UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	)	DOCKET NUMBER:
Kai Palaoa, LLC,	)	**PI 1402055**
Kimberly Pisciotta, and	)	
Roxane Stewart,	)	
Respondents.	)	

INITIAL DECISION AND ORDER

Date: November 22, 2017

Before: The Honorable Christine Donelian Coughlin, Administrative Law Judge, United States Environmental Protection Agency[1]

Appearances:

For the Agency:
Duane R. Smith, Esq.
Enforcement Attorney
U.S. Department of Commerce
National Oceanic and Atmospheric Administration
Office of General Counsel, Enforcement Section
Pacific Islands Regional Office
Honolulu, HI

Alisha Falberg, Esq.
Enforcement Attorney
U.S. Department of Commerce
National Oceanic and Atmospheric Administration
Office of General Counsel, Enforcement Section, Alaska Region
Juneau, AK

For Respondents:
Gary Zamber, Esq.
Law Offices of Gary C. Zamber
Hilo, HI

[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

The National Oceanic and Atmospheric Administration ("NOAA" or "Agency") issued a Notice of Violation and Assessment of Administrative Penalty ("NOVA"), dated September 10, 2015, to Kai Palaoa, LLC, Kimberly Pisciotta, and Roxane Stewart (hereinafter referred to as "Respondent Kai Palaoa," "Respondent Pisciotta," and "Respondent Stewart," respectively, or "Respondents," collectively). The NOVA charges Respondents with a single count of violating Section 102 of the Marine Mammal Protection Act ("Act" or "MMPA"), 16 U.S.C. § 1372, and the Agency's implementing regulations at 50 C.F.R. § 216.11 by "unlawfully tak[ing] and/or transport[ing] a marine mammal" on or about June 10-11, 2014. The NOVA seeks to impose a total penalty of $5,000 against Respondents jointly and severally for this alleged violation. Respondents, through counsel, timely requested a hearing before an Administrative Law Judge.

On May 9, 2016, I was designated as the Administrative Law Judge to preside over this matter. On May 11, 2016, I issued an Order to Submit Preliminary Positions on Issues and Procedures that established various prehearing filing deadlines, which the parties subsequently met. On June 1, 2016, I issued a Notice of Hearing Order that established another set of prehearing filing deadlines and scheduled the hearing in this matter to commence on August 17, 2016, in Kailua-Kona, Hawaii. Thereafter, the Agency filed a Notice of Amended NOVA, which "add[ed] 50 C.F.R. § 216.13 as an alternate regulatory basis for the penalty assessed against Respondents."

Following my rulings on a number of prehearing motions, I conducted a hearing in this matter that began on August 17, 2016, and concluded on August 19, 2016, in Kailua-Kona, Hawaii.[2] During the hearing, the Agency offered Agency's Exhibits ("AX") 1, 2, 3, 4, and 6, which were admitted into evidence. The Agency also presented the testimony of the following witnesses: Jeffrey S. Walters, Ph.D., Deron Verbeck, Robert L. Gladden, Bethany M. Doescher, D.V.M., Officer Verl Nakama, Claire Trester, Officer Nicholas Mitsunaga, Special Agent Royce Take Tomson, Timothy David Schofield, Jr., and Kristi West, Ph.D.

Respondents offered Respondents' Exhibits ("RX") A, B, D, E, F, G, H, K, O, R (pages 1 through 14), V (pages 3 through 6), and W, which were admitted into evidence.[3] Respondents also presented the testimony of the following witnesses: Sharney Aroha Grace Murphy, Jennifer Sims, Sue Greene, Ho'olulahui Erika Perry, Shanel Puaaokalani Nihau Subica, Sandra Lehua Kamaka, Bonnie Pualani Case, Respondent Stewart, and Respondent Pisciotta.

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[2] Citations herein to the transcript of testimony taken at the hearing will be made in the following format: "Tr. at __."

[3] The Agency moved for the admission of RX H because it was discussed during the testimony of Timothy David Schofield, Jr., and Respondents did not object. *See* Tr. at 898. As to exhibit RX O, a nine-page exhibit, the Agency stipulated to the admission of pages 5 and 6, but objected to the admission of the remaining pages of that exhibit. Over the Agency's objection, RX O was admitted into evidence in its entirety. *See* Tr. at 838-48. Respondents also offered into evidence proposed exhibits RX P, which was excluded with proffer, and RX X, which was also excluded. Respondents' proposed exhibits RX I, J, L, M, N, Q, R (pages 15-16), S, T, and V (pages 1-2) were withdrawn. Respondents' remaining proposed exhibits, RX C, U, Y, Z, and AA, were not offered into evidence. *See* Tr. at 896-98.

The parties submitted a Joint Set of Stipulated Facts, Exhibits, and Testimony as Joint Exhibit ("JX") 1, which was also admitted into evidence. At the hearing, I also ruled on an outstanding motion by the Agency that I take official notice of the Agency's Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions ("Penalty Policy"). Without objection by Respondents, I granted the Agency's motion and took official notice of the Penalty Policy. *See* Tr. at 20-24.

Soon after the hearing, the Hearing Clerk of this Tribunal received the official transcript of testimony taken at the hearing, and electronic copies of the transcript were sent to the parties on September 6, 2016. On September 14, 2016, I issued an Order Scheduling Post-Hearing Briefs, which set deadlines for the submission of the parties' briefs, as well as a deadline for the submission of any motion to conform the transcript to the actual testimony.[4] On October 12, 2016, the Agency filed a Motion to Conform Transcript, which was subsequently granted by order dated November 4, 2016. The parties also timely submitted initial briefs and reply briefs in this matter.

II. STATEMENT OF THE ISSUES

In dispute is whether Respondents violated the MMPA and its implementing regulations by unlawfully taking and/or transporting a marine mammal on or about June 10-11, 2014, as alleged in the amended NOVA. If liability for the charged violation is established, then I must determine the appropriate amount of any civil penalty to be imposed for the violation. To this end, I may evaluate certain factors, including the nature, circumstances, extent, and gravity of the violation; Respondents' degree of culpability, history of prior violations, and ability to pay; and such other matters as justice may require. *See* 15 C.F.R. § 904.108(a) (enumerating factors that may be considered in assessing a penalty).

III. FACTUAL SUMMARY

The following facts consist of those that I have found to be proven, material, and relevant based upon a careful and thorough review of the evidentiary record and an assessment of the witnesses' credibility. Specific credibility findings and analyses of the evidence are presented in the Liability and Civil Penalty sections below.

A. The National Marine Mammal Stranding Network

The term "stranding" is generally used to refer to situations where marine mammals swim or float onto shore and become "beached," or unable to return to the sea. AX 3 at 2. "As air-breathing mammals, cetaceans (whales and dolphins) strand when they become incapacitated and seek physical protection and support." *Id.* By stranding, these animals support their bodies

[4] Also on September 14, 2016, I issued an Order Scheduling Briefing on Constitutionally-Related Claims that set deadlines for the parties to submit briefs regarding the constitutional issues raised in the hearing that I am not authorized to address under Agency regulations but that, nonetheless, must be preserved for potential review. The parties timely submitted their initial briefs on these claims. Respondents also timely submitted a reply brief. The Agency did not offer a reply brief.

above the surface of the water in an effort to enable themselves to breathe. Tr. at 40; AX 1 at 23; AX 3 at 2.

Implemented by NOAA's National Marine Fisheries Service, the Marine Mammal Health and Stranding Response Program regulates responses to all strandings in the United States through a branch of the program called the National Marine Mammal Stranding Network. AX 2 at 1-2; AX 3 at 2. The National Marine Mammal Stranding Network consists of independent volunteers nationwide that have been authorized to respond to stranded marine mammals as regional stranding network participants. Tr. at 38; AX 2 at 2; AX 3 at 2. Through their respective regional marine mammal stranding response coordinators, regional offices of NOAA oversee, coordinate, and authorize response-related activities by regional stranding network participants, as well as provide training and other support to those entities. *Id.*

B. Responses to Stranded Marine Mammals in Hawaii Generally

In order to respond to a stranded marine mammal as a regional stranding network participant in Hawaii, an entity needs to have been authorized to act pursuant to either a formal stranding agreement with NOAA or the approval of Timothy David Schofield, Jr., who is authorized as the regional marine mammal stranding response coordinator for NOAA's Pacific Islands Regional Office ("PIRO") to delegate response-related duties to others. Tr. at 40-41, 374, 389; AX 1 at 17-18. At the time of the violation charged in this matter, Hawaii Pacific University ("HPU") was authorized to respond to stranding events pursuant to a formal stranding agreement between HPU and NOAA in effect at that time. Tr. at 42-43, 62, 453; AX 1 at 18. Conversely, the Hilo Marine Mammal Response Network ("Hilo Response Network"), an organization affiliated with the University of Hawaii at Hilo ("UHH") and led by Dr. Jason Turner, had once been authorized to respond to stranding events on the island of Hawaii pursuant to a formal stranding agreement between UHH and NOAA, but that agreement expired as of January 1, 2014, and had not been renewed as of the time of the alleged violation. Tr. at 42-43, 339, 386-89, 541-42, 565; AX 1 at 172-75. The Hawaii Cetacean Rehabilitation Facility ("HCRF"), an entity also affiliated with UHH and operated by Dr. Turner for the purpose of rehabilitating living stranded marine mammals and releasing them back into the ocean, had been authorized to accept such animals at the facility pursuant to UHH's stranding agreement with NOAA, but the HCRF had also ceased operations by the time of the alleged violation. AX 1 at 175-76; Tr. at 383, 598-99.

"Approximately 20 cetacean (whale and dolphin) strandings occur in the Hawaiian Islands in an average year." AX 3 at 1. Members of PIRO and regional stranding network participants in Hawaii respond to such strandings by "render[ing] care when possible or . . . humanely euthaniz[ing] sick or injured animals to reduce their suffering when recovery or rehabilitation is not feasible, and . . . [by] retriev[ing] carcasses of deceased animals." AX 3 at 1. For any given stranding, Mr. Schofield acts as "incident commander" and directs response-related activities either from the scene of the stranding or remotely. Tr. at 406. When a stranded marine mammal dies under the care of responders or the carcass of a deceased marine mammal is retrieved, a necropsy[5] is performed whenever possible in an effort to determine the cause of death for the given marine mammal. AX 3 at 1; Tr. at 59-60, 222, 385-86, 464. Necropsies can

[5] A necropsy is an autopsy performed on an animal. AX 3 at 1; Tr. at 59, 222.

also yield "a great deal of information about Hawaii's cetacean populations, local ecosystem health, and the occurrence of common and unusual diseases that may affect other marine mammals or other species," as well as evidence of human interaction, "such as foreign body ingestion, entanglement, acoustic impacts, and intentional killings." AX 3 at 1; *see also* Tr. at 58-59, 222-23, 384-85, 464-67. Such information has the potential to inform management decisions by NOAA. Tr. at 385, 462; *see also* Tr. at 222-23. Pursuant to its formal stranding agreement with NOAA, HPU then maintains samples collected from the deceased marine mammals for purposes of scientific study "as often as is feasible." Tr. at 446.

For approximately 10 years, NOAA has engaged in efforts to integrate Native Hawaiian cultural practitioners into authorized responses to marine mammal strandings in Hawaii. *See, e.g.*, Tr. at 44-45, 114, 522-23, 585-86; AX 1 at 177-78; AX 3 at 1, 3-4; RX B (Mr. Schofield explaining in a letter to Respondents Stewart and Pisciotta that PIRO has sought "to include cultural sensitivity as part of the Marine Mammal Stranding and Response Network"). NOAA has partnered with some Native Hawaiian cultural practitioners such that the practitioners are treated as members of the authorized response team and are duly notified of a stranding event by NOAA. Tr. at 402. Any other Native Hawaiian cultural practitioner may freely appear at the scene of a stranding and engage in cultural activities on the condition that the practitioner maintains enough distance from the stranded marine mammal that his or her activities do not affect the animal or interfere with responders, but the practitioner is required to obtain Mr. Schofield's authorization if he or she seeks to be in closer proximity to the animal, especially if physical contact with the animal is involved. Tr. at 400-03, 412. According to Mr. Schofield, NOAA accommodates such requests of practitioners when human and animal safety can be assured. Tr. at 400-01, 412-13, 421.

C. Respondents

At the direction of Mr. Schofield, Dr. Turner endeavored to integrate Native Hawaiian cultural practitioners into the activities of the Hilo Response Network and HCRF while those entities were operational. *See* AX 1 at 177; Tr. at 522-23. In approximately December of 2009, Respondents Stewart and Pisciotta were invited to participate in that capacity by way of Ho'olulahui Erika Perry, then a contractor for NOAA whose objectives included developing a network of practitioners that could respond to stranding events on the island of Hawaii and who had been advised by other members of the Native Hawaiian community to contact Respondents Stewart and Pisciotta as potential participants. *See* Tr. at 425-26, 521-22, 585-88, 704-05, 719, 792-93; RX E at 1.

Respondents Stewart and Pisciotta are both residents of Hawaii. AX 1 at 129; Tr. at 791. In describing the aspects of her background that led to her being recommended to Ms. Perry, Respondent Stewart noted that, among other qualifications, she has bachelor's and master's degrees in the field of marine science, and she is "a composer of chant, specifically for the realms of Kanaloa."[6] Tr. at 705-06; *see also* AX 1 at 120. According to Respondent Stewart,

[6] According to the belief system of Native Hawaiians, "Kanaloa" is the god of the ocean. *See* AX 1 at 119 (Special Agent Take Tomson stating that "Kanaloa" is a Hawaiian term referring to a god of the ocean and ocean creatures); RX R at 3 (Ms. Perry stating that Kanaloa is a major Hawaiian god of the sea); Tr. at 808 (Respondent Pisciotta

her "Kanaloa practice" stems from her family's history as a "fishing family" or "ocean family" and the relationships that her family had developed with Kanaloa, and she herself has a deep spiritual connection to the ocean. Tr. at 706-711.

Respondent Pisciotta described her own Kanaloa practice as also stemming from her family's history, as well as her childhood experiences with marine animals while engaging in such activities as working at the Waikiki Aquarium. Tr. at 794. Her background in science includes 12 years as a telescope systems specialist at the James Clerk Maxwell Telescope on Mauna Kea on the island of Hawaii. Tr. at 804. She is the agent and sole officer of Respondent Kai Palaoa, a for-profit domestic limited liability company created and organized under the laws of the State of Hawaii. AX 1 at 93; JX at ¶ 1. As described by Respondent Pisciotta, one of the organization's themes is "Ola i ke ao a Kanaloa," meaning "life to the realms of Kanaloa," "life to the sea," or "giving breath and spirit to the Kanaloa." Tr. at 806; *see also* RX W at 2. Respondent Kai Palaoa has organized at least one Aloha Kanaloa Cultural Festival, the purpose of which was to honor Kanaloa, build support in the community for ocean conservation, and

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describing Kanaloa as a primary god of Native Hawaiians). As reflected in the administrative record, at least some Native Hawaiians also use the term to refer to cetaceans, which they regard as both embodiments of the deity and ancestors that are meant to be treated with the commensurate respect. *See, e.g.*, Tr. at 565-66 (Sue Greene, a member of the Hilo Response Network, explaining that she learned from Respondents Stewart and Pisciotta that "marine animals are not just animals; that they are Kanaloa; that they are ancestors of the Hawaiian people; that, as such, they are actually higher up than we are; [and] that we should treat them with respect"); Tr. at 692-93 (Bonnie Pualani Case, a Native Hawaiian cultural practitioner present for the events at issue, describing the whale as "a living ancestor" and "record keeper" that "is to be revered" and treated "as an honored grandparent"); Tr. at 713-14 (Respondent Stewart explaining that the "Kumulipo," or creation chant of Native Hawaiians, describes how specific family lines in Hawaii are genealogically linked to all other living things in existence, including Kanaloa, which were "one of the first creatures of the sea" and are thus viewed as elders with "a higher elevated status" than humans); Tr. at 856-57 (referring to RX R at 4) (Respondent Pisciotta affirming that cetaceans are "kinolau," or physical manifestations of a Hawaiian god, which are then occasionally referred to by the god's name); Tr. at 885 (Respondent Pisciotta affirming that Kanaloa are akin to a revered family member); RX D at 3 (an article entitled "Saving Kanaloa" explaining that Native Hawaiians consider the whale "an ancestor and a Kanaloa, a sacred embodiment of the natural world," and quoting Dr. Turner as stating that "[f]rom the Hawaiian perspective [whales] are thought of as somewhere between kupuna (elders) and gods"); *accord* Tr. at 509-10 (Sharney Aroha Grace Murphy, a Maori woman present for the events at issue in this proceeding, explaining that whales, as one of the oldest living things to be created and animals that were instrumental in guiding ancient Polynesians as they navigated the Pacific, are regarded as elders who "carry our DNA origins and our history on this planet as humans").

As an extension of their regard for cetaceans, Respondents Stewart and Pisciotta oppose euthanasia of those animals, in part because it robs Kanaloa of the decision to die, which they believe rightfully belongs only to the given Kanaloa. In describing the role of cultural practitioners at the HCRF, Respondent Stewart explained their view on the subject:

> It's not for us to decide whether or not these akua, these highly sacred beings, should live or not. That is not – we are not allowed to do that. They are above us in ranking. And they are above us in seniority for the most simplest terms. Our job is to help transition. They decide and we have to adjust ourselves to whatever they decide.

Tr. at 723-24; *accord* Tr. at 566 (Sue Greene explaining that she learned from Respondents Stewart and Pisciotta that Kanaloa "need to make their own choices" and therefore "we shouldn't be euthanizing"); AX 1 at 123 (Respondent Stewart stating her opposition to euthanasia because "it was the 'kanaloa's decision' on when to pass"); Tr. at 884-85 (Respondent Pisciotta stating that "we just can't participate in euthanizing from a cultural standpoint because we cannot be responsible for killing the Kanaloa").

celebrate Native Hawaiian culture, and it has received a formal commendation from the Hawaii State Senate for its activities. *See* Tr. at 807-10; RX W at 1-3.

At the hearing, Respondent Stewart spoke of the negative perception of NOAA among members of the Native Hawaiian community, namely that NOAA's role is "to disallow practice and access," and the typical guarded response of community members when interacting with government officials. Tr. at 717-18. Notwithstanding the misgivings of other Native Hawaiian cultural practitioners with whom she consulted, she agreed to partner with Dr. Turner with the hope of "heighten[ing] awareness" and acting out of "service of our Kanaloa." Tr. at 718.

To that end, Respondent Stewart coordinated the dedication of the structure housing the HCRF, which, as she explained, was executed in such a manner as to signify the structure's purpose as a place of healing and transition. *See* Tr. at 719-24. Both Respondent Stewart and Respondent Pisciotta subsequently joined the Hilo Response Network, undertaking the training modules required of volunteers of the network and the HCRF, which covered such topics as the laws governing responses to stranding events; the protocols that NOAA follows for certain processes, including communicating news of a stranding event to Mr. Schofield and others, verifying and assessing the status of a stranding event, and the execution of a response as appropriate; proper handling techniques for marine mammals; and the importance of necropsies on deceased marine mammals. AX 1 at 20, 120, 178; Tr. at 383-86, 415, 422-23, 588-89, 727; *see also* RX E at 1; RX G. Respondents Stewart and Pisciotta also developed and presented a training module, which later became compulsory for volunteers, on the relationship of Native Hawaiians to Kanaloa and the participation of Native Hawaiian cultural practitioners in stranding responses and rehabilitation efforts. Tr. at 414, 426, 545-46, 564-66, 589-90, 727; *see also* RX E at 1; RX G.

In May of 2010, at NOAA's request, a group of individuals, including Respondents Stewart and Pisciotta, presented on the topic of Native Hawaiian cultural practices pertaining to responses to stranding events at the Fifth Annual Pacific Islands Region Hawaiian Monk Seal and Cetacean Responders Meeting, which was held in Hilo and sponsored by NOAA and the Hilo Response Network. Tr. at 113-14, 424, 589-90, 726-27; RX F; *see also* RX E at 1; RX G. Additionally, Respondent Stewart provided the opening blessing of that meeting, also at NOAA's request. Tr. at 726; RX F at 1; *see also* RX E at 1. The collaboration of NOAA, the leaders of the Hilo Response Network and HCRF, and Respondents Stewart and Pisciotta continued in approximately June of 2010 with the adoption of new protocols incorporating both NOAA's procedures and Native Hawaiian cultural practices for responses to stranding events, which the Hilo Response Network and HCRF then attempted to implement in future responses and rehabilitation efforts. *See* Tr. at 526, 529-30, 606-08; AX 1 at 177-78; RX E at 1-2; RX G.

Respondent Stewart proceeded to serve as a Native Hawaiian cultural practitioner on the board overseeing the administration of the Hilo Response Network and, according to Dr. Turner, took a "lead role" in the network's responses to stranding events, both in her capacity as a practitioner and as a "regular volunteer." AX 1 at 120, 174-75, 178. Respondent Pisciotta also remained involved, although to a lesser extent than Respondent Stewart, according to Dr. Turner. AX 1 at 179.

Notably, Respondent Stewart participated in the Hilo Response Network's response to the stranding of a live striped dolphin known as Waikini in June of 2010. *See* AX 1 at 121, 178; RX E at 1; Tr. at 528, 572-73. Following his stranding, Waikini was transported to the HCRF and cared for there under NOAA's direction, as was a live beaked whale known as Kamaui that had stranded on the island of Maui in August of 2010. *See* AX 1 at 176; RX D; RX E at 1-2; Tr. at 528, 535, 554. Respondents Stewart and Pisciotta participated in both of those rehabilitation efforts, as well as performed death rites and ceremonies in preparation for the necropsies of Waikini and Kamaui after they died at the HCRF. Tr. at 415, 531, 536-37, 747, 753-59, 763-66, 777; RX A at 6; RX D.

Tension between NOAA and Respondents Stewart and Pisciotta became evident during Kamaui's care and disposition. For example, employees of NOAA perceived Respondent Stewart as "prevent[ing] officials from performing their work, e.g., drawing blood samples" on account of Kamaui "not [being] ready." AX 1 at 20. Respondents Stewart and Pisciotta, however, objected to the manner in which Kamaui's necropsy was performed by HPU personnel at the HCRF, asserting that the occurrence of the necropsy in the HCRF conflicted with the "healing" purpose of the facility as consecrated by Respondent Stewart and that it was conducted in a culturally inappropriate and offensive manner. *See, e.g.*, RX A at 3, 6-10; Tr. at 756-61, 822-26. Respondent Stewart likened the conflict to "changing a baptismal pool into an autopsy table." Tr. at 757. Respondents Stewart and Pisciotta also desired for HPU personnel to be respectful of Kamaui in recognition of his status as a "high-ranking akua." Tr. at 758; *see also* RX A at 2. Yet HPU personnel left the HCRF in disarray after completion of the necropsy, leaving behind "a lot of blood material and soft material" and remnants of the necropsied animal packed in trash bags around the inside of the bloodied holding tank. Tr. at 760-61; *see also* RX A at 8. An HPU staff member also emptied a cooler of Kamaui's blood from the necropsy into the entranceway of the consecrated facility. RX A at 8; Tr. at 760.

Respondents Stewart and Pisciotta formally communicated their concerns to Mr. Schofield by letter dated September 19, 2010. *See* RX A. Mr. Schofield responded by letter dated September 30, 2010, in which he addressed the issues raised in their letter, voiced his disappointment that they had purportedly "shar[ed] this information with the public," and then expressed his hope that open and direct communication would restore trust between NOAA and Respondents Stewart and Pisciotta and that their collaboration would then continue. RX B. However, communication between NOAA and Respondents Stewart and Pisciotta was seemingly strained thereafter, *see, e.g.*, Tr. at 826-27, 829, 831-32, 844-46; RX E at 2-3; RX G; RX O at 7, with Mr. Schofield viewing Respondents Stewart and Pisciotta as having been "antagonistic towards NOAA's efforts to deal with marine mammal strandings in a certain way," Tr. at 381. Meanwhile, the partnership between the Hilo Response Network and Respondents Stewart and Pisciotta continued unaffected. *See, e.g.*, AX 1 at 178-79; RX E at 2-3; RX G.

D. Response to Stranding Event on June 10-11, 2014

On June 10, 2014, at approximately 7 a.m., a fisherman by the name of Russ Hemphill first observed a melon-headed whale, later named Wananalua by Respondent Stewart, circling in water approximately two meters in depth at Kawaihae Harbor on the island of Hawaii. AX 1 at 42, 82, 90. Afflicted with what appeared to be cookie cutter shark bites, Wananalua proceeded

to launch herself onto the rocks lining an interior man-made section of the harbor variously referred to as a "canal," "spillway," and "fish management area," among other monikers. *See* AX 1 at 42, 82, 88; AX 6 at 1; Tr. at 182-83, 197, 258. Mr. Hemphill engaged with Wananalua at approximately 2 p.m., when he tried to support her on the rocks and keep her wet by putting towels on her back and splashing her with water. AX 1 at 42, 82; Tr. at 180.

Upon learning of the stranding, Mr. Schofield, who was on the island of Oahu at the time, dispatched a team of individuals to respond. AX 1 at 18-19; Tr. at 377-78. The team consisted of a contract veterinarian for NOAA, Bethany M. Doescher, D.V.M.; the director of the stranding response program at HPU, Kristi West, Ph.D.; and volunteers from the West Hawaii Marine Mammal Response Network ("West Hawaii Response Network"), an organization that did not have a formal stranding agreement with NOAA at the time but was authorized to respond pursuant to Mr. Schofield's request. AX 1 at 18-19; Tr. at 41-42, 212, 377-78, 447, 453. He also called upon Tricia Kehaulani Watson, J.D., Ph.D., who had replaced Ms. Perry as a consultant for NOAA on Native Hawaiian cultural issues but was no longer serving in that role at the time, to volunteer as a cultural liaison and coordinate the participation of Native Hawaiian cultural practitioners from the area of Kawaihae Harbor.[7] Tr. at 380, 422, 426-27, 430; AX 1 at 68-69.

According to Mr. Schofield, he did not authorize Respondents or any affiliate of UHH to respond. AX 1 at 21; Tr. at 389-90. While Dr. Turner was one of the individuals to notify Mr. Schofield of the stranding, Mr. Schofield advised him by text message that the West Hawaii Response Network and NOAA would be responding to it, and Dr. Turner did not reply by text message or otherwise give any indication that he or other members of the Hilo Response Network intended to respond as well. AX 1 at 21; Tr. at 389. Nor did Respondent Stewart, Respondent Pisciotta, or anyone purporting to represent Respondent Kai Palaoa communicate with Mr. Schofield to seek authorization to respond. Tr. at 389-90. As Mr. Schofield explained, he did not invite Respondents Stewart and Pisciotta to participate in their capacity as Native Hawaiian cultural practitioners for multiple reasons. Tr. at 427. In particular, NOAA typically seeks to involve practitioners from the same ahupua'a[8] where the stranding has occurred, and Respondents Stewart and Pisciotta reside in a different ahupua'a than that of Kawaihae Harbor. Tr. at 427; AX 1 at 71; *see also* Tr. at 791 (Respondent Pisciotta explaining that she lives in Mountain View on the island of Hawaii). Mr. Schofield also felt uncomfortable involving Respondents Stewart and Pisciotta given the conflicts that had arisen between them and NOAA in the past. *See* Tr. at 427-28.

Respondent Stewart nevertheless learned of the stranding from a member of the Native Hawaiian community, who contacted her in her capacity as a Native Hawaiian cultural practitioner. Tr. at 768, 869-70; AX 1 at 121. Respondent Stewart subsequently notified Respondent Pisciotta. Tr. at 870. She also communicated with Dr. Turner, who advised her that NOAA was aware of the stranding, that NOAA was going to respond, and that the Hilo Response Network would not be participating in the response. AX 1 at 180-81; Tr. at 366-67.

[7] Nothing in the record suggests that any Native Hawaiian cultural practitioner responded to the stranding at Dr. Watson's behest.

[8] The term "ahupua'a" refers to "a traditional Hawaiian form of land division." AX 1 at 71.

Members of the authorized response team arrived at Kawaihae Harbor at different times. Robert L. Gladden, a volunteer with the West Hawaii Response Network, was the first to arrive and relieve Mr. Hemphill at approximately 4 p.m. *See* AX 1 at 42, 64-65, 81-82; Tr. at 180, 187, 271. Other volunteers from the West Hawaii Response Network, including Claire Trester and Julie Steelman, subsequently arrived, and they proceeded to assess Wananalua's condition, collect data, complete documentation, and keep Wananalua wet while waiting for Drs. Doescher and West to arrive. *See* AX 1 at 42, 45, 64-65, 78, 82, 100; Tr. at 139, 184, 270-72. During this time, Wananalua occasionally thrashed and exhibited such seizure-like behavior as pounding her tail, arching her back, and breathing erratically. Tr. at 139, 170-72, 174-76.

Respondents Stewart and Pisciotta also traveled to Kawaihae Harbor and reached the scene of the stranding together after the arrival of members of the West Hawaii Response Network but before the arrival of Drs. Doescher and West. *See* AX 1 at 45, 65, 82, 100, 121; Tr. at 139, 184, 187, 274, 276, 280, 429-30, 870-71. Respondents Stewart and Pisciotta first introduced themselves to at least some members of the authorized response team as Native Hawaiian cultural practitioners with "the network" who wished to perform a cultural ritual for Wananalua. *See* AX 1 at 65, 82, 100-01, 122; Tr. at 139-40, 184, 274, 770, 871-72. They then directed their complete attention to Wananalua, performing blessings, prayers, and chants; carrying her from the rocks where she had stranded into deeper water with the assistance of bystanders who had gathered at the scene; holding her afloat there; and continuing to perform their cultural practices. *See* AX 1 at 65, 82-83, 101-02, 122; Tr. at 143-44, 185-87, 275-77, 872.

According to Mr. Gladden, he assented to their initial blessing of Wananalua when they indicated a desire to perform it, but when they indicated their intent to move Wananalua off of the rocks, he advised against it because of the difficulties it would pose for Dr. Doescher when she arrived to assess Wananalua's condition.[9] Tr. at 184-85, 198; AX 1 at 82-83. Indeed, NOAA instructs not to move living stranded marine mammals. *See* AX 1 at 23 ("The act of pushing a stranded marine mammal back into the ocean prolongs the animal's suffering; 'it came to shore for a reason.' Pushing a stranded marine mammal back into the ocean is analogous to pushing a drowning person back to the middle of the pool after s/he attempts to grab at the pool's sides."); AX 3 at 2 ("Never attempt to push live stranded marine mammals back into the water – this will almost never be helpful for the animal. Pushing an animal back out in the water usually prolongs their suffering and makes it more difficult for response staff and veterinarians to render aid when they arrive."); Tr. at 198-99. As Respondents Stewart and Pisciotta explained, their purpose in moving Wananalua into the water was to keep her wet and facilitate her breathing.[10]

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[9] Dr. Doescher confirmed at the hearing that her examination was not as thorough as it could have been if Respondents Stewart and Pisciotta had left Wananalua onshore. Tr. at 214. For example, she was unable to assess some of Wananalua's wounds, which could have yielded more information about her condition and the cause of her stranding. Tr. at 215, 228.

[10] Respondents' counsel elicited testimony from Jennifer Sims, a lecturer in UHH's marine science department and once a co-director of the Hilo Response Network, that it is "ideal" to support a cetacean in water when responding to a stranding. Tr. at 520, 550. She explained that cetaceans have collapsible rib cages, which are designed to allow for pressure changes occurring when cetaceans dive. *Id.* This anatomical feature "becomes an Achilles heel," however, when a cetacean strands because it causes the weight of the animal to be pressed on its lungs, hindering its

AX 1 at 122; Tr. at 883. Respondent Pisciotta also explained their reasons for "holding [Wananalua] up," including that she would "not have to struggle while she is dying." Tr. at 884.

Sometime after the arrival of Respondents Stewart and Pisciotta, more individuals, including a Native Hawaiian cultural practitioner and kumu hula[11] by the name of Bonnie Pualani "Pua" Case and a number of her students, arrived at Kawaihae Harbor. *See* AX 1 at 102, 123, 169; Tr. at 197, 277, 281, 632-34, 649-50, 673. Ms. Case had been summoned to the stranding by Respondents Stewart and Pisciotta on account of her familial connection to the geographical area where the stranding occurred and her standing as a cultural practitioner, teacher, and leader of numerous cultural organizations, among other designations. *See* Tr. at 649-50, 672-74, 680, 682, 686, 767, 870; AX 1 at 169. Her students, who had been participating in hula practice with Ms. Case at the time she learned of the stranding, then decided to accompany her. Tr. at 632, 649-50, 680. As one of her students, Sandra Lehua Kamaka, explained, "When you have a calling from your kupuna,[12] there's no denying their call, so you have to go." Tr. at 664.

At the time of their arrival, Respondents Stewart and Pisciotta were already in the water with Wananalua. Tr. at 637-38. Ms. Case and most of the individuals arriving with her proceeded to assemble on the rocks at the water's edge in close proximity to Wananalua, while at least Ms. Kamaka entered the water to join those supporting Wananalua. *See* Tr. at 281, 641, 664, 680-81. Over the course of the evening, the individuals assembled on the rocks regularly conversed with those assembled in the water, and they periodically swapped positions. Tr. at 147-48, 277, 281-82, 284, 457-58, 681. Collectively, their attention was focused on Wananalua and the cultural rituals in which they were engaged, and their demeanor was calm and reverential. *See, e.g.*, Tr. at 500-03, 638-39, 770-71.

At approximately 7:15 p.m., Drs. Doescher and West arrived at Kawaihae Harbor, at which time Wananalua was being supported in approximately two to three feet of water by at least four individuals, including Respondents Stewart and Pisciotta. *See* AX 1 at 32-33, 39, 45, 56, 61, 65, 124; Tr. at 211, 225-26, 453. Approximately six more individuals were situated on the adjacent rocks, bringing the total number of individuals in the water and on the rocks closest to where Wananalua was being held to at least ten individuals. *See* Tr. at 154, 211; AX 1 at 56. The volunteers from the West Hawaii Response Network were onshore and standing apart from the larger group of onlookers that had gathered close to Wananalua, with the exception of Ms. Steelman, who was sitting on the rocks near Wananalua recording her respiration rates. *See* AX 1 at 39, 61; Tr. at 453-54, 472. Ms. Steelman described to Dr. Doescher her observations of Wananalua's condition over the previous two hours, including her variable respiration rates; episodes of "seizure-like" behavior and tremoring, which had since subsided; three cookie cutter shark bites in varying stages of healing; and a number of superficial scrapes and lesions likely related to the stranding. AX 1 at 45, 57, 61; Tr. at 212-13, 225-26. Dr. Doescher identified

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ability to breathe. *Id.* Thus, Ms. Sims testified, "[i]t's much easier for the animal if it's in water, where it's meant to be, rather than on a beach," thus taking weight off of the animal's lungs and other organs. *Id.* at 550-51.

[11] A "kumu hula" is a hula teacher, according to one of Ms. Case's students, Shanell Puaalaokalani Nihau Subica. Tr. at 633-64.

[12] According to Ms. Kamaka, the term "kupuna" can refer to both human elders and Kanaloa. Tr. at 653, 661.

Wananalua's behavior as described by Ms. Steelman as being consistent with "extreme physiologic distress in cetaceans." Tr. at 212.

Dr. Doescher next approached Wananalua to examine her. AX 1 at 33, 39, 57, 61; Tr. at 213. Nearby onlookers assisted Dr. Doescher as she traversed the rocks and found her footing in the water. AX 1 at 33, 57. As observed by Dr. Doescher, Wananalua was quiet and breathing slowly, her heart rate and breath sounds were normal, her eyes were mostly to completely closed, and her skin was softer and more pliable than would be expected of a healthy cetacean, which is symptomatic of weight loss. AX 1 at 57; Tr. at 213-14, 226. Wananalua also appeared to be underweight. AX 1 at 57; Tr. at 214. Dr. Doescher confirmed that Wananalua was no longer displaying seizure-like behavior and tremoring, as had previously been observed, and she did not see any conscious or purposeful movements by Wananalua. AX 1 at 57; Tr. at 225-26. When Dr. Doescher touched Wananalua around her eyes in an attempt to elicit the involuntary response used to gauge an animal's consciousness level, Wananalua did not respond. Tr. at 213-14.

Based on her assessment, Dr. Doescher determined that Wananalua was in a "minimally conscious" or "comatose-type" state and in the process of dying. Tr. at 215-16; AX 1 at 58. According to Dr. Doescher, cetaceans often respond to "extremely stressful event[s]" by displaying "seizure-like activity" and "tremoring," as had been observed with Wananalua, and that once a cetacean has transitioned through that stage, they may enter a state of minimal consciousness while slowly dying. Tr. at 216. Dr. Doescher also suspected that Wananalua had "a more chronic disease state." AX 1 at 58. Because of Wananalua's condition, Dr. Doescher concluded that no amount of medical care would enable Wananalua to recover and that euthanasia was the best course of action given that Wananalua was already dying and that she could behave in such a way during that process, such as by experiencing seizures, that the safety of nearby individuals could be put at risk. Tr. at 216-17, 228, 236-37; AX 1 at 58.

Dr. Doescher proceeded to leave the water with the assistance of the onlookers and inform Dr. West of her findings. AX 1 at 58. Her findings were also communicated to Mr. Schofield, who agreed that euthanasia was "the most humane course of action" given the behavioral signals of Wananalua that had been reported to him, which indicated that Wananalua was "quite moribund[13] in status." Tr. at 378-79, 391.

At approximately 8 p.m., Dr. Doescher departed the scene to retrieve the medical supplies necessary to euthanize Wananalua. AX 1 at 39, 58, 62; Tr. at 217. During that time, the assemblage of individuals on the rocks and in the water continued to support Wananalua's body and perform cultural practices. AX 1 at 33; Tr. at 455. Dr. West notified Dr. Doescher by telephone that she had learned that some of the individuals gathered at the scene had a known history of interfering with NOAA's interactions with live cetaceans. AX 1 at 58. However, when the authorized response team requested the assistance of law enforcement personnel from the State of Hawaii, Department of Land and Natural Resources, Division of Conservation and Resource Enforcement ("DOCARE"), in anticipation of those individuals refusing to release Wananalua voluntarily, their request was at first denied on account of law enforcement personnel being unavailable at that time. *See* AX 1 at 37, 40, 45, 58, 65, 78; Tr. at 105-06. While

[13] As explained by Mr. Schofield, the term "moribund" means "basically near death." Tr. at 392.

DOCARE subsequently dispatched law enforcement personnel to assist, NOAA advised DOCARE before the officers arrived at the scene that NOAA wished to avoid any conflicts and that the officers no longer needed to respond. Tr. at 262; AX 1 at 78.

When Dr. Doescher returned, she observed that Wananalua's condition had further deteriorated. Tr. at 217. In particular, Wananalua's respiration had declined to "a very low and steady rate," and although the individuals supporting her body in the water appeared to be occasionally bouncing her at the surface,[14] which Dr. Doescher described as a technique used to stimulate respiration in cetaceans, Wananalua's respiration did not change in response to their activities. Tr. at 217; AX 1 at 58.

At Ms. Trester's request, Ms. Case then met with Drs. Doescher and West, as well as some members of the West Hawaii Response Network, on the shoreline some distance away from the individuals assembled on the rocks and in the water. *See* Tr. at 218, 232, 277-78, 282, 456, 689, 692; AX 1 at 40, 58, 65. After being introduced to Ms. Case as the veterinarian representing NOAA, Dr. Doescher advised Ms. Case of Wananalua's condition and the plan to euthanize her. *See* Tr. at 218, 456, 689; AX 1 at 34, 40, 45, 58, 65, 103, 169. Ms. Case responded by calmly saying "no" multiple times. AX 1 at 34, 40, 58-59, 103, 123, 169; Tr. at 219, 231, 379-80, 456-57. As Ms. Case explained, while she communed with Wananalua from her position on the rocks, Wananalua had imparted that she was in a peaceful state as she was being held in the water and did not assent to being euthanized, and Ms. Case communicated that wish on behalf of Wananalua to the authorized response team. Tr. at 689-90. Ms. Case then walked away to rejoin the group of individuals assembled on the rocks. AX 1 at 40, 59; Tr. at 219, 285. The individuals in the water, including Respondents Stewart and Pisciotta, also maintained their positions supporting Wananalua's body. Tr. at 285, 379; AX 1 at 65.

After this exchange, members of the authorized response team concluded that the assembled group of individuals would not voluntarily relinquish their hold on Wananalua to allow for euthanasia. *See* Tr. at 219-20, 285-86, 458; AX 1 at 40, 59. Upon learning of this turn of events from Dr. West, Mr. Schofield contacted Jeffrey S. Walters, Ph.D., the Chief of the Wildlife Management and Conservation Branch of the Protected Resources Division of PIRO and Mr. Schofield's supervisor, among others, to seek guidance as to how to proceed. Tr. at 36, 41, 47, 220, 380, 459. Like Mr. Schofield, Dr. Walters was on the island of Oahu at the time. AX 1 at 19. They discussed a number of considerations presented by the situation that they perceived as posing a risk to human safety. Tr. at 52-54, 418-19; AX 1 at 21-22. Those considerations included that Wananalua could inflict serious injury to nearby individuals due to her size, strength, and unpredictability; that the time of day was late and darkness had fallen; that sharks could be drawn to the area by Wananalua's condition; and that the passion of Respondents Stewart and Pisciotta for marine mammals could cause the situation to escalate into an emotional confrontation, which Dr. Walters had purportedly experienced before[15] and which

[14] One of Respondents' witnesses denied that Wananalua was "bounced" at any time, testifying that the movement of the water may have simply suggested as much. Tr. at 643-44.

[15] According to Dr. Walters, Respondent Stewart blamed him for the closure of the HCRF and believed that the closure occurred as retribution for the actions taken by Respondent Stewart during the efforts to rehabilitate Kamaui

he and Mr. Schofield wished to avoid on this occasion. Tr. at 52-54, 380-81, 392; AX 1 at 21-22. Accordingly, they concluded that the authorized response team would be unable to maintain the necessary control over the scene to ensure human safety at that time, and that the best course of action was to suspend the response temporarily until the following morning, by which time Wananalua would likely have died and her remains would be on the beach for NOAA to recover. Tr. at 52-54, 69, 105, 380-81; AX 1 at 22.

At the direction of Mr. Schofield, every member of the authorized response team departed Kawaihae Harbor by approximately 10:30 p.m. with the intention of returning the next morning to reassess the situation. *See* AX 1 at 34, 45, 59, 65, 81; Tr. at 187, 294, 476. At the time of the team's departure, individuals remained in the water holding Wananalua afloat and gathered on the adjacent rocks. AX 1 at 34, 40, 45, 65; Tr. at 187, 286. None of those individuals, including Respondents Stewart and Pisciotta, were notified of the authorized response team's intentions. *See* Tr. at 69-70, 432, 481, 459-60, 641, 664-65, 691, 766-67, 772, 886, 889-90; AX 1 at 104. No physical altercations occurred between those individuals and the authorized response team at any point, nor were any physical or verbal threats made to anyone at the scene. AX 1 at 34, 40, 45, 84, 104, 125; Tr. at 114, 164, 200-01, 229, 419-21, 501, 638, 664, 688, 775, 875.

According to Respondent Stewart, Wananalua died at approximately 1:30 a.m. on June 11. AX 1 at 77. From the time they first moved Wananalua into the water until shortly before her death, Respondents Stewart and Pisciotta had held her afloat while continuing to perform their cultural practices. AX 1 at 124; Tr. at 773, 872. However, at a certain point, Ms. Case directed them to step away from Wananalua, whereupon Wananalua circled the portion of Kawaihae Harbor where she had stranded and then flung herself back onto the rocks lining the waterway, an action that Respondent Stewart believed to signify her transition to the spiritual realm. *See* Tr. at 506, 697, 773-75; AX 1 at 124. At that time, all of the individuals still present at the scene departed, except for Respondents Stewart and Pisciotta, who continued their vigil on the rocks. *See* Tr. at 506-07, 780-81, 887; AX 1 at 124. Once they felt assured that Wananalua had died, they covered her with a wet sheet and moved her away from the water. *See* Tr. at 781; AX 1 at 124. They then remained on the rocks with her until sunrise, at which time they, with the assistance of bystanders in the area, secured Wananalua's carcass to a vessel, transported it approximately two miles away from the location of the stranding, and used rocks to sink it. AX 1 at 77-78, 111-12, 124; Tr. at 781, 783-84.

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that Dr. Walters had questioned. AX 1 at 20. During NOAA's investigation of the events at issue in this proceeding, Dr. Walters explained to Special Agent Take Tomson that Respondent Stewart had "'yelled' at him about the closure" in the past. *Id.* At hearing, Dr. Walters testified that following an unrelated public meeting, Respondent Stewart "confronted" him with concerns about how she perceived NOAA to be treating Dr. Turner, which led to "a heated discussion." Tr. at 67, 121, 125-26. It is unclear from the record whether the encounters described by Dr. Walters to Special Agent Tomson and at hearing constituted the same incident or represented two distinct incidents. Further, Respondent Pisciotta disputed the purported intensity of the encounter after the public meeting, asserting that it did not rise to the level of being aggressive and suggesting that Dr. Walters needed to develop a "little fortitude." Tr. 877-79. In any case, the record is clear that conflicts had arisen between NOAA and Respondents Stewart and Pisciotta prior to Wananalua's stranding.

As explained by Respondents Stewart and Pisciotta, such actions are consistent with their beliefs and those of at least some other Native Hawaiian cultural practitioners that the remains of Kanaloa should be either returned to the ocean or utilized in cultural practice. Tr. at 742-43, 752-53, 888; AX 1 at 123; RX A at 6; *see also* Tr. at 504; RX V at 4; AX 3 at 3 ("In several cases, PIRO has made arrangements so that skeletal remains or cremated remains of stranded marine mammals have been . . . placed in the ocean directly by cultural practitioners.").[16] Because of this belief, Respondents Stewart and Pisciotta oppose HPU's practice of storing remains of marine mammals in its purported "bone museum," as "they do not belong there" and "[t]hat is not where their resting place should be." Tr. at 752. According to Respondent Stewart, "in this case, that was the reason for our actions, that we did not want [Wananalua] to end up in HPU's bone museum." Tr. at 753. Neither Respondent Stewart, Respondent Pisciotta, nor anyone purporting to represent Respondent Kai Palaoa contacted Mr. Schofield to seek authorization for their actions. Tr. at 397.

After releasing Wananalua's remains, Respondents Stewart and Pisciotta waited approximately 45 minutes to ensure that she would not resurface, during which time they performed a cultural ceremony. AX 1 at 125; Tr. at 784. They then returned to Kawaihae Harbor. AX 1 at 125; Tr. at 784. Some members of the authorized response team also returned to Kawaihae Harbor early on June 11 to assess the status of the situation at that time, and upon discovering that neither Wananalua nor any of the cultural practitioners were at the scene of the stranding, they began to search Kawaihae Harbor. *See* Tr. at 188-89, 287-88, 460; AX 1 at 83. During that search, Ms. Trester happened upon Respondents Stewart and Pisciotta, and Respondent Stewart informed her that Wananalua had died during the night and that they had transported her out to sea for burial. Tr. at 189-90, 288. Dr. West and Mr. Gladden proceeded to travel along the coast line in Mr. Gladden's vessel for several hours in an effort to locate Wananalua's remains, but they were unsuccessful. Tr. at 190-91, 461; AX 1 at 83.

IV. LIABILITY

A. Principles of Law Relevant to Liability

1. Burden of Proof

In a proceeding governed by the Administrative Procedure Act, the proponent of a rule or order bears the burden of proof unless otherwise directed by statute. 5 U.S.C. § 556(d). Thus, in the present proceeding, the Agency bears the burden of establishing that Respondents violated the MMPA and its implementing regulations as charged in the amended NOVA. In order to prevail on this claim, the Agency is required to prove facts supporting the elements of violation by a preponderance of reliable, probative, substantial, and credible evidence. *Cuong Vo*, 2001 NOAA LEXIS 11, at *17 (NOAA Aug. 17, 2001) (citing 5 U.S.C. § 556(d); *Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100-03 (1981)); *cf.*

[16] While statements attributable to Dr. Watson found at AX 1 at 70-71 (stating that it is "not culturally appropriate" to sink a whale's carcass, as strandings were viewed in traditional Hawaiian culture as "a gift from the gods to use all of the [stranded] animals' parts") appear to offer a contrary view of Native Hawaiian cultural practices, the Agency notably elected not to present Dr. Watson, who was available as a witness, to authenticate such competing viewpoints.

15 C.F.R. §§ 904.251(a)(2), 904.270(a). This standard requires the Agency to demonstrate that the facts it seeks to establish are more likely than not to be true. *Fernandez*, 1999 NOAA LEXIS 9, at *8-9 (NOAA Aug. 23, 1999) (citing *Herman & MacClean v. Huddleston,* 459 U.S. 375, 390 (1983)). The Agency may rely upon either direct or circumstantial evidence to satisfy its burden. *Cuong Vo*, 2001 NOAA LEXIS 11, at *17 (citing *Paris*, 4 O.R.W. 1058 (NOAA 1987)).

2. "Taking" of Marine Mammals under the Marine Mammal Protection Act and its Implementing Regulations

Congress enacted the Marine Mammal Protection Act of 1972 ("MMPA"), as amended, 16 U.S.C. §§ 1361-1423h, based upon findings that "marine mammals have proven themselves to be resources of great international significance," that "certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities," and that "they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management." Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, § 2, 86 Stat. 1027, 1027 (codified at 16 U.S.C. § 1361(1), (6)).

To accomplish this objective, Section 102 of the MMPA and the implementing regulations delineate prohibitions of the "taking" of marine mammals. *See, e.g.*, 16 U.S.C. § 1372(a). Specifically, it is unlawful for any person to "take" any marine mammal in waters or on lands under the jurisdiction of the United States or for any person to use any port, harbor, or other place under the jurisdiction of the United States for any purpose connected with a prohibited taking of any marine mammal. 16 U.S.C. § 1372(a)(2)(A), (B); 50 C.F.R. §§ 216.11(b), 216.13(a). It is also unlawful for any person to transport any marine mammal that is unlawfully taken. 16 U.S.C. § 1372(a)(4)(A); 50 C.F.R. § 216.13(b).

Under the MMPA and its implementing regulations, the term "take" means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill, any marine mammal. 16 U.S.C. § 1362(13); 50 C.F.R. § 216.3. In turn, the term "harassment" is defined for purposes of the MMPA to mean any act of pursuit, torment, or annoyance that (i) has the potential to injure a marine mammal in the wild ("Level A harassment") or (ii) has the potential to disturb a marine mammal in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering ("Level B harassment"). 16 U.S.C. § 1362(18); 50 C.F.R. § 216.3. The implementing regulations then expound on the types of conduct deemed to fall within the "taking" prohibition:

> 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.

Other relevant defined terms are the term "person," which is defined to include any private person or entity, 16 U.S.C. § 1362(10), and the term "marine mammal," which is defined to encompass any mammal that is morphologically adapted to the marine environment, including Cetacea (whales, dolphins, and porpoises), 16 U.S.C. § 1362(6); 50 C.F.R. § 216.3. Finally, the MMPA defines the phrase "waters under the jurisdiction of the United States" to include:

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

16 U.S.C. § 1362(15).

The unlawful taking of a marine mammal in violation of the MMPA is a strict liability offense and, therefore, requires no specific intent. *See Pac. Ranger, LLC v. Pritzker*, 211 F. Supp. 3d 196, 214 (D.D.C. Sept. 30, 2016) ("[A]s the text of the MMPA and its implementing regulations make clear, the prohibited act of taking a marine mammal is a strict-liability offense that is broadly defined."); *Cordel*, 1994 NOAA LEXIS 15, at *7 (NOAA Apr. 11, 1994) (finding that no specific intent is required for an unlawful taking of a marine mammal in violation of the MMPA); *see also* 16 U.S.C. § 1375(a)(1).

Notably, the MMPA creates an exception to the "taking" prohibitions set out in the Act for the Marine Mammal Health and Stranding Response Program. 16 U.S.C. §§ 1372(a), 1421(a). As described in the statute, the purpose of the program is to:

> (1) facilitate the collection and dissemination of reference data on the health of marine mammals and health trends of marine mammal populations in the wild; (2) correlate the health of marine mammals and marine mammal populations, in the wild, with available data on physical, chemical, and biological environmental parameters; and (3) coordinate effective responses to unusual mortality events by establishing a process in the Department of Commerce in accordance with section 404.

16 U.S.C. § 1421(b).

To that end, the Agency "may enter into an agreement under section 112(c) [which authorizes the Agency to enter into agreements as may be necessary to carry out the purposes of the MMPA] with any person to take marine mammals under section 109(h)(1) in response to a stranding." 16 U.S.C. § 1421b(a). Section 109(h)(1) of the MMPA, in turn, authorizes

government officials and employees to take marine mammals in the course of their official duties under certain conditions:

> Nothing in this title or title IV shall prevent a Federal, State, or local government official or employee or a person designated under section 112(c) from taking, in the course of his or her duties as an official, employee, or designee, a marine mammal in a humane manner (including euthanasia) if such taking is for—
>
> (A) the protection or welfare of the mammal,
> (B) the protection of the public health and welfare, or
> (C) the nonlethal removal of nuisance animals.

16 U.S.C. § 1379(h)(1). For purposes of liability under the MMPA, "a person who is authorized to respond to a stranding pursuant to an agreement entered into under section 112(c) is deemed to be an employee of the government" insofar as the actions of the person are in accordance with the agreement. 16 U.S.C. § 1421e(a).

Defined terms relevant to the Marine Mammal Health and Stranding Response Program include the term "stranding," which means an event in the wild in which a marine mammal can be either dead or alive. *See* 16 U.S.C. § 1421h(3). A dead marine mammal that is on a beach or shore of the United States, or in waters under the jurisdiction of the United States (including any navigable waters), is deemed a "stranding." *See* 16 U.S.C. § 1421h(3)(A); 50 C.F.R. § 216.3. A living marine mammal that is on a beach or shore of the United States and unable to return to the water, or able to return to the water but in need of apparent medical attention, or a living marine mammal that is in waters under the jurisdiction of the United States (including any navigable waters) but is unable to return to its natural habitat under its own power or without assistance, is also deemed a "stranding." *See* 16 U.S.C. § 1421h(3)(B); 50 C.F.R. § 216.3. Additionally, the term "stranding network participant" means a person who is authorized by an agreement with the Agency under section 112(c) to take marine mammals as described in section 109(h)(1) in response to a stranding. 16 U.S.C. § 1421h(4).

B. Parties' Arguments as to Liability

1. Agency's Post-Hearing Brief

The Agency first argues that each Respondent is a "person" subject to the jurisdiction of the United States for purposes of the MMPA, pointing to Respondent Kai Palaoa's stipulation that it is a "person" and the testimonial and documentary evidence in the record that Respondents Stewart and Pisciotta are residents of the State of Hawaii. Agency's Post-Hearing Brief ("Agency's Br.") at 2 (citing JX at ¶ 1; Tr. at 791; AX 1 at 129). The Agency then argues that the term "take" is broadly defined by the applicable law and that "it is hard to see how Respondents[']actions could be characterized as anything other than an illegal take and transportation of a marine mammal" given the undisputed facts in the record. Agency's Br. at 15-16. The Agency lists many such facts in its brief, including Respondents' admissions that

they did not act on June 10 and 11, 2014, as members of a marine mammal stranding response network or on behalf of NOAA; they moved Wananalua from the rocks where she had chosen to strand to the water and subsequently held her there; upon Wananalua's death, they collected her carcass and secured it to a canoe; and they transported Wananalua's carcass approximately two nautical miles offshore in the U.S. territorial sea, where they sank it. Agency's Br. at 15-16. Citing the strict liability nature of the MMPA, the Agency maintains that the motivations behind Respondents' actions are irrelevant to a finding of liability. Agency's Br. at 16.

2. Respondents' Initial Post-Hearing Brief

Respondents counter that their conduct did not violate the MMPA, first arguing that their actions were, in fact, consistent with the policy objectives codified in the statute. Respondents' Initial Post-Hearing Brief ("Respondents' Br.") at 11. Respondents rely in particular on the declaration that "the primary objective of [marine mammal] management should be to maintain the health and stability of the marine ecosystem." *Id.* (quoting 16 U.S.C. § 1361(6)[17]). Respondents argue that their conduct – particularly the act of returning Wananaloa's remains to the ocean, which serves as "a vital component of the nutrient cycle" occurring "[i]n a naturally balanced and healthy ecosystem" – fulfilled this objective. *Id.* Respondents maintain that the significance of this act is recognized by cultural practitioners and those espousing Western views alike. *Id.* at 12 (citing Tr. at 532, 565-66; https://en.wikipedia.org/wiki/Whale_fall). Respondents then urge, "If the primary objective of the Act is the maintenance of healthy and stable ecosystems, penalizing an action that accomplishes that objective in fact is an absurd result, regardless of the regulatory mechanisms that have arisen under the authority of the statute." *Id.* at 12.

Respondents next contend that their conduct did not constitute a "take" by "harassment," as those terms are defined by the MMPA. Respondents' Br. at 12-13. Noting that the term "harassment" is defined to include "any act of pursuit, torment, or annoyance" that has the potential to injure a marine mammal or disturb a marine mammal by disrupting its behavioral patterns, Respondents argue that they engaged in no such acts but rather acted only to comfort Wananalua and ease her suffering. *Id.* (citing 16 U.S.C. § 1362(18)). Respondents also suggest that their conduct fails to satisfy the standard for "harassment" under the MMPA articulated in *United States v. Hayashi*, in which the United States Court of Appeals for the Ninth Circuit deemed the intent of Congress in enacting the MMPA's prohibition of "taking" as the prevention of "seriously intrusive acts." *Id.* at 14 (citing *Hayashi*, 22 F.3d at 864 n.12 (9th Cir. 1993)). Respondents maintain that "[a] charge of 'harassment' for acts that are the functional and literal opposite of 'harassment' is, again, an absurd result." *Id.* at 13.

Respondents also deny that their conduct constituted a "take" in the form of "collection of dead animals, or parts thereof." Respondents' Br. at 13. Respondents argue that the term "'collection' suggests sustained activity to locate – or even to facilitate the demise of – deceased or dying marine mammals. The basic purpose of the 'collection' prohibition is undoubtedly to deter difficult-to-detect killings of mammals by prohibiting possession of dead mammal by-products." *Id.* (quoting *Hayashi*, 22 F.3d at 864).

[17] In their Brief, Respondents cite Section 1631 of Title 16 of the United States Code for this text. However, I presume that that citation was a scrivener's error and that Respondents intended to refer to Section 1361.

Finally, Respondents urge that "this is a case of apparent acquiescence and the matter ought to be dismissed." Respondents' Br. at 15. For support, Respondents first cite legal definitions of the term "acquiescence" and related caselaw and then point to the Agency's conduct at the scene of the stranding – namely, "remaining a silent spectator" to Respondents' actions and failing to inform Respondents of its plans regarding Wananalua – as evidence of the Agency's acquiescence. *Id.* at 14-15 (citing various authorities). Further, Respondents maintain, given the partnership that had developed between NOAA and Hawaiian cultural practitioners in recent years, "[i]t was reasonable for Respondents to believe that this working relationship and consultation . . . was being honored at the scene." *Id.* at 16. Respondents conclude, "Where NOAA failed to step in to assert its authority, they ought to be estopped from asserting violations of the MMPA where NOAA clearly acquiesced, by both action and inaction, to the Respondents[']] lawful behavior." *Id.* at 17.

3. Agency's Reply to Respondents' Post-Hearing Brief

The Agency first responds to a purported "factual inaccuracy" in Respondents' Initial Post-Hearing Brief, noting that Respondents failed to acknowledge in describing Ms. Case's testimony concerning an earlier marine mammal stranding response that she testified that this response was overseen by a representative of NOAA. Agency's Reply to Respondents' Post-Hearing Brief ("Agency's Reply") at 1 (citing Tr. at 682-83). According to the Agency, "[t]his description of the Agency's regular practice, as related by Respondents' own witness Ms. Case, reinforces the concept that NOAA controls the parameters of a marine mammal response from its inception through the final disposition of the animal's remains." *Id.* at 1-2.

The Agency next challenges Respondents' claim that their conduct was consistent with the purpose of the MMPA. Agency's Reply at 2-3. In particular, the Agency contends that Respondents' focus on the objective of maintaining healthy and stable ecosystems "conveniently ignores" the other policy objectives codified in the statute, namely, Congress's emphasis on the importance of science and research. *Id.* at 2-3 (citing 16 U.S.C. § 1361). Further, the Agency maintains, "Congress made it clear [through its creation of the Marine Mammal Health and Stranding Response Program] that it intended for NOAA to respond to marine mammal strandings and to use those events to increase the Agency's knowledge of marine mammals and improve its ability to manage marine mammals effectively." *Id.* (citing 16 U.S.C. § 1421(b)). The Agency admonishes that "Respondents' actions completely thwarted the Agency's ability to respond to this Congressional concern." *Id.* at 2 (citing 16 U.S.C. § 1361).

Turning to Respondents' purported criticisms of the regulations, the Agency argues that any contentions related to the regulations exceeding the scope of the statute or the application of the regulations producing "an absurd result" are barred by the procedural rules governing this proceeding. Agency's Reply at 3 (citing 15 C.F.R. § 904.200(b)). According to the Agency, "Respondents' arguments are essentially an attack on the Agency's definition of 'take' and are therefore not properly before the court." *Id.* Even if this Tribunal was empowered to consider Respondents' arguments, the Agency argues, Respondents' reliance upon *Hayashi* and related caselaw is misplaced because *Hayashi* construed the term "harassment" under the MMPA prior

to Congress amending the statute to add a definition for the term. *Id.* (citing Marine Mammal Protection Act Amendments of 1994, Pub. L. No. 103-238 (defining harassment at sec. 12, § 1362). The Agency then argues:

> Contrary to Respondents' assertion that the application of the text of the statute and the [A]gency's implementing regulations to Respondents' actions would lead to an absurd result, their application serves to advance the Agency's ability to fulfill its congressionally imposed mandate to advance the scientific understanding of marine mammals and protect marine mammal species and populations from harm.

Id. at 3-4.

Finally, the Agency challenges Respondents' position that NOAA acquiesced to their conduct at the scene of the stranding and should be estopped from charging Respondents with a violation, arguing that Respondents unilaterally acted in ways prohibited by the applicable law, in contravention of their training and experience with the protocols utilized by NOAA during responses, and at odds with communications from the authorized response team. Agency's Reply at 4. The Agency further contends that Respondents could only conceivably argue "implicit acquiescence" on the part of the Agency, "[b]ut even this argument fails," especially with respect to Respondents' transport of Wananalua's remains offshore, which was "such a novel and unprecedented flouting of NOAA's authority and the MMPA, particularly given Respondents' knowledge of the MMPA and NOAA's stranding procedures," that NOAA had no reason to anticipate it. *Id.* at 4-5. According to the Agency, "NOAA could not possibly acquiesce to conduct that NOAA could not possibly have anticipated." *Id.* at 5. The Agency then objects to Respondents' urging that the doctrine of estoppel be applied, arguing that "Respondents simply cannot make a case for estoppel here" based on the standard for its application against the government. *Id.* at 5 (citing various authorities).

4. Respondents' Reply Post-Hearing Brief

Respondents first accuse the Agency of "attempting to bar the very cultural and religious practices that it claims [in literature issued by the Agency] they are upholding." Respondents' Reply Post-Hearing Brief ("Respondents' Reply Br.") at 3 (citing AX 3). Respondents then argue that while the Agency claims that Respondents knew of its procedures for responding to stranding events, the Agency likewise knew of Respondents' protocols for such events given the trainings conducted by Respondents, among other considerations. *Id.* at 4. Respondents maintain that, notwithstanding that knowledge and its purported practice of overseeing responses to stranding events, the Agency "grossly failed" to perform any type of oversight during Wananalua's stranding and instead acquiesced to Respondents. *Id.* In particular, Respondents argue, neither Dr. West nor Mr. Schofield made a good faith effort to communicate with the Native Hawaiian cultural practitioners at the scene of the stranding. *Id.* at 4-5. Further, Respondents argue, the Agency "chose not to act at a time when those expectations [to euthanize Wananalua and perform a necropsy] could have been realized," *id.* at 6, and it "invited the Respondents to err" through its silence, *id.* at 7. Respondents maintain that the Agency thereby

waived the opportunity to euthanize Wananalua and its right to enforce its expectations against Respondents. *See id.* at 6, 7.

Pointing to evidence in the record showing that an injured marine mammal may pose a risk to human safety by attracting sharks, Respondents next defend their transport of Wananalua's remains from Kawaihae Harbor as a necessity. *See* Respondents' Reply Br. at 8 (citing Tr. at 108, 418-22, 785-86). Respondents question why the Agency would "call off its responders and other law enforcement and fail to secure the safety of the Respondents and the public" if human safety truly was of paramount importance to NOAA as claimed by Mr. Schofield. *Id.* Respondents urge that "the Agency ought not be permitted to prevail . . . where it did not engage its responsibility but left such to the Respondents." *Id.*

Respondents proceed to argue that the charge against them arose "from cultural conflicts more than a legal violation" and that "[l]iability for regulatory violations should be directly related to the protection of marine mammals by deterrence of abusive acts rather than reflecting an after the fact moral judgment of the enforcement community." Respondents' Reply Br. at 5. Respondents contend that none of the cultural practices in which they engaged with Wananalua "reflect an intent to possess, restrain, harass, hunt, capture, collect or kill the whale, or take parts of the dead animal, to the detriment of marine mammals or the health and stability of the marine ecosystem." *Id.* at 7. To the contrary, Respondents argue, "based on centuries of observation and evolution within their cultural practices, Respondents and their fellow practitioners at the scene were well informed as to how to best show respect and nurture for a being they revere." *Id.* at 7-8. Referring to the Agency's argument that Respondents may have acted out of spite or antipathy towards the Agency, Respondents counter that "it is equally possible that some level of spite or antipathy within the agency led to the prosecution decision." *Id.* at 6. Respondents conclude, "There has never been harassment or an unlawful take within the intent of the MMPA where Respondents[']actions were performed in good faith, within their religious and cultural protocol, in accord with principles of necessity and where NOAA waived enforcement through its demonstrated acquiescence to Respondents in this particular response." *Id.* at 9.

C. Discussion of Liability

The NOVA, as amended, charges Respondents with unlawfully taking and/or transporting a marine mammal in violation of the MMPA, 16 U.S.C. § 1372, and the implementing regulations at 50 C.F.R. §§ 216.11 and 216.13. As set forth above, those provisions establish that it is unlawful for any person to "take" any marine mammal in waters or on lands under the jurisdiction of the United States or for any person to use any port, harbor, or other place under the jurisdiction of the United States for any purpose connected with a prohibited taking of any marine mammal. 16 U.S.C. § 1372(a)(2)(A), (B); 50 C.F.R. §§ 216.11(b), 216.13(a). It is also unlawful pursuant to those provisions for any person to transport any marine mammal that has been taken in violation of the MMPA or the implementing regulations.[18] 16 U.S.C. § 1372(a)(4)(A); 50 C.F.R. § 216.13(b). Thus, liability for the violation

[18] Additionally, it is unlawful under the MMPA and its implementing regulations for any person to possess any marine mammal that has been unlawfully taken. 16 U.S.C. § 1372(a)(3); 50 C.F.R. § 216.13(b). In its Post-Hearing Brief, the Agency cites those provisions, Agency's Br. at 4, and alleges that Respondents "took possession of

charged in this matter is conditioned upon a finding that Respondents' actions on June 10 and 11, 2014, amounted to a "take" in violation of the MMPA and the implementing regulations. To prevail on this issue, the Agency bears the burden of demonstrating by a preponderance of the evidence that on June 10 and 11, 2014, each Respondent was a "person" who engaged in a "take" of a "marine mammal" in "waters or on lands under the jurisdiction of the United States" or used a port, harbor, or other place under the jurisdiction of the United States for such purpose.

The uncontroverted evidence reflects that each Respondent is a "person" and that Wananalua was a "marine mammal" as those terms are defined by 16 U.S.C. § 1362(6) and (10) and 50 C.F.R. § 216.3. Further, there is no dispute that the events at issue transpired in Kawaihae Harbor on the island of Hawaii.[19] Accordingly, the Agency is deemed to have proven those elements of liability.

The element of liability that the parties do vigorously dispute is whether each Respondent engaged in a "take" within the meaning of the applicable law. As previously discussed, the MMPA and its implementing regulations define the term as meaning to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill, any marine mammal. 16 U.S.C. § 1362(13); 50 C.F.R. § 216.3. In turn, the term "harassment" is defined for purposes of the MMPA to mean any act of pursuit, torment, or annoyance that (i) has the potential to injure a marine mammal in the wild ("Level A harassment") or (ii) has the potential to disturb a marine mammal in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering ("Level B harassment"). 16 U.S.C. § 1362(18); 50 C.F.R. § 216.3. The regulatory definition of the term "take" then enumerates examples of conduct deemed to constitute a "take" under the statute. 50 C.F.R. § 216.3.

Of particular significance to this proceeding, "the restraint or detention of a marine mammal, no matter how temporary," is one such example. Neither "restraint" nor "detention" is defined by the implementing regulations. Therefore, it is appropriate to ascribe the commonly understood meaning to those terms. *See, e.g.*, *Perrin v. United States*, 444 U.S. 37, 44 (1979)

[Wananalua]" upon their arrival at Kawaihae Harbor, Agency's Br. at 16. Taking note of this argument in their Reply Post-Hearing Brief, Respondents assert that "it should be assumed that NOAA intended the averred single count [of violation] to include each of the specific elements described in the prosecution's brief – *i.e.*, that Respondents unlawfully took, possessed, and transported a melon-headed whale." Respondents' Reply Br. at 5. I disagree. As the charging document in this matter, the amended NOVA frames this proceeding, and the count of violation set forth therein charges Respondents with unlawfully taking and/or transporting a marine mammal only. Thus, to the extent that the Agency indeed argues that Respondents also unlawfully possessed Wananalua in violation of the foregoing provisions, I have not considered that argument in this Initial Decision.

[19] While Respondents' counsel elicited testimony from Officer Verl Nakama of DOCARE that Officer Nakama was not certain that federal jurisdiction extended to the particular man-made section of Kawaihae Harbor where Wananalua stranded, *see* Tr. at 261, Respondents have not explicitly challenged that this waterway falls under the jurisdiction of the United States, and legal precedent supports that conclusion, *see, e.g.*, *Ex parte Boyer*, 109 U.S. 629 (1883) ("Navigable water situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States, *even though the canal is wholly artificial*, and is wholly within the body of a State, and subject to its ownership and control . . . .") (emphasis added); *Scow No. 36 v. United States*, 144 F. 932, (1st Cir. 1906) ("The power of the federal government over the navigable waters of its ocean harbors is absolute, general, and without limitations, except such as are prescribed by the Constitution.").

("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); *Smith v. Brown*, 35 F.3d 1516, 1523 (Fed. Cir. 1994) ("The canons of construction . . . apply equally to any legal text and not merely to statutes.") (citing *Black & Decker Corp. v. Comm'r*, 986 F.2d 60, 65 (4th Cir. 1993); *Campesinos Unidos, Inc. v. U.S. Dep't of Labor*, 803 F.2d 1063,1069-70 (9th Cir. 1986)). Courts customarily look to dictionaries to ascertain the ordinary meaning of terms used in statutes and regulations. *See, e.g.*, *Carey v. Saffold*, 536 U.S. 214, 219 (2002); *United States v. Lachman*, 387 F.3d 42, 51 (1st Cir. 2004); *United States v. Willfong*, 274 F.3d 1297 (9th Cir. 2001). Looking to a dictionary then to define the terms at issue, I note that the root word of the term "restraint" – "restrain" – has been defined to include "prevent[ing] (someone or something) from doing something," "keep[ing] under control or within limits," and "depriv[ing] (someone) of freedom of movement or personal liberty." OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/restrain. In turn, the root word of the term "detention" – "detain" – has been defined to include "keep[ing] (someone) from proceeding by holding them back." OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/detain.

Applying those definitions to the record before me, I am obliged to find that the conduct of Respondents Stewart and Pisciotta amounted to a prohibited "taking" in the form of the "restraint" or "detention" of a marine mammal, as those terms are commonly understood. By their own admissions and the accounts of numerous witnesses, Respondents Stewart and Pisciotta physically interacted with Wananalua beginning upon their arrival at the scene of the stranding on June 10 and continuing into the morning of June 11. Most notably, they carried Wananalua from the rocky perimeter of the area of Kawaihae Harbor where she had stranded to deeper water in that waterway. In doing so, Respondents Stewart and Pisciotta clearly exerted physical control over Wananalua, which falls within the plain meaning of the terms "restraint" and "detention." While the record contains credible evidence showing that Respondents Stewart and Pisciotta had good intentions for moving Wananalua, such an act nevertheless constitutes a "take" under the applicable law by virtue of falling within the plain meaning of "restraint" and "detention," and their intentions are irrelevant given the strict liability nature of the MMPA.

The actions of Respondents Stewart and Pisciotta once they were in the water with Wananalua also appear to fall within this form of prohibited "taking." Specifically, the record reflects that Respondents Stewart and Pisciotta supported Wananalua in the water from underneath her body, with their palms facing upwards, from the time they carried Wananalua into the water until shortly before her death. *See* Tr. at 276, 642-43, 772-73, 872; AX 1 at 108, 124. When questioned at the hearing about whether Respondents Stewart and Pisciotta sought to "control" Wananalua during that time, one of Ms. Case's students who was present during the response, Ms. Subica, denied that they restrained her such that she was restricted in her own choice of any type of movement. Tr. at 644-45. Respondent Stewart similarly testified:

> [T]here was a number of us in the water supporting Wananalua, again, on the – hands on the ventral side and just kind of being there so she doesn't sink, she's free to move. So we kind of placed individuals in certain areas to support her, but still allowing her to move.

Tr. at 772.

I do not doubt the sincerity of Ms. Subica and Respondent Stewart in explaining their sense that Wananalua retained her freedom of movement in the water. However, I find that Respondent Stewart's testimony and other evidence in the record support the opposite conclusion – that Respondents Stewart and Pisciotta, among the other individuals assembled in the water, in fact, limited the scope of Wananalua's movement. As Respondent Stewart testified, she and the others present in the water placed their hands on the underside of Wananalua's body "so she [would not] sink." Likewise, Respondent Pisciotta testified to "hold[ing] her up." Tr. at 872. Thus, by their own admissions, Wananalua's ability to submerge was effectively hindered. Additionally, another witness present at the scene of the stranding, Ms. Murphy, described the individuals in the water as "cradling [Wananalua] and whispering to her and looking after her," Tr. at 500, and "cradling that whale in love," Tr. at 503. Ms. Case similarly referred to Wananalua as "being cradled, like a mother would cradle an injured child." Tr. at 678. The imagery evoked by their testimony is undeniably one of benevolence. However, it also conjures a sense of being enveloped or enclosed. As shown by a photograph taken by a member of the authorized response team, the individuals assembled in the water (including Respondents Stewart and Pisciotta) indeed look like they surrounded Wananalua on each side and then crouched over her. *See* AX 1 at 108. Such positions imply a restriction of Wananalua's movement. This also appears evident from the fact that Wananalua promptly swam away when Respondents Stewart and Pisciotta stepped back from her body at Ms. Case's direction, before she stranded herself on the rocks once more. Accordingly, the weight of the evidence supports the conclusion that the actions of Respondents Stewart and Pisciotta in the water over the course of several hours were tantamount to the "restraint" or "detention" of a marine mammal, as those terms are commonly understood. Again, the record contains some evidence that Respondents Stewart and Pisciotta had good intentions for holding Wananalua as they did. Nevertheless, such conduct constitutes a "take" in the form of "restraint" and "detention" of a marine mammal under the applicable law, and their intentions are irrelevant to the inquiry of whether a "take" occurred.

Another form of prohibited "taking" identified in the regulatory definition of the term – "the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal" – also appears to apply in this proceeding. The statutory and regulatory definitions of "harassment" expound on the meaning of the term "disturb" for purposes of the MMPA, reflecting that one "disturb[s] a marine mammal 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); 50 C.F.R. § 216.3. The term "molesting" as used in the regulatory definition of "take" was left undefined. Looking to the dictionary for the plain meaning of the term, I note that the root word of "molesting" – "molest" – has been defined to include "pester[ing] or harass[ing] (someone) in an aggressive or persistent manner." OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/molest.

At the very least, the act of moving Wananalua satisfies the meaning of the term "disturb" under the applicable law. But for the actions of Respondents Stewart and Pisciotta, Wananalua likely would have remained in the rocky area where she had chosen to strand, ostensibly in an effort to seek physical protection and support given her debilitated physical

condition, until her death. *See* AX 3 at 2 ("As air-breathing mammals, cetaceans (whales and dolphins) strand when they become incapacitated and seek physical protection and support."). I am hard-pressed to characterize their movement of Wananalua from the location where she had elected to shelter (the shoreline) to a location of Respondent Stewart and Respondent Pisciotta's choosing (water two to three feet in depth) as anything other than a disruption of Wananalua's natural behavior under the circumstances. Given that such a disruption in behavioral patterns is synonymous with the term "disturb" as defined for purposes of the MMPA, it follows that Respondents Stewart and Pisciotta intentionally acted in such a way that Wananalua was "disturbed" within the meaning of the applicable law, which is another form of a prohibited "taking" under the regulatory definition of the term.

Having determined that the evidentiary record supports a finding that Respondents Stewart and Pisciotta engaged in a prohibited "taking" of Wananalua within the meaning of the applicable law, I turn to the allegation that Respondents then unlawfully transported her. As noted above, it is unlawful for any person to transport any marine mammal that has been taken in violation of the MMPA or the implementing regulations. 16 U.S.C. § 1372(a)(4)(A); 50 C.F.R. § 216.13(b). By their own admissions, Respondents Stewart and Pisciotta secured Wananalua's carcass to a vessel early on June 11, 2014, and transported it approximately two miles offshore, where they sank it. Thus, the record also supports the conclusion that Respondents Stewart and Pisciotta transported a marine mammal that had been taken in violation of the MMPA and its implementing regulations, as prohibited by those provisions.

In their post-hearing briefs, Respondents do not directly address the two forms of prohibited "taking" discussed above. Respondents also do not argue that any exceptions enumerated in the MMPA apply in this matter.[20] The arguments and defenses that Respondents do raise are unavailing. First, to the extent that Respondents challenge the validity of the applicable regulations, I am barred from entertaining such arguments by the procedural rules governing this proceeding. *See* 15 C.F.R. § 904.200(b) ("The Judge has no authority to rule on . . . challenges to the validity of regulations promulgated by the Agency or statutes administered by NOAA.").

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[20] "Since the [MMPA] is a remedial statute, exceptions to prohibitions are generally construed narrowly, and the burden of establishing entitlement to the exceptions rests on the individual claiming the benefit of such exceptions." *Jenison*, 4 O.R.W. 309, at *9-10 (NOAA 1985) (citing *United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967); *Piedmont & N. Railway Co. v. Interstate Commerce Comm'n*, 286 U.S. 299, 311-12 (1932); *In re Israel-British Bank (London) Ltd.*, 536 F.2d 513 (2nd Cir. 1976), *cert. denied*, 429 U.S. 978 (1976)). As previously discussed, one exception available under the MMPA relates to the Marine Mammal Health and Stranding Response Program. 16 U.S.C. §§ 1372(a), 1421(a). More specifically, the Agency may enter into agreements authorizing any person to take marine mammals in response to a stranding event pursuant to Section 109(h)(1) of the MMPA, which authorizes government officials and employees to take marine mammals in the course of their official duties under certain conditions. 16 U.S.C. §§ 1421b(a), 1379(h)(1). A person who is a party to such an agreement is deemed to be a "stranding network participant" under the Act. 16 U.S.C. § 1421h(4). As further explained by Dr. Walters and Mr. Schofield, in order to respond to a stranding event as a stranding network participant in Hawaii, an entity must have been authorized to act pursuant to either a formal stranding agreement with NOAA or the approval of Mr. Schofield. Tr. at 40-41, 374, 389; AX 1 at 17-18. Respondents do not attempt to avail themselves of this exception by arguing that they acted pursuant to any such authorization. Indeed, Respondent Stewart professed that she and Respondent Pisciotta "responded as Hawaiian cultural practitioners" and "not . . . as representatives of the Hilo Response Network or Dr. Turner." AX 1 at 121.

To the extent that Respondents seek to advance a particular reading of the statutory and regulatory definitions of the term "take" so as not to produce an "absurd result," it is true that "[u]nder the rules of statutory construction, 'the plain meaning of the statute controls, and courts will look no further, unless its application leads to unreasonable or impracticable results.'" *United States v. Leyva*, 282 F.3d 623, 625 (9th Cir. 2002) (quoting *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999)). Contrary to Respondents' arguments, however, concluding that the conduct of Respondents Stewart and Pisciotta amounted to a prohibited "taking" within the plain meaning of the regulatory definition of the term is not an "absurd result." Based on the totality of the evidence presented and my observations of the witnesses at hearing, I do not doubt that Respondents Stewart and Pisciotta genuinely believed that their actions served only to comfort Wananalua and ease any suffering that she was experiencing.[21] While an effort to render aid may seem to be at odds with the legal concept of "taking," the regulatory definition of the term does not contain any language that could reasonably be construed to require a showing of detriment to the marine mammal in order for a "take" to have occurred, and I decline to read such a requirement into the regulatory text and effectively narrow the meaning of the term "take" for purposes of the MMPA. I have seen nothing to suggest that Congress, in enacting the MMPA, or the Agency, in promulgating the regulations to implement the statute, intended for a showing of detriment to be a condition of determining that a "take" occurred. To the contrary, Congress expressly intended for the term to be "defined broadly by the Act," H.R. REP. NO. 92-707, at 23 (1971), and a broad reading is supported by the myriad forms of prohibited "taking" set forth in the regulatory definition, *see* 50 C.F.R. § 216.3.

Indeed, a similar argument was rejected in *Jones*, 2003 NOAA LEXIS 7 (NOAA Mar. 27, 2003), and I find that tribunal's reasoning to be persuasive. The respondent in that matter had been charged with unlawfully "taking" an immature harbor seal in violation of the MMPA by removing the seal from a public beach after determining that it required medical attention, with the intention of taking it to a wildlife rehabilitation clinic at which he volunteered, and then returning the seal to a different public beach after law enforcement officials declined to authorize the seal's removal. *Jones*, 2003 NOAA LEXIS 7, at *1, 4-7 (NOAA Mar. 27, 2003). As part of his defense, the respondent claimed that the regulatory definition required a showing of some harm or injury as an "essential ingredient" of a "take," which the tribunal viewed as arguing, in essence, that "the interpretations and definitions found in the Endangered Species Act should be used to place an interpretative gloss on the definition in the MMPA and its regulatory definition."[22] *Id.* at *11. Pointing to the holding in *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1993), that the definitions employed by the Endangered Species Act and its implementing regulations do not apply to the MMPA, the tribunal concluded that "50 C.F.R. § 216.3 implements an entirely different statute[,] and while it may be useful to employ the Endangered Species Act definition as analogous authority, the starting point still must be the regulation

[21] The parties presented conflicting evidence as to whether Respondent Stewart and Respondent Pisciotta's actions did, in fact, provide relief to Wananalua.

[22] The Endangered Species Act defines the term "take" as meaning "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The implementing regulations promulgated by the United States Fish and Wildlife Service define the term "harass" as used in the statutory definition of "take" as meaning "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3.

facially applicable to the statute in question, i.e., the MMPA." *Id.* at *11-12 (citing *Hayashi*, 22 F.3d at 862). The tribunal ultimately found that the respondent had engaged in an unlawful "taking" by his act of restraining and intentionally disturbing the seal in violation of the MMPA. *Id.* at 12.

Additionally, I agree with the Agency that the application of the text of the MMPA and its implementing regulations as set forth above also clearly serves to facilitate "the Agency's ability to fulfill its congressionally imposed mandate to advance the scientific understanding of marine mammals and protect marine mammal species and populations from harm." Agency's Reply at 3-4. This ability is undermined if the text of the MMPA and its implementing regulations is construed in such a way that they do not apply when a member of the public engages in an activity otherwise deemed to constitute an unlawful "take," such as the restraint or detention of a marine mammal, because the individual subjectively believes that his or her actions served the animal's welfare. Accordingly, Respondents' arguments in this regard are unpersuasive.

As for Respondents' reference to *Hayashi* to support their position, such reliance is misplaced. In *Hayashi*, the United States Court of Appeals for the Ninth Circuit construed the term "harass" as used in the MMPA and its implementing regulations to require "direct and serious disruptions of normal mammal behavior" in order to constitute a "taking."[23] 22 F.3d at 863-65. As observed by the Agency, however, the court rendered its decision prior to the amendments that added a definition for the term "harass" to the statute. Marine Mammal Protection Act Amendments of 1994, Pub. L. No. 103-238, § 12, 108 Stat. 532, 557. The court itself acknowledged in a subsequent decision that *Hayashi* had been superseded, suggesting that any reliance on *Hayashi* for its interpretation of the term "harass" as used in the MMPA would be misplaced because it "decided *Hayashi* a year before the adoption of the 1994 amendment expanding the definition of 'harassment.'" *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1224 (9th Cir. 2004). Accordingly, I find that the holding in *Hayashi* does nothing to advance Respondents' position in this proceeding.

Respondents also argue that the Agency acquiesced to their conduct and, as a consequence, should be estopped from enforcing the MMPA against them. Respondents' attempt to invoke the doctrine of equitable estoppel against the Agency fails to absolve them of liability. The doctrine of equitable estoppel is applied "to avoid injustice in particular cases." *Heckler v. Cty. Health Servs. of Crawford Cty, Inc.*, 467 U.S. 51, 59 (1984). As a general rule, however, application of the doctrine against the government is disfavored as a matter of public policy. *See id.* at 60 ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined."). Indeed, "the Supreme Court has alerted the judiciary that equitable estoppel against the government is an extraordinary remedy." *Bd. of Cty. Comm'rs of Cty. of Adams v. Issac*, 18 F.3d 1492, 1498-99 (10th Cir. 1994) (citing *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 421-22 (1990)).

[23] Applying this standard to the facts at issue in *Hayashi*, the court found that "any diversion" from the abnormal behavior of eating bait and hooked fish from a fisherman's lines, including the act of firing a weapon in an area outside of where the offending porpoises were located, "is not of the significance required for a [criminal] 'taking' under the MMPA." *Hayashi*, 22 F.3d at 865.

A party asserting the doctrine of equitable estoppel against the government thus carries a commensurately "heavy burden." *Yerger v. Robertson*, 981 F.2d 460, 466 (9th Cir. 1992). In particular, the party is required to satisfy not only the four traditional elements of equitable estoppel claims[24] but also three additional elements applicable to equitable estoppel claims against the government: "(1) the government engaged in affirmative misconduct going beyond mere negligence; (2) the government's wrongful acts will cause a serious injustice; and (3) the public's interest will not suffer undue damage by imposition of estoppel." *Baccei v. United States*, 632 F.3d 1140, 1147 (9th Cir. 2011).

Here, Respondents have failed to show that the Agency engaged in "affirmative misconduct going beyond mere negligence" such that the first element for equitable estoppel claims against the government is met. As the basis for their argument that the Agency should be estopped from enforcing the MMPA in this matter, Respondents point to the Agency's purported acquiescence to their activities and failure to intervene to assert its authority during the response to Wananalua's stranding. More specifically, Respondents argue that the Agency "remain[ed] a silent spectator," despite its one-time pledge to collaborate with Native Hawaiian cultural practitioners, by failing to inform Respondents Stewart and Pisciotta of any plans regarding Wananalua and leaving the scene of the stranding without notifying them of the authorized response team's intent to depart and return the next morning. Respondents' Br. at 15.

While it is undisputed that the authorized response team left Kawaihae Harbor on June 10 without conveying any information to Respondents Stewart and Pisciotta concerning the Agency's intentions, such a failure to inform falls short of affirmative misconduct. *See Lavin v. Marsh*, 644 F.2d 1378, 1384 (9th Cir. 1981) ("A mere failure to inform or assist does not justify application of equitable estoppel.") (citing *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8-9 (1973)). A showing of "[m]ere negligence, delay, inaction, or failure to follow agency guidelines" is also insufficient to establish that the government engaged in affirmative misconduct. *Bd. of Cty. Comm'rs of Cty. of Adams v. Issac*, 18 F.3d 1492, 1499 (10th Cir. 1994) (citing *Fano v. O'Neill*, 806 F.2d 1262, 1265 (5th Cir. 1987)). Rather, "an affirmative misrepresentation or affirmative concealment of a material fact by the government" is required. *Watkins v. United States Army*, 875 F.2d 699, 707 (9th Cir. 1989) (en banc) (citing *United States v. Ruby Co.*, 588 F.2d 697, 703-04 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979)). I see nothing in the record before me demonstrating that the Agency affirmatively misrepresented or concealed a material fact from Respondents during the response to Wananalua's stranding. Accordingly, Respondents have not sustained their burden in raising the defense of equitable estoppel against the Agency.

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[24] Those traditional elements consist of the following:

> (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Baccei v. United States, 632 F.3d 1140, 1147 (9th Cir. 2011) (quoting *Morgan v. Gonzales*, 495 F.3d 1084, 1092 (9th Cir. 2007)).

Finally, Respondents raise necessity as a defense to a finding of liability, but this too fails to excuse the charged violation. The Supreme Court has held that where a reasonable, legal alternative to violating the law exists, a chance both to refuse to commit the wrongful act and to avoid the threatened harm, the defense of necessity fails. *See United States v. Bailey*, 444 U.S. 394, 410 (1980). As grounds for invoking the defense in this matter, Respondents argue that the presence of Wananalua's remains in Kawaihae Harbor posed a risk to human safety because of the potential that they would attract sharks, and thus, "removal [of her remains] by Respondents was a necessary action that . . . served the public safety." Respondents' Reply Br. at 8. While there does not appear to be any dispute that an injured marine mammal could attract sharks and thereby pose a risk to human safety, Respondents' claim fails for two reasons. First, Respondent Stewart's testimony on the subject was conflicting. In one instance, she affirmed that she would have been concerned for the safety of others because of sharks if she and Respondent Pisciotta had left Wananalua's remains at Kawaihae Harbor after her death. Tr. at 785-86. In another instance, however, she testified that she and Respondent Pisciotta moved Wananalua's remains away from the water after her death such that "during the night, into the morning, there wasn't any worry about her being carried off by water or *by other things being able to get to her through the water*." Tr. at 781 (emphasis added). That testimony suggests that Respondents Stewart and Pisciotta minimized the potential risk to human safety posed by predators, such that their defense of necessity is baseless. Second, Respondents Stewart and Pisciotta clearly had a legal and reasonable alternative to removing Wananalua's remains from Kawaihae Harbor themselves, which was to contact representatives from NOAA or law enforcement officials immediately upon Wananalua's death to request their cooperation with the disposition of her remains. I see nothing in the record to suggest that this alternative was unviable. Instead, Respondents Stewart and Pisciotta waited on the rocks where Wananalua had died until sunrise, at which time they transported her remains out to sea. For the foregoing reasons, I conclude that the defense of necessity is unsupported and does not absolve Respondents of liability in this matter.

Based on the discussion above, I am compelled to conclude that, while undoubtedly well-meaning, Respondents Stewart and Pisciotta engaged in an unlawful "taking" by the "restraint or detention" of a marine mammal and an intentional act that served to "disturb" a marine mammal in Kawaihae Harbor on June 10-11, 2014, in violation of the MMPA and its implementing regulations. Further, I must conclude that Respondents Stewart and Pisciotta also violated the MMPA and its implementing regulations by transporting a marine mammal taken in violation of those provisions.

Conversely, I find that the evidence in the record linking Respondent Kai Palaoa to the events at issue is simply too tenuous to establish liability for that entity. On one hand, the Agency produced an entry dated July 4 from the Facebook page of Respondent Kai Palaoa. AX 1 at 90-91. Described as a "Report on Kai Palaoa Kanaloa Rescue," the narrative refers to Wananalua and the actions taken by "Roxy" and the author of the narrative with respect to her stranding, which parallel the events at issue in this proceeding. AX 1 at 90-91. This evidence suggests that Respondent Kai Palaoa played some role in responding to Wananalua's stranding.

On the other hand, Respondents proffered a document described by Respondent Stewart at the hearing as a "poster presentation" that "chronicled the collaboration . . . and partnership

that was developed between our group, Kai Palaoa, and the . . . Hilo Marine Mammal Response Network and the Hawaii Cetacean Rehab Facility," which she and Dr. Turner had purportedly prepared for the Hawaii Conservation Conference held in 2015. Tr. at 728-31 (referring to RX G). While the document depicts an "HMMRN / Kai Palaoa Partnership Timeline of Significant Events" noting that "[c]ommunity practitioners & Kai Palaoa care[d] for Wānanalua" in June of 2014, I find the timeline's portrayal of Respondent Kai Palaoa's activities to be problematic. *See* RX G. In addition to the aforementioned notation, the timeline also refers to the following: "Kai Palaoa practitioners asked to conduct opening ceremony for Hawai'i Cetacean Rehabilitation Facility" in December of 2009; "Kai Palaoa & HMMRN (Hilo Marine Mammal Response Network) build a collaborative relationship" at that time; "Kai Palaoa asked by Regional Stranding Coordinator to provide cultural training" at the Fifth Annual Pacific Island Region Hawaiian Monk Seal and Cetacean Respondents Meeting in May of 2010; "[c]ollaboration [between NOAA and Respondent Kai Palaoa] severely diminished [concurrent with the attempted rehabilitation of Kamaui in August of 2010] despite attempts by HCRF & Kai Palaoa to informally and formally address G.O. conflicts with agencies and personnel"; and "[c]ollaboration between Kai Palaoa and HMMRN continues." RX G. Given that Respondent Kai Palaoa was not formally organized until December 11, 2012, according to state records obtained by the Agency, it could not have participated in any of the events described in the timeline prior to that date. *See* AX 1 at 93. This discrepancy casts some doubt on the accuracy of the timeline's content with respect to Respondent Kai Palaoa.

Further, another document proffered by Respondents consists of a timeline purported to depict a "Kia'i Kanaloa Partnership with HCRF/HMMRN," which identifies another entity, "Kia'i Kanaloa," as having been involved in some of the events underlying this proceeding, without any mention of Respondent Kai Palaoa. *See* RX E at 1-2. "Kia'i Kanaloa" is described in the document as having "organically formed when R. Stewart & K. Pisciotta brought together by the efforts of E. Perry" in approximately January of 2010. RX E at 1. Respondent Kai Palaoa is not named in this timeline until the notation for June of 2011, when it purportedly "continue[d] to wait along with HMMRN/HCRF for resolution with NOAA & HPU in regards to concerns brought forth in Kāmaui response." RX E at 3. Once again, this date precedes the organization of Respondent Kai Palaoa. As for Wananalua's stranding, this timeline describes it as follows:

> Kai Palaoa practitioner contacted by fellow practitioner from Waimea/Kohala area to request cultural response to stranded "Kanaloa" in Kawaihae Harbor.
>
> R. Stewart calls & briefs Jason Turner.
>
> Roxane & Kealoha respond, contacting P. Case en route.

RX E at 3. It is hardly clear from this timeline that Respondents Stewart and Pisciotta acted as representatives of Respondent Kai Palaoa in responding to Wananalua's stranding. Further, at the hearing, the Agency did not elicit any testimony to that effect or testimony otherwise decisively linking Respondent Kai Palaoa to the conduct found to constitute a "taking" in this proceeding. Given that the record contains insufficient evidence to establish that Respondent Kai Palaoa engaged in conduct amounting to an unlawful "taking" and/or transport of a marine

mammal in violation of the MMPA and its implementing regulations, I conclude that Respondent Kai Palaoa is not liable for the charged violation.

V. CIVIL PENALTY

Having determined that Respondents Stewart and Pisciotta are liable for violating the MMPA and its implementing regulations as charged in the amended NOVA, I must next determine the appropriate amount, if any, of a monetary penalty to impose.

A. Principles of Law and Policy Relevant to Civil Penalty

In making a determination as to the appropriate civil penalty to assess, there is no presumption in favor of the penalty proposed by the Agency, and an Administrative Law Judge is not "required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document." *Nguyen*, 2012 NOAA LEXIS 2, at *21 (NOAA Jan. 18, 2012); *see also* 15 C.F.R. § 904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631 (June 23, 2010). Rather, the Administrative Law Judge determines an appropriate penalty independently, "taking into account all of the factors required by applicable law." 15 C.F.R. § 904.204(m).

The MMPA provides that any person who violates any provision of the Act or an implementing regulation may be assessed a civil penalty not to exceed $10,000 for each such violation. 16 U.S.C. § 1375(a)(1). Consistent with the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, 129 Stat. 584, the maximum civil penalty available under the MMPA has been increased to $27,950 per violation to adjust for inflation. *See* 15 C.F.R. § 6.3(f)(11) (adjusting the penalty amount in 16 U.S.C. § 1375(a)(1) for inflation, effective January 15, 2017).

The MMPA does not identify any statutory factors to be considered in determining the appropriate amount of civil penalty to assess. *See* 16 U.S.C. § 1375(a)(1). However, the procedural rules governing this proceeding, set forth at 15 C.F.R. Part 904 (the "Rules of Practice"), provide, in pertinent part:

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

15 C.F.R. § 904.108(a).

Additionally, in calculating a proposed penalty, the Agency typically utilizes its Penalty Policy,[25] which is publically available at http://www.gc.noaa.gov/enforce-office3.html and http://www.gc.noaa.gov/documents/Penalty%20Policy_FINAL_07012014_combo.pdf.

Under the Penalty Policy, penalties are based on two criteria:

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

Penalty Policy at 4. The "initial base penalty" consists of two factors, collectively constituting the seriousness of the violation: "(1) the gravity of the prohibited act that was committed; and (2) the alleged violator's degree of culpability." *Id.* Under the MMPA, the "gravity" factor (also referred to as "gravity of the violation" or "gravity-of-offense level") is comprised of four offense levels, which reflect a continuum of increasing gravity and take into consideration the nature, circumstances, and extent of a violation.[26] *Id.* at 6-8. Thus, offense level I represents the least significant offense level and offense level IV represents the most significant offense level. *Id.* at 8. The "culpability" factor (also referred to as "degree of culpability") is comprised of four levels of increasing mental culpability: unintentional activity (a violation that is inadvertent, unplanned, and the result of accident or mistake); negligence (the failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances); recklessness (a conscious disregard of a substantial risk of violating conservation measures that involves a gross deviation from the standard of conduct that a law-abiding person would observe in like circumstances); and intentional activity (a violation that is committed deliberately, voluntarily, or willfully). *Id.* at 6, 8-9.

The foregoing factors are depicted in a penalty matrix, with the "gravity" factor represented by the vertical axis of the matrix and the "culpability" factor represented by the horizontal axis of the matrix. Penalty Policy at 6. The intersection point from the levels used in each factor then identifies a penalty range on the matrix, and the midpoint of this penalty range determines the "initial base penalty" amount. *Id.* at 7. Once an "initial base penalty" amount is determined, "adjustment factors" are considered in order "to reflect legitimate differences among similar violations," with the effect being that the initial base penalty may be adjusted up or down (or not at all) from the midpoint of the penalty range, or to an altogether different penalty range. *Id.* at 9–10. The "adjustment factors" consist of an alleged violator's history of prior offenses and "other matters as justice may require," including the alleged violator's conduct after the

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[25] As discussed earlier in this decision, I took official notice of the Agency's Penalty Policy, *see* Tr. at 20-24, and I have considered it in rendering this decision.

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

violation has occurred. *Id.* at 9-12. After the application of any "adjustment factors," the resulting figure constitutes the "base penalty." *Id.* at 5, 9. Next, the value of proceeds gained from the unlawful activity and any additional economic benefit of non-compliance to the alleged violator are considered and factored into the penalty calculation. *Id.* at 13-14.

B. Parties' Arguments as to Civil Penalty

Looking to the factors set forth at 15 C.F.R. § 904.108(a) to frame its arguments, the Agency first contends that the nature, circumstances, extent, and gravity of the violation support the proposed penalty. *See* Agency's Br. at 17-19. In particular, the Agency argues that "Respondents' behavior is of serious cause for concern to the Agency" because it thwarted the Agency from performing a necropsy on Wananalua, which was "a significant loss to the Agency and science, as a whole." *Id.* at 17. Noting that a primary purpose of the Marine Mammal Health and Stranding Response Program is "the collection of scientific data and information," the Agency maintains that the data yielded from a necropsy of Wananalua "would have been particularly important" due to a number of factors, including that so little is known about her specific species and the opportunity to determine the cause of death for dolphins and whales in Hawaiian waters arises so infrequently. *Id.* at 18-19 (citing Tr. at 462-68). "As an additional matter in aggravation," the Agency argues, Respondents knew the importance of necropsies given their training and experience with strandings where the marine mammal had ultimately died and a necropsy had been performed, and they nevertheless transported Wananalua offshore upon her death and weighted her down with rocks to ensure that she would not resurface. *Id.* at 19 (citing Tr. at 531, 533, 553, 567, 581-82, 753-54, 756, 758-60, 825).

Turning to Respondents' culpability and history of prior violations, the Agency argues that Respondents' training and experience demonstrates their understanding of the laws and policies governing responses to marine mammal strandings, "yet they consciously disregarded them all, choosing instead to act unilaterally and in violation of the law." Agency's Br. at 19-20. Further, the Agency argues, certain evidence in the record reflects that Respondents became frustrated with NOAA over the course of their partnership, which "suggests that some level of spite or antipathy towards the Agency may have played a part in Respondents[']' decision to prevent NOAA from performing a necropsy on [Wananalua]." *Id.* at 20 (citing Tr. at 67, 121, 393-97; RX A, B, H).

The Agency ultimately argues in favor of a penalty

> severe enough to deter any such future conduct by Respondents or others who might be inclined to act in a manner similar to Respondents in this case. The Agency has a congressionally mandated duty to respond to marine mammal strandings and to learn all it can about the reasons for such events. It is imperative that members of the general public not be allowed to interfere with the Agency in the performance of its duties and act in a manner designed to thwart the Agency's obligations under the MMPA.

Agency's Br. at 20.

In response, Respondents do not specifically address the factors identified by the Agency. *See* Respondents' Br. at 15. Rather, Respondents argue simply that "a finding of no-penalty is appropriate" based upon the applicable statutory and regulatory provisions and "the particulars of this case." *Id.* Among other considerations, Respondents cite evidence in the record as showing that Respondents never prevented Dr. Doescher from accessing Wananalua. Respondents' Reply Br. at 8 (citing Tr. at 771-72). Respondents further contend that "there was only a respectful and solemn and peaceful interaction" during the events in question. *Id.* at 9. Additionally, Respondents argue that they "have only ever provided care and respect for marine mammals and have demonstrated their sincere long-held benevolence toward marine mammals" by holding an annual festival in honor of Kanaloa. *Id.* at 9 (citing Tr. at 807; RX W).

C. Discussion and Assessment of Civil Penalty

As noted above, I am tasked with independently determining the appropriate penalty to assess, if any, for the charged violation, "taking into account all of the factors required by applicable law." 15 C.F.R. § 904.204(m). In calculating the penalty assessed below, I considered the following factors set forth in the Rules of Practice at 15 C.F.R. § 904.108(a): the nature, circumstances, extent, and gravity of Respondent Stewart and Respondent Pisciotta's violative conduct; their degree of culpability; and other matters required by justice.[27] Insofar as the guidelines contained in the Agency's Penalty Policy added context to the arguments raised by the Agency, I also gave some consideration to the Penalty Policy.

Specifically, I took into account the extent of harm done to the Marine Mammal Health and Stranding Response Program. As noted above, a primary purpose of the program is to "facilitate the collection and dissemination of reference data on the health of marine mammals and health trends of marine mammal populations in the wild." 16 U.S.C. § 1421(b)(1). This objective was clearly frustrated by Respondents Stewart and Pisciotta transporting and sinking Wananalua's remains offshore, which effectively prevented representatives of the Agency from performing a necropsy. The record contains ample evidence showing the value of necropsies of marine mammals generally. As that evidence reflects, a necropsy presents an opportunity not

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[27] The Rules of Practice also identify a respondent's ability to pay and history of prior violations as factors that may be considered in determining a penalty. Here, Respondents did not timely raise arguments with regard to their ability to pay a civil penalty, and consequently, their pre-hearing request for leave to present financial evidence for purposes of penalty consideration was denied by Order on Respondents' Motion for Leave to File Supplemental Exhibits and Evidence, dated August 10, 2016. Respondents' renewed motion at the hearing on this issue was also denied. *See* Tr. 22-23, 25-30. Accordingly, I did not consider this factor in my assessment of a penalty in this case.

Turning to the next factor, the Agency acknowledges that Respondents Stewart and Pisciotta have no history of prior violations. *See* Agency's Br. at 20. While a history of prior violations may serve as a basis to increase a penalty, a number of administrative tribunals have conversely determined that an absence of prior violations may support the assessment of a lower penalty. *See, e.g.*, *Frenier*, 2012 NOAA LEXIS 11, at *39 (NOAA Sept. 27, 2012) ("The absence of any prior or subsequent offenses can serve as a mitigating factor and support the assessment of a lower civil penalty under certain circumstances."); *Fishing Co. of Alaska*, 1996 NOAA LEXIS 11, at *43–44 (NOAA Apr. 17, 1996) ("In an industry that is so heavily regulated, this absence of prior violations by any of the Respondents has been taken into consideration as a mitigating factor in the penalty assessment."). The Agency's Penalty Policy also recognizes a respondent's long history of compliance as a mitigating factor. *See* Penalty Policy at 5, 12. The circumstances of this matter appear to be dissimilar to those in which a respondent's history of compliance has been considered as a mitigating factor in that Respondents Stewart and Pisciotta are not longtime participants in the fishing industry. Therefore, I did not consider their absence of prior infractions in my assessment of a penalty.

only to determine the cause of death for the marine mammal in question but also to learn about the health of the local population of that species of marine mammal, the occurrence of diseases that could affect other organisms within that species or other species, the health of local ecosystems as a whole, and instances of human interaction affecting marine mammals. *See, e.g.*, AX 3 at 1; Tr. 58-60, 222-23, 384-86. As Dr. Walters summarized, marine mammals are "considered health sentinels of the ocean." Tr. at 58. The information obtained from necropsies then has the potential to inform management decisions by NOAA. Tr. at 385, 462; *see also* Tr. at 222-23.

The record also contains ample evidence demonstrating that the opportunity to perform a necropsy of a melon-headed whale such as Wananalua would have been especially valuable. First, as Dr. West testified, the species generally is poorly understood. Tr. at 462. She explained that a necropsy of Wananalua could have produced data for a number of ongoing studies examining the biology and ecology of marine mammals generally and melon-headed whales in particular in which Dr. West was involved, including a study investigating the ability of marine mammals to dive to great depths for long periods of time and a study about the diet of melon-headed whales specifically. Tr. at 466-69. Thus, a necropsy of Wananalua could have contributed to the scientific community's understanding of these animals. Dr. West testified that it could have also yielded information about the particular threats facing the two populations of melon-headed whales known to be living in Hawaiian waters. Tr. at 462-66. She explained that such threats as anthropogenic impacts and outbreaks of infectious diseases could be especially detrimental to the population residing exclusively in the shallower waters off of the island of Hawaii due to its relatively small size. Tr. at 463.

The significance of the opportunity to perform a necropsy of Wananalua is underscored by the likelihood that the necropsy would have yielded considerable quantities of data given the particular circumstances of her stranding. As explained by Dr. Doescher, the amount of information yielded by a necropsy is significantly affected by how soon the procedure is performed after the time of death because the tissues of a deceased animal quickly begin to decompose, which then impacts the ability to discern the presentation of certain diseases or conditions during the necropsy. *See* Tr. at 242-44. Thus, Dr. Doescher testified, "we always try to do the necropsy as quickly as possible afterwards to gain the maximum amount of information." Tr. at 243. Because Wananalua would have been so recently deceased at the time of necropsy, the information yielded by the procedure would have been particularly significant. *See* Tr. at 60 (Dr. Walters explaining that a recently deceased animal "has a very high value in terms of information" that can be obtained through necropsy).

The rarity of the opportunity is also noteworthy. Dr. Walters explained that it is "very unusual" for NOAA to have an opportunity to perform a necropsy of a "fresh, dead animal." Tr. at 60. Further, Dr. West noted that relatively few opportunities to perform a necropsy on a melon-headed whale from the populations residing in Hawaii waters have arisen, testifying that the scientific community has been able to study the stomach contents of only seven individuals from one of the local populations, and the stomach contents of no individuals from the other local population, over the last 30 years. *See* Tr. at 468-69.

The evidence presented by the Agency as to the significance of necropsies generally and the significance of a necropsy of Wananalua in particular was credible and compelling, and it was not rebutted by Respondents. Rather, Respondent Pisciotta explained at the hearing that she and Respondent Stewart do not oppose necropsies in general because, while the procedure may be inconsistent with their cultural practices, they respect the scientific value of it. Tr. at 824-25; *accord* Tr. at 606 (Ms. Perry testifying that it was "clear" that Respondents Stewart and Pisciotta did not oppose necropsies generally at the time of Kamaui's necropsy); *cf.* Tr. at 442-43 (Mr. Schofield testifying that Respondents Stewart and Pisciotta were involved with two marine mammals on which NOAA performed necropsies, and they did not prevent those necropsies from occurring); RX A at 3 (letter addressed to Mr. Schofield from Respondents Stewart and Pisciotta stating their "hope to help in any way [they] can to facilitate science that seeks to improve our relationship with the ocean" and, specifically, "to help scientists collect data they need to better understand why our 'ohana are suffering and dying"). Based on the foregoing discussion, I agree with the Agency that its failure to gain access to Wananalua's remains for necropsy "was a significant loss to the Agency and science, as a whole." Agency's Br. at 17. I considered the significance of this loss in my assessment of a penalty.

I also considered that Respondents Stewart and Pisciotta ostensibly knew of the laws and policies governing responses to stranding events in Hawaii, and knew that they had not been authorized by Mr. Schofield as required to respond to Wananalua's stranding, yet they proceeded to engage in violative conduct. First, by their own admissions and the accounts of numerous others, Respondents Stewart and Pisciotta completed all of the training modules required of volunteers for the Hilo Response Network and the HCRF, which covered such topics as the laws governing responses to stranding events; the protocols that NOAA follows for certain processes, including communicating news of a stranding event to Mr. Schofield and others, verifying and assessing the status of a stranding event, and the execution of a response as appropriate; proper handling techniques for marine mammals; and the importance of necropsies on deceased marine mammals. AX 1 at 20, 120, 178; Tr. at 383-86, 415, 422-23, 588-89, 727; *see also* RX E at 1; RX G. It is also undisputed that Respondents Stewart and Pisciotta participated in responses and rehabilitation efforts for stranded marine mammals under NOAA's direction prior to Wananalua's stranding. *See, e.g.*, AX 1 at 121, 178; RX A at 6; RX D; RX E at 1; Tr. at 415, 528, 531, 536-37, 572-73, 747, 753-59, 763-66, 777. I may reasonably infer from this evidence that Respondents Stewart and Pisciotta were aware that the MMPA and its implementing regulations prohibit the "taking" of marine mammals; that one may physically interact with a stranded marine mammal in Hawaii pursuant only to a formal stranding agreement with NOAA or the authorization of Mr. Schofield and that this rule applies even to Native Hawaiian cultural practitioners; and that NOAA and those acting on NOAA's behalf follow certain policies and procedures in responding to stranding events, including the practice of performing necropsies. Indeed, during NOAA's investigation of the events underlying this matter, Dr. Turner informed Special Agent Take Tomson of his belief that, based on their training and experience, Respondents Stewart and Pisciotta were "aware of marine mammal laws." AX 1 at 179, 180. Respondent Pisciotta also acknowledged that she and Respondent Stewart understood necropsies to be "[NOAA's] way." Tr. at 825.

I may also reasonably infer from the evidence in the record that Respondents Stewart and Pisciotta knew that they had not been authorized by Mr. Schofield to respond to Wananalua's

stranding, either in their capacity as Native Hawaiian cultural practitioners or as volunteers for the Hilo Response Network.[28] In particular, Mr. Schofield testified that neither Respondent Stewart nor Respondent Pisciotta contacted him to seek his authorization to respond and that he did not otherwise authorize Respondents or any other affiliate of UHH to respond. AX 1 at 21; Tr. at 389-90. Further, during NOAA's investigation of the events at issue, Dr. Turner reported that he had advised Respondent Stewart when she notified him of the stranding event that NOAA was already aware of it, that NOAA was going to respond, and that the Hilo Response Network would not be participating in the response. AX 1 at 180-81; Tr. at 366-67. This evidence is uncontested. Thus, Respondents Stewart and Pisciotta must have known that Mr. Schofield had not bestowed his authorization for their activities at the scene of the stranding. Any argument that Respondents Stewart and Pisciotta believed such authorization to be implied from their history of collaboration with NOAA is unavailing given that their partnership had clearly soured in the years preceding Wananalua's stranding.

Respondents Stewart and Pisciotta did not pay heed to their training knowledge of these matters, however. Instead, Respondents Stewart and Pisciotta effectively took command of the response by moving Wananalua from the rocky area of Kawaihae Harbor where she had stranded to deeper water in that waterway, arranging bystanders around her body and together keeping her afloat in the water, and performing their cultural practices over the course of several hours, all without engaging in any communication with the members of the authorized response team. I considered such actions in my assessment of a penalty.

While evaluating the amount of a penalty that acknowledged both the loss of data resulting from the Agency's inability to perform a necropsy of Wananalua and the lack of attention shown by Respondents Stewart and Pisciotta for the laws and protocols governing responses to marine mammal strandings, I was cognizant of a number of significant mitigating factors. In particular, after observing Respondents Stewart and Pisciotta, as well as other witnesses that Respondents presented at the hearing, as they testified about their genuinely-held belief systems, how those belief systems informed the actions they took with respect to Wananalua, and the manner in which they interacted with her, I am convinced that their conduct was motivated by their deeply-held beliefs and with good intentions. I found their testimony in this regard to be exceptionally genuine and compelling, and it became abundantly clear to me that they acted as they did in order to show their reverence for Wananalua and to comfort her in her debilitated physical condition, in a manner that was consistent with their belief systems.

The Agency takes the opposing stance, arguing that the evidence in the record suggests that Respondents Stewart and Pisciotta acted out of "spite or antipathy" to some degree in their "decision to prevent NOAA from performing a necropsy on [Wananalua]." Based on my observations throughout the multi-day hearing, including my observations of the candor and demeanor with which Respondents Stewart and Pisciotta and their witnesses testified, I do not agree with the Agency's position. First, as noted above, the record contains evidence that

[28] It is uncontested that at the time of Wananalua's stranding, the formal stranding agreement authorizing the Hilo Response Network to respond to stranding events on the island of Hawaii was no longer in effect. *See* Tr. at 42-43, 339, 386-89, 541-42, 565; AX 1 at 172-75. Thus, in order for volunteers from the Hilo Response Network to respond to Wananalua's stranding lawfully, Mr. Schofield would have needed to have authorized their actions directly. *See* Tr. at 40-41, 374, 389; AX 1 at 17-18.

Respondents Stewart and Pisciotta do not oppose necropsies, which I found to be credible given their backgrounds in Western science. *See, e.g.*, Tr. at 606, 824-25; *cf.* Tr. at 442-43 (Mr. Schofield testifying that Respondents Stewart and Pisciotta were involved with two marine mammals on which NOAA performed necropsies, and they did not prevent those necropsies from occurring); RX A at 3 (letter addressed to Mr. Schofield from Respondents Stewart and Pisciotta stating their "hope to help in any way [they] can to facilitate science that seeks to improve our relationship with the ocean" and, specifically, "to help scientists collect data they need to better understand why our 'ohana are suffering and dying"). Second, the weight of the evidence in the record reflects that the actions taken by Respondents Stewart and Pisciotta with respect to Wananalua's disposition were consistent with their beliefs and those of at least some Native Hawaiian cultural practitioners that the remains of Kanaloa should be returned to the ocean or utilized in cultural practice. *See, e.g.*, Tr. at 504, 742-43, 752-53, 888; RX A at 6; RX V at 4; AX 1 at 123; AX 3 at 3 ("In several cases, PIRO has made arrangements so that skeletal remains or cremated remains of stranded marine mammals have been . . . placed in the ocean directly by cultural practitioners."). Thus, even though they were aware of NOAA's general practice of performing necropsies of deceased marine mammals, it appears that, in the absence of any direct countervailing information from NOAA during the response to Wananalua's stranding, Respondents Stewart and Pisciotta simply engaged in their regular cultural practice.

As for the purported frustrations that Respondents Stewart and Pisciotta had with NOAA, which the Agency cites in its Post-Hearing Brief as support for its claim that Respondents Stewart and Pisciotta acted out of spite or antipathy during the response to Wananalua's stranding, there is no question that conflicts arose between NOAA and Respondents Stewart and Pisciotta as they endeavored to collaborate. As explained by Mr. Schofield, those conflicts, in part, drove his attempt to exclude Respondents Stewart and Pisciotta from participating in the response to Wananalua's stranding. *See* Tr. at 427-28. However, the notion that Respondents Stewart and Pisciotta harbored some resentment towards the Agency, which then motivated their actions on June 10 and 11, 2014, lacks sufficient support in the record. Based on my observations at the hearing, Respondent Pisciotta's testimony concerning the breakdown in cooperation between the two groups reflected bewilderment more than anything else. She also testified to the absence of any ill will towards Mr. Schofield:

> We really did ask and really did try. And I don't really know what the problem is. Because we can't change what we do. We've done it for millennia. So we are going to continue. But how are we going to move past where we are in the world today if we can't find goodness in both? And like I said, there's not bad on David [Schofield] at all. I totally trust his intention and goodness for the animal, but it still needs – we have to communicate.
>
> And that is what this letter [the letter sent by Respondents Stewart and Pisciotta to Mr. Schofield following the necropsy of Kamaui] teaches us is – or for me, is it's instructional that communication broke down, and we don't know why. And I think the incident with Wananalua says that, too, because we were not aware of what they wanted, and they did not communicate.

Tr. at 829 (referring to RX A). I found this testimony to be sincere and compelling.

Further, to the extent that some of Respondent Stewart and Respondent Pisciotta's conduct may have been perceived by members of the authorized response team as standoffish or uncooperative,[29] ample evidence in the record reflects that Respondents Stewart and Pisciotta were simply so focused on their cultural rituals that they became oblivious to their surroundings, tantamount to entering a meditative state. *See, e.g.*, Tr. at 500-01, 639, 770-71, 775-76, 871. Indeed, when asked at the hearing why she interacted so little with members of the authorized response team, Respondent Stewart testified to the concentration that she and Respondent Pisciotta maintained on Wananalua, beginning as early as their transit to Kawaihae Harbor: "[W]hen we got on scene, . . . our immediate focus is on the Kanaloa. Even in transit, we're starting to transition into ceremony already. . . . [W]e are preparing ourselves mentally for what we would need to be doing." Tr. at 767; *accord* Tr. at 769 (Respondent Stewart affirming that they began their cultural practice while traveling to the scene of the stranding); Tr. at 775 (same). Given the considerable evidence in the record showing that Native Hawaiians regard cetaceans as revered family members and that one such family member was gravely ill, it is entirely plausible that the unwavering focus of Respondents Stewart and Pisciotta on tending to her simply caused them to lose sight of anything else, including the members of the authorized response team.

The compelling circumstances motivating Respondent Stewart and Respondent Pisciotta's conduct with regard to Wananalua merit significant weight as a mitigating factor. As another mitigating factor, I also considered that Respondents Stewart and Pisciotta acted in nothing but a calm and gentle manner towards Wananalua, as shown by multiple accounts of the events in question. *See, e.g.*, Tr. at 500-03, 638, 645, 663-64, 775-76. Their demeanor overall was calm and reverential. *See, e.g.*, Tr. at 500-03, 638-39, 770-71. Such conduct is entirely consistent with the evidence presented concerning the profoundly high regard with which Native Hawaiians generally hold cetaceans such as Wananalua.

Finally, I took into account the efforts of Respondents Stewart and Pisciotta in furthering NOAA's goals of incorporating Native Hawaiian cultural practices into the Marine Mammal Health and Stranding Response Program, which is uncontroverted. *See, e.g.*, Tr. at 113-14, 414, 424, 426, 545-46, 564-66, 589-90, 726-27; RX F; *see also* RX E at 1; RX G. In this regard, Ms. Perry explained that Respondents Stewart and Pisciotta were among the few Native Hawaiian cultural practitioners willing to partner with NOAA. Tr. at 617. The reluctance of Native

[29] For example, according to Dr. Doescher's account of her examination of Wananalua, when she attempted to question the individuals supporting Wananalua in the water (including Respondents Stewart and Pisciotta) about her condition and progression during the time they had been with her, the only person who responded or even seemed to acknowledge her presence was a man standing near Wananalua's head, who gave brief answers to her questions. AX 1 at 57; Tr. at 228. Both Respondent Stewart and Respondent Pisciotta contradicted this claim at the hearing, testifying that they communicated with Dr. Doescher while she examined Wananalua. *See, e.g.*, Tr. at 771 (Respondent Stewart testifying that she "started telling [Dr. Doescher] what our observations were on respiration, what was happening, what she was doing, movement, if any"); Tr. at 874 (Respondent Pisciotta testifying that Dr. Doescher asked few questions and that Respondent Pisciotta answered at least one of them). Further, according to Ms. Kamaka and Respondent Stewart, the individuals supporting Wananalua in the water repositioned themselves to enable Dr. Doescher to access her. Tr. at 668-70, 771-72.

Hawaiian cultural practitioners to affiliate themselves with NOAA is exemplified by the testimony of Respondent Stewart, who spoke of the negative perception of NOAA among members of the Native Hawaiian community, namely that NOAA's role is "to disallow practice and access," and the typical guarded response of community members when interacting with government officials. Tr. at 717-18. That their subsequent partnership with NOAA helped to foster better relationships between responders and members of the community is supported by the testimony of multiple witnesses. In particular, both Jennifer Sims, once a co-director of the Hilo Response Network, and Sue Greene, a volunteer for the Hilo Response Network, testified to their view that the participation of Respondents Stewart and Pisciotta in the activities of the Hilo Response Network eased tensions between that organization and the community. *See* Tr. at 542-45, 575. Ms. Perry also observed better relations between responders and members of the community as a result of the efforts of Respondents Stewart and Pisciotta to facilitate more harmonious dialogue and interaction between those groups. *See* Tr. at 593, 617-18. For example, with regard to their involvement in the response to the stranding of Kamaui in particular, Ms. Perry explained that their participation "made a big difference" in alleviating friction between other cultural practitioners and NOAA. Tr. at 596-98. While Mr. Schofield claimed to be unaware of any prior negative interactions between NOAA and members of the community, *see* Tr. at 414-15, I find the testimony of Ms. Perry, Ms. Sims, and Ms. Greene on this subject to be credible. The efforts of Respondents Stewart and Pisciotta are commendable and should be encouraged, and I have considered their efforts in my assessment of a penalty.

Based upon my consideration of the foregoing factors and my careful and thorough review of the record in this case, I conclude that a civil monetary penalty in the total amount of $500 is appropriate. While the loss of data resulting from the Agency's inability to perform a necropsy of Wananalua and the inattentiveness shown by Respondents Stewart and Pisciotta for the laws and protocols governing responses to marine mammal strandings support the assessment of a penalty, I have determined that those factors are greatly outweighed by the unique mitigating factors in this case, especially the compelling circumstances motivating the actions of Respondents Stewart and Pisciotta that underlie the finding of liability and the compromise that seemingly could have been made to allow them to practice their beliefs within the bounds of the applicable law. While those circumstances could not excuse the violation charged, they undoubtedly weigh in favor of a nominal penalty in this matter.

Distinct from my decision and penalty assessment in this matter, I am inclined to offer some comments for the parties' future consideration. At the outset, I wish to commend the parties for their professionalism throughout the multi-day hearing and to express that it was my privilege to preside over this matter. As stated during the hearing, the underlying issues presented in this unique case, issues that I am not authorized to resolve, address important constitutionally-related claims, namely those regarding the Religious Freedom Restoration Act.[30] I trust that these significant issues have been adequately preserved for any potential review by a court of competent jurisdiction. I recognize and appreciate the challenges that the parties have faced, and may continue to face, given the extent of each party's commitment to their respective interests, duties, and obligations. Among such challenges are the competing interests between the Agency's duty to fulfill the mandates imposed by federal law and the duty of Native

[30] 42 U.S.C. §§ 2000bb *et seq.*

Hawaiian cultural practitioners, specifically Respondents Stewart and Pisciotta, to adhere to practices contained within their deeply-held cultural and religious beliefs. Admittedly, these are complex issues to resolve, and they impact many individuals. Nevertheless, I noted an apparent willingness on the part of both sides to work collaboratively to reach resolution and to alleviate the tensions that have evolved over time. It is my sincere hope that the parties are successful in negotiating a long-term solution to the underlying source of this conflict so that, among other objectives, trust between individuals is restored and respect fostered.

VI. DECISION AND ORDER

Respondent Roxane Stewart and Respondent Kimberly Pisciotta are liable for the violation charged in this case. A civil monetary penalty in the amount of $500 is assessed jointly and severally against Respondents Stewart and Pisciotta for the charged violation. Once this Initial Decision becomes final under the provisions of 15 C.F.R. § 904.271(d), Respondents Stewart and Pisciotta will be contacted by NOAA with instructions as to how to pay the civil penalty imposed herein.

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

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

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

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

SO ORDERED.

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

Dated: November 22, 2017
Washington, D.C.

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.