incidental, but not intentional, take is the nonintentional or accidental taking of a marine mammal that results from, but is not the purpose of, carrying out an otherwise lawful action. The proposed definition of incidental mortality is the non-

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

Taking of Marine Mammals Incidental to Commercial Fishing Operations, 60 Fed. Reg. 31,666, 31,675 (June 16, 1995) (Proposed Rule) (emphasis added). Thus, while the exception provides commercial fishing vessels with a shield from culpability from the strict liability moratorium provision for accidentally taking a marine mammal in the course of fishing, in recognition that such accidents occur in the normal course of fishing activities, it does not shield a vessel that knowingly sets its nets on tuna associated with whales, indifferent to their wellbeing, which is what occurred in the three instances at issue in this case. *See* AE 1 at 156.

Furthermore, despite Respondents' concern that their authorization would be "meaningless" if their incidental taking authorization were limited to truly accidental takes, the record clearly shows that is not the case. Mr. Canepa himself, the fishing master of the vessel, understood the significance of the permit to protect him from liability under the MMPA, despite its strict liability provision, if a whale unexpectedly "popped up" in his purse seine net, *i.e. if* he engaged in an *accidental* (incidental) taking in the course of fishing, but not if he made "a set on a school that I see a whale on it." AE 1 at 277. That is where Congress drew the line between its resolute effort to protect marine mammals from the activity of man and the latitude granted the commercial fishing industry. *See Fla. Marine Contrs. v. Williams*, 378 F. Supp. 2d 1353, 1362 (M.D. Fla. 2005) ("Congress clearly designed Section 1371 to end the taking of marine mammals without regard to the nature of the activity that caused the taking . . . . The exceptions to the moratorium in Section 1371 also demonstrate that the section is intended to operate to further the Act's objectives. These exceptions are either directly conditioned upon conformity with the Act's objectives, or . . . are limited by their very terms to avoid any conflict with these objectives.") (citations omitted). Granting broader latitude and protection to commercial fishing operations would be inapposite to the achievement of the objective and congressional intent. *See Comm. for Humane Legislation, Inc.*, 414 F. Supp at 309 ("The MMPA does not direct the defendants to afford porpoise only that amount of protection which is consistent with the maintenance of a healthy tuna industry. The interests of the marine mammals come first under the statutory scheme, and the interests of the industry, important as they are, must be served only after protection of the animals is assured.").

Moreover, granting such greater latitude is factually unwarranted. Observer Suaki was present for some 43 sets made by the vessel during its 55 day trip, until it was full of tuna, and only on three occasions were whales reported as being associated with a school being investigated. *See* AE 1 at 231, 234; Stip., ¶¶ 11, 23; Tr. at 63. Thus, there is no indication that prohibiting vessels from setting on schools associated with whales significantly impedes their ability to successfully acquire tuna.

In conclusion, the Agency has shown by a preponderance of the evidence that Respondents took marine mammals by knowingly setting purse seine fishing gear on whales on March 28, 2010, April 20, 2010, and April 23, 2010, resulting in their temporary capture (restraint/detention) and/or harassment as alleged in the NOVA. Further, such taking was inconsistent with Respondents' Section 118 authorization to *incidentally* take pursuant to their commercial fishing operations. Respondents, therefore, are liable for three counts of violating the MMPA, 16 U.S.C. § 1372(a)(1), and 50 C.F.R. § 216.11(a), and may be assessed a civil penalty in accordance with 16 U.S.C. § 1375(a)(1).

VIII. DISCUSSION AS TO PENALTY

The MMPA provides, in pertinent part, that "[a]ny person who violates any provision of this title or of any permit or regulation issued thereunder . . . may be assessed a civil penalty by the Secretary of not more than $10,000 for each such violation." 16 U.S.C. § 1375(a)(1). The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, as amended, resulted in the maximum civil penalty increasing to $11,000 per violation. 15 C.F.R. § 6.4(f)(10); *see also* Stip., ¶ 10.

As to the penalty assessment, the procedural rules governing this proceeding, found at 15 C.F.R. part 904, provide:

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

15 C.F.R. § 904.108(a).[34]

There is no presumption in favor of the penalty proposed by the Agency. 15 C.F.R. § 904.204(m); *see* Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,361, 35,361 (Jun. 23, 2010). Nor is the ALJ required to state good reasons for departing from the Agency's analysis. 75 Fed. Reg. at 35,631. Rather, the presiding ALJ may assess a civil penalty *de novo*, "taking into account all of the factors required by applicable law." 15 C.F.R. § 904.204(m); *see also Frenier*, 2012 NOAA LEXIS 11, at *11 (NOAA, Sept. 27, 2012).

A. The Parties' Arguments

The Agency seeks to assess penalties totaling $21,000 against Respondents, jointly and severally, for the three MMPA violations. NOVA at 2. In determining the proposed penalties, NOAA states it considered the relevant statutory and regulatory provisions, specifically as

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

incorporated within its "Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions," dated March 16, 2011 ("Penalty Policy").[35] AB at 4. NOAA asserts that the Penalty Policy "improves consistency at a national level, provides greater predictability for the regulated community and the public, and promotes transparency in enforcement." *Id.* at 4-5.

The Penalty Policy utilizes a sanction matrix for each statute that NOAA enforces to determine an "initial base penalty." Penalty Policy at 4. The two factors mapped on the matrix are: (1) the "offense level" (I-IV), representing the gravity of the prohibited act that was committed as enumerated on tables included in the Penalty Policy; and (2) the "intent level" (A-D) representing an assessment of the violator's mental culpability in committing the violation. *Id.* at 4, 22. These two factors constitute the seriousness of the violation. *Id.* at 4. Once the initial base penalty is determined, various adjustment factors are applied to account for compliance history, whether the violation occurred as part of commercial or recreation activity, and post-violation cooperation. *Id.* at 22. The third and final step in the process is to add to the adjusted penalty a sum to recoup from the violator the proceeds of the unlawful activity and/or any other economic benefit. *Id.* Among the purposes of recouping economic benefit is to "keep the alleged violator from gaining an unfair advantage over lawful actors." *Id.* at 5.

The Agency's Penalty Assessment Worksheets attached to the NOVA detailed its initial penalty calculation methodology for each count. Those worksheets reflect that the Agency identified the gravity offense level for each violation as "Level III," representing a "Taking Violation" involving the "Harm, Hunt, or Capture of a Marine Mammal, or attempt to do so." JE 1 at 8-10. *See* Penalty Policy at 51. On the worksheets, the culpability level for each of the violations is identified as "D," meaning the violations were "intentional," rather than reckless, negligent or unintentional. JE 1 at 8-10. Charting those factors upon the applicable matrix reveals a base penalty range of $4,000-$6,000. JE 1 at 8-10; Penalty Policy at 29. The Agency proposes a mid-range base penalty of $5,000 per violation, with no adjustments upward or downward at the second step for any count. JE 1 at 8-10. However, based upon the economic benefit of the violation set forth in Count 1, specifically the proceeds from the unlawful set activity, NOAA increased the penalty for that Count to the $11,000 statutory maximum.[36] JE 1

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[35] The relevant Penalty Policy is publically accessible at http://www.gc.noaa.gov/enforce-office3.html. As it was not admitted into the record, citation to the Penalty Policy will be to its numbered pages as reflected on the website. The subject Penalty Policy has since been revised, with the revised edition effective for enforcement actions charged on or after July 1, 2014. *See* http://www.gc.noaa.gov/documents/Penalty%20Policy_FINAL_07012014_combo.pdf.

[36] The Penalty Assessment Worksheet indicates that the economic benefit, *i.e.*, the value of the fish caught as a result of set 14 in Count 1, was $57,900. However, the parties subsequently stipulated that the value of the fish caught (77.2 metric tons) actually "had an approximate ex-vessel value of no less than $80,000." Stip., ¶¶ 29, 30. However, in terms of the penalty the difference is insignificant as the maximum penalty allowed for the violation is $11,000.

at 8. This together with $5,000 penalties proposed for each of the second and third violations, totals the (amended) collective proposed penalty of $21,000.[37] JE 1 at 8-10.

The Agency argues that the "relatively low statutory maximum [penalty of $11,000] pales in comparison to the potential economic gain that can be realized by setting purse seine nets in order to capture tuna, whether whales are present or not." AB at 5. NOAA suggests that "[i]n a competitive and challenging fiscal environment, . . . some fishermen may conclude that catching fish matters more than avoiding the take of marine mammals and that any potential penalties are merely the cost of doing business." AB at 5.

On the other hand, Respondents declare the proposed penalties are "unjustified and excessive," "out of line with the facts in this case[,] and disregard the circumstances." RB at 10 (citing *United States v. Bajakajian*, 524 U.S. 321, 334-337 (1998)). "[T]he value of the fish landed is not relevant to the degree of culpability," they assert. RRB at 7. In fact, this is a case of "overzealous prosecution," they argue, because their activities were consistent with incidental takings allowed under the MMPA, they have no prior history of violations, they were engaged in lawful commercial fishing activities, and no whale was harmed or killed. RB at 10-11; RRB at 7. Respondents suggest that they are not the type of fishermen who need to be sent a message, because they were acting "to avoid marine mammals in the first place." RB at 11 (citing AE 1 at 277). Finally, they argue, if the "excessive penalties" proposed here are levied upon them, "there is nothing left to distinguish a case where someone intentionally and maliciously seeks out and/or kills the whales while setting on tuna." RB at 11; *see also* RRB at 7.

B. Penalty Analysis

Nature, Circumstances, Extent, and Gravity of the Violation

The record shows that during a single fishing voyage, Respondents knowingly set their nets on tuna in the presence of whales, three separate times, each time resulting in one or more whales being restrained for some period of time by encirclement of the vessel's purse seine net. *See* AE 1 at 145. Moreover, while the record in Counts Two and Three suggests the whales were able to easily escape the net before it closed upon them, the whale caught in the net during set 14, at issue in Count One, was not so lucky.[38] Mr. Suaki testified that in attempting to free itself during that set the whale tore a large rip or hole in the net. This suggests the whale was well restrained by the net, and likely felt annoyed, harassed, and/or threatened, and in response

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[37] NOAA initially asked for an $8,375 penalty for Count 3 – and a total penalty of $24,375 – before amending its request. *See* n.3, *supra*.

[38] The net on the Respondents' ship was 480 fathoms (2,880 feet) long and 104 fathoms (624 feet) deep, with 105 metal rings attached to the chain at the bottom allowing it to be closed up during pursing so the contents do not swim down and escape from the sack (made of very thick string) before being brought onboard. AE 1 at 141; Tr. at 23, 26. The ship also employs "dye bombs" and a speedboat deployed around the net to keep the fish inside it. AE 1 at 146. There was no evidence introduced at hearing regarding the effect on the whales of the dye or the sound and waves created by the speedboat.

violently thrashed and flailed about until the net was torn and it was able to swim free.[39] While there is no evidence the whale was injured by the interaction, any lack of injury was serendipitous and not a result of care taken by the Respondents.

Therefore, I find a substantial penalty is appropriate for this violation, and the others, based on their serious nature, circumstances, extent, and gravity.

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

As to culpability, Mr. Suaki credibly testified in regard to Count One that the Respondents were aware of the whales' presence prior to setting the nets, knew it was illegal to set upon them, set the nets anyway, and then attempted to intimidate the novice observer into not reporting their activity. This testimony, which I found very credible, clearly establishes that the violation for that count was intentional. Mr. Suaki's testimony with regard to the Respondents seeing the whales prior to setting the nets at the time relevant to Counts Two and Three establishes that those violations were intentional as well. Engaging in such intentional and repeated violative behavior by an experienced captain and experienced fishing master is reprehensible. Those in charge of a vessel should foster an environment encouraging compliance with and respect for the law. Consequently, Respondents' acts warrant a significant penalty. That Respondents had no prior history of violations, and that the whales involved were not identified as threatened or endangered or killed does not offset this conclusion. Stip., ¶¶ 25, 26, 33, 39, 45.

Furthermore, I agree with the Agency that economic benefit and deterrence are important considerations in cases such as this one, where the fishery is high-value and competitive, and all Respondents stood to benefit significantly from noncompliance. In the set at issue in Count 1, Respondents landed at least $80,000 worth of tuna. Stip., ¶ 30. Even assessing the maximum permissible penalty of $11,000, the facts before me show that Respondents will still realize an economic benefit of $69,000 from the violation. Thus, the maximum penalty is not excessive or disproportional in any way to the violation, but is actually inadequate to compensate for its full magnitude. Moreover, while this Initial Decision takes no position on whether Respondents view potential MMPA penalties for setting on live whales as a "cost of doing business," the penalties imposed in this matter must deter Respondents and others from adopting such an attitude. *See Churchman*, 2011 NOAA LEXIS 2, at *60-61 (NOAA Feb. 18, 2011) ("The deterrent effect of a monetary sanction can thus be accomplished in these cases by imposing a significant sanction against each Respondent that encompasses not only the value of the unlawful catch but also an additional amount. . . . [A] sanction amount should be large enough to alter the economic calculus that might lead Respondents and other participants in the fishery to simply account for any possible sanction as the cost of doing business."); *see also* 15 C.F.R. §

[39] The Tribunal hesitates to overly engage in anthropomorphic rationalizations regarding the reactions of mammals or their emotional states. On the other hand, the animals obviously cannot speak up for themselves or file suit on their own behalf for being detained and harassed under the MMPA. *See Citizens to End Animal Suffering & Exploitation v. New England Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993) ("The MMPA does not authorize suits brought by animals.").

904.108(b) (civil penalty may be increased for commercial violators "to make a civil penalty more than a cost of doing business"); *Pesca Azteca, S.A. de C.V.*, 2009 NOAA LEXIS 10, at *39 (NOAA Oct. 1, 2009), *aff'd* 2010 NOAA LEXIS 3 (NOAA App. 2010); *Silva*, 2005 NOAA LEXIS 1, at *17–18 (NOAA Mar. 17, 2005).

C. Conclusion

After weighing the relevant statutory and regulatory penalty factors, it is hereby found that, as a result of violating the MMPA and implementing regulation as alleged in the NOVA, Respondents are jointly and severally liable for civil penalties in the amount of $11,000 for the violation in Count 1; $5,000 for the violation in Count 2; and $5,000 for the violation in Count 3.

ORDER

Pursuant to 16 U.S.C. § 1375(a)(1), a total penalty of **$21,000** is hereby **ASSESSED** against Respondents Raymond L. Fournier, Alfred Canepa, and AACH Holding Co., LLC, jointly and severally, for three counts of violating the Marine Mammal Protection Act, 16 U.S.C. § 1372(a)(1), and 50 C.F.R. § 216.11.

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

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

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

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

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

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency[40]

Dated: September 21, 2015
Washington, D.C.

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

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

15 CFR 904.271-273

§ 904.271 Initial decision.

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

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

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

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

(4) A statement of further right to appeal.

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

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

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

(1) Otherwise provided by statute or regulations;

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

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

§ 904.272 Petition for reconsideration.

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

§ 904.273 Administrative review of decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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