UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	)	DOCKET NUMBER:
	)	
Casey Phillips Cho and Auwana Hawaii, LLC,	)	**PI1500705, HA-1630-CP**
	)	
Respondents.	)	

INITIAL DECISION AND ORDER

Before: Christine Donelian Coughlin, Administrative Law Judge, U.S. EPA[1]

Appearances: For the Agency:
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[1] The Administrative Law Judges of the United States Environmental Protection Agency ("U.S. EPA") are authorized to hear cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011. *See* 5 U.S.C. § 3344; 5 C.F.R. § 930.208.

I. PROCEDURAL BACKGROUND

The National Oceanic and Atmospheric Administration ("NOAA" or "Agency") issued a Notice of Violation and Assessment of Administrative Penalty ("NOVA"), dated June 29, 2015, to Casey Phillips Cho ("Respondent Cho") and Auwana Hawaii, LLC ("Respondent Auwana Hawaii") (collectively, "Respondents"). The NOVA charges Respondents, jointly and severally, with one count of violation, as follows: "[o]n or about 23 October 2014, Casey Phillips Cho and Auwana Hawaii, LLC, doing business as Adventure X Boat Tours, did unlawfully take a marine mammal in violation of the Marine Mammal Protection Act, 16 USC 1372 and 50 CFR 216.11." NOVA at 3. The Agency assessed a penalty in the NOVA of $2,500 for the single count of violation charged. NOVA at 4. Respondents requested a hearing by letter dated July 14, 2015, and the Agency subsequently forwarded a copy of the NOVA and Respondents' hearing request to this Tribunal.

Thereafter, the parties accepted this Tribunal's invitation to participate in mediation for settlement of the case through an Alternative Dispute Resolution ("ADR") process. On December 3, 2015, following termination of the ADR process, Chief Administrative Law Judge Susan Biro ("Judge Biro") was designated to preside over the litigation of this matter. On December 8, 2015, Judge Biro issued an Order to Submit Preliminary Positions on Issues and Procedures ("PPIP Scheduling Order") to the parties, setting forth various prehearing filing deadlines and procedures. Pursuant to the PPIP Scheduling Order, the parties were directed to participate in a settlement conference on or before January 8, 2016, with a status report regarding settlement to be filed by the Agency on or before January 15, 2016. Additionally, the Agency was required to file its Preliminary Position on Issues and Procedures ("PPIP") on or before January 8, 2016, and Respondents were required to file their PPIP on or before January 22, 2016. In the interim, Judge Biro issued an Order of Redesignation on December 16, 2015, wherein I was designated to preside over this matter.

On January 8, 2016, the Agency filed a Notice of Serious Settlement Discussions, which resulted in an automatic extension of the PPIP filing deadlines by fourteen days. Thereafter, the parties timely filed their respective PPIPs, with the Agency filing its PPIP on January 22, 2016, and Respondents filing their PPIP on February 5, 2016. I issued a Notice of Hearing Order on June 1, 2016, scheduling the hearing in this matter to begin August 15, 2016. On July 4, 2016, Respondents filed an amendment to their PPIP, and on July 12, 2016, the Agency filed a supplement to its PPIP.

I conducted an evidentiary hearing in this matter on August 15, 2016, in Kailua-Kona, Hawaii.[2] At the hearing, I entertained the Agency's previously filed Motion Requesting the Court Take Official Notice of the Agency's Penalty Policy and Increase in Civil Monetary Penalties ("Motion Requesting Official Notice"), which requested that I take official notice of NOAA's "Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions" ("Penalty Policy"), as well as rulemaking adjusting the relevant maximum statutory civil penalty

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[2] Citations to the transcript of this evidentiary hearing are made in the following format: "Tr. [page]."

for inflation, codified at 15 C.F.R. § 16.3(f)(11).[3] Respondents did not object to the Agency's Motion Requesting Official Notice.[4] In accordance with 15 C.F.R. § 904.204(l), I took official notice of the Penalty Policy, which is publicly available, but did not deem it necessary to do so with regard to rulemaking adjusting the relevant maximum statutory civil penalty for inflation.[5] Adjustments to civil monetary penalties for inflation, such as at issue in the Agency's Motion for Official Notice, are periodic and required by law, are the subject of rulemaking published in the Federal Register, and are codified, and therefore, constitute law for which official or judicial notice need not be taken.[6] [7]

At the hearing, the Agency presented Agency's Exhibits ("A") 1-10, which were admitted into evidence. The Agency also presented the testimony of six witnesses: Take Tomson ("Special Agent Tomson"), a law enforcement Special Agent with NOAA; Michael Vasquez ("Mr. Vasquez"), Assistant Director of Safety and Security at Mauna Kea Resort; Brad Stumph ("Mr. Stumph"), a microbrewery owner and wildlife biologist, who was a passenger on the dolphin swim excursion at issue in this proceeding;[8] Duane Viloria ("Officer Viloria"), an officer with the Hawaii Department of Land and Natural Resources, Division of Conservation and Resources Enforcement;[9] James Ridzon ("Officer Ridzon"), an officer with the Hawaii Department of Land and Natural Resources, Division of Conservation and Resources Enforcement; and Laura McCue ("Ms. McCue"), a fishery biologist with NOAA Fisheries Service, Office of Protected Resources. Respondents offered two exhibits at the hearing, Respondents' Exhibits ("R") A and B, which were admitted into evidence.[10] Respondents also presented the testimony of Respondent Cho. Additionally, the parties presented Joint Exhibit 1

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[3] Notably, the Agency's motion indicated that the rulemaking adjusting the relevant maximum statutory civil penalty was codified at 15 C.F.R. 16.4(f)(11). However, this provision was actually codified at 15 C.F.R. § 16.3(f)(11).

[4] Tr. 10.

[5] Tr. 10-11.

[6] Adjustments for inflation to civil monetary penalties are required by the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended by the Debt Collection Improvement Act of 1996, Pub. L. 104-134, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Section 701 of Pub. L. 114-74. *See* Civil Monetary Penalty Adjustments for Inflation, 81 Fed. Reg. 36,454, 36,455 (June 7, 2016) (discussing authority for adjusting the civil monetary penalties provided by law within the jurisdiction of the U.S. Department of Commerce).

[7] Notably, a subsequent adjustment to civil monetary penalty amounts for inflation was made by the Agency that further raised the maximum penalty for Marine Mammal Protection Act violations from $27,500 to $27,950. *See* Civil Monetary Penalty Adjustments for Inflation, 81 Fed. Reg. 95,432, 95,434 (Dec. 28, 2016).

[8] Although Mr. Stumph was listed as a potential witness by Respondents and arrangements were made to obtain telephonic testimony from him in this capacity, Respondents elected not to call him as a witness. The Agency, however, desired to have Mr. Stumph testify and sought approval from this Tribunal to present such telephonic testimony, which was granted over objection by Respondents. Tr. 11, 19-22.

[9] Officer Viloria provided testimony regarding a prior violation of the MMPA by Respondent Cho. Although Respondents objected to this testimony, it was admitted and considered for purposes of penalty consideration. *See* Tr. 107-10.

[10] Although it is one exhibit, Respondents' Exhibit A contains multiple videos.

("J1"), a copy of the parties' Joint Set of Stipulated Facts, Exhibits, and Testimony, which was admitted into evidence.

Following service of the certified transcript of the hearing to the parties on August 31, 2016, I issued an Order Scheduling Post-Hearing Submissions on September 13, 2016, establishing various post-hearing deadlines. Consistent with the established post-hearing deadlines, the Agency filed a Motion to Conform the Transcript to the Actual Testimony on September 23, 2016, which was granted by Order dated September 30, 2016. Thereafter, the Agency filed its Initial Post-Hearing Brief ("Ag. In. Br."), and Respondents filed their Initial Post-Hearing Brief ("Resps. In. Br."),[11] in accordance with established post-hearing deadlines. Subsequently, the Agency timely filed its Reply Brief ("Ag. Rep. Br."), and Respondents timely filed their Reply Brief ("Resps. Rep. Br.").

II. STATEMENT OF THE ISSUES

a. Liability

In dispute is whether Respondents violated the Marine Mammal Protection Act ("MMPA"), at 16 U.S.C § 1372, and Agency regulation, at 50 C.F.R. § 216.11, by unlawfully taking a marine mammal on or about October 23, 2014.

b. Civil Penalty

If liability for the charged violation is established, then I must determine the amount of any appropriate 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.[12] *See* 15 C.F.R. § 904.108(a) (enumerating factors that may be considered in assessing a penalty).

III. FACTUAL SUMMARY

Respondent Cho is the owner and manager of Respondent Auwana Hawaii, a limited liability company that operates commercial charter boat tours for snorkeling, whale watching, and dolphin swim excursions under the trade names Adventure X Boat Tours and Adventure X Rafting. Tr. 38-39, 239; A2 at 1, 3, 5-9. In his employment with Respondent Auwana Hawaii, Respondent Cho operates charter boat tours daily. Tr. 239-40.

Respondent Auwana Hawaii normally operates one dolphin swim excursion a day. Tr. 258-59. Often such tours will encounter a pod of dolphins, and the boat will come alongside the pod. *See* Tr. 256-57 (discussing interactions with pods of dolphins on tours). After encountering

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[11] The deadline for Respondents' Initial Post-Hearing Brief, initially set as October 28, 2016, was extended by request to November 21, 2016.

[12] While ability to pay is a factor that may be considered when determining penalty, Respondents did not raise such a claim in this case. Thus, this factor was not considered in rendering my decision. *See* 15 C.F.R. § 904.108.

a dolphin pod on such tours, Respondent Cho testified that he will "go up ahead and find a place, a shallow, reefy area and let the passengers in the water there." Tr. 257. After dolphins have passed the area, Respondent Cho reported that passengers are boarded back on the vessel. Tr. 242-43. Prior to leaving a location on such tours, Respondent Cho testified that he makes large circles with the boat in a manner that causes a big wake. Tr. 243-45.

Respondent Cho operated a dolphin swim excursion for Respondent Auwana Hawaii on October 23, 2014, in the vicinity of Kauna'oa Point, Hawaii, onboard a vessel registered with the State of Hawaii as HA-1630-CP ("tour boat"). Tr. 240; J1 at ¶¶ 2, 4; RB at 1. Multiple people paid for, and were passengers of, this tour. Tr. 261; RB at 1. Included among these passengers were Mr. Stumph, a microbrewery owner and wildlife biologist, and his son. Tr. 86-87, 97, 260, 262; RB at 1.[13] Although accompanied by two additional crew members, Respondent Cho made all the decisions regarding the operation of the boat on the tour. Tr. 240-41. The tour left from the Puako boat ramp at 9:00 a.m., Tr. 241, and concluded at approximately noon, Tr. 246, 261.

At the beginning of the tour, Respondent Cho explained to passengers that he would locate a pod of dolphins, get in front of the pod in the boat, and allow passengers an opportunity to swim after the boat was in front of the pod. Tr. 88. Respondent Cho further explained to passengers that he could not guarantee that dolphins would be viewed on the tour, and commented that the dolphins may or may not interact with the tour. Tr. 96. However, he mentioned that occasionally dolphins play in the wake of the boat or the waves the wake makes. Tr. 94.

The tour approached a pod of spinner dolphins,[14] and after the tour boat moved in front of the pod of dolphins, the passengers were allowed to swim. Tr. 88-89. The dolphins were visible to the passengers both on and below the surface of the water, with only a few dolphins present at the surface upon approach. Tr. 90. The pod of dolphins traveled underneath the tour boat and the passengers swimming in the water, Tr. 89-90, 92, and a number of dolphins were seen returning to the surface in the process, Tr. 90. After the pod of dolphins had passed, the passengers boarded the boat, the boat moved ahead of the pod of dolphins, and the passengers returned to swim in the water. Tr. 89. The tour completed this sequence of moving in front of the dolphin pod, offloading passengers to swim, and then reboarding passengers, multiple times. Tr. 89-90, 93; *see also* Tr. 242 (testimony from Respondent Cho regarding unloading and reboarding passengers on the tour).

Prior to returning the tour to shore, Respondent Cho made multiple large circles with the tour boat in the water. Tr. 63-64, 68-69, 93-94, 97, 130-32, 243. Respondent Cho made these circles with the tour boat around dolphins in the water. *See* Tr. 97, 131 (testimony reflecting that Respondent Cho encircled dolphins with the circles). Additionally, these circles created a large wake line with whitewash, Tr. 78, 131, and made the water choppy, Tr. 93-94, 132, 162. After

[13] Although the boat manifest for the relevant trip, contained in RB, reflects the name "Brad stoumph," Mr. Stumph testified at the hearing that his surname is Stumph. *See* RB at 1; Tr. 84.

[14] Officer Ridzon identified the dolphins encountered on the tour at issue as spinner dolphins, and his identification was not contested. *See* Tr. 131; A1 at 6-8. As a result, the dolphins encountered on the tour at issue are found to be spinner dolphins. Accordingly, references to dolphins encountered on the tour at issue refer to spinner dolphins.

the boat created the wake, dolphins in the wake engaged in aerial displays, jumping out of the water and spinning. Tr. 63-64, 93-94, 131-32. Notably, Officer Ridzon and Mr. Vasquez were attending to an unrelated matter at the Hapuna Prince Hotel on the shore of Kauna'oa Point during the tour, Tr. 62-63, 69-70, 127-29, 138; A1 at 7, and they observed the tour boat operated by Respondent Cho making circles in the water and dolphins subsequently jumping and spinning in the wake, Tr. 63-63, 68-69, 130-32; A1 at 7. Officer Ridzon and Mr. Vasquez did not observe dolphins jumping out of the water prior to the tour boat making circles in the water. Tr. 64, 133. In addition to the dolphins in the wake of the tour boat, Officer Ridzon saw another group of dolphins about 50 to 100 yards from the dolphins in the wake and the tour boat, Tr. 132, 159, and he observed these dolphins breaching the water and traveling north, Tr. 132. Once the tour boat stopped making circles in the water, Officer Ridzon observed the tour boat travel north following the group of dolphins he previously saw traveling north, Tr. 134-35, 142; A1 at 7, and he also saw the dolphins that had been in the wake swimming north, in the direction of the other dolphin group, Tr. 156.

Officer Ridzon approached Respondent Cho at the Puako boat ramp following the tour, and confirmed that he was operating the tour boat that morning in the vicinity of the Hapuna Prince Hotel. Tr. 136; A1 at 7. Officer Ridzon told Respondent Cho that he saw him circling dolphins and that he was possibly in violation of the MMPA. A1 at 8. In response, Respondent Cho acknowledged "doing donuts like I normally do," and stated that he saw the dolphins in the water behind his boat, and believed that they were playing in the wake, so he continued to circle them. A1 at 8; Tr. 136. Respondent Cho further expressed to Officer Ridzon that he believed he had done nothing wrong. A1 at 8.

IV. LIABILITY

a. Principles of Law Relevant to Liability

i. Standard of Proof

To prevail on its claim that Respondents violated the MMPA and its implementing regulations, the Agency must prove facts constituting the violation by a preponderance of reliable, probative, substantial, and credible evidence. 5 U.S.C. § 556(d); *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)); 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)). To satisfy this burden of proof, the Agency may rely upon either direct or circumstantial evidence. *Vo*, 2001 NOAA LEXIS 11, at *17 (citing *Paris*, 4 O.R.W. 1058 (NOAA 1987)).

ii. MMPA and Implementing Regulations

Congress enacted the MMPA, as amended, 16 U.S.C. §§ 1361-1423h, based upon findings that "certain species and population stocks of marine mammals are, or may be, in

danger of extinction or depletion as a result of man's activities" and that "they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management." 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 provide, in pertinent part, that it is unlawful "for any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States." 16 U.S.C. § 1372(a)(2)(A); 50 C.F.R. § 216.11(b).

Definitions relevant to these provisions are as follows. The term "person" includes any private person or entity. 16 U.S.C. § 1362(10). "Marine mammal" encompasses any mammal, including Cetacea (whales, dolphins, and porpoises), that is morphologically adapted to the marine environment. 16 U.S.C. § 1362(6); 50 C.F.R. § 216.3. The MMPA defines "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).

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. Agency regulations further define "take" to include "the restraint or detention of a marine mammal, no matter how temporary," as well as "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." 50 C.F.R. § 216.3.

The term "harassment" means any act of pursuit, torment, or annoyance, which: (i) has the potential to injure a marine mammal or marine mammal stock in the wild ("Level A harassment"); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering ("Level B harassment"). 16 U.S.C. § 1362(18); *see also* 50 C.F.R. § 216.3 (defining levels of harassment).

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*, 2016 U.S. Dist. LEXIS 135543, at *36 (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). The MMPA provides that any

person who violates any of its provisions or implementing regulations may be assessed a civil penalty. 16 U.S.C. § 1375(a)(1).

b. Parties' Arguments as to Liability

In its Initial Post-Hearing Brief, the Agency contends that Respondents violated the MMPA and Agency regulations through their actions on or about October 23, 2014, and it presents multiple theories to support a finding of liability. The Agency argues Respondents committed a "taking" of a marine mammal by operating the tour boat in a manner it asserts constitutes Level A harassment,[15] as well as Level B harassment,[16] under the MMPA and regulations. Ag. In. Br. at 11-13. Additionally, the Agency asserts that Respondents committed a "taking" of a marine mammal by temporarily detaining dolphins in the wake of the tour boat.

The Agency argues that Respondents' actions in operating the tour boat "constitute an act of pursuit, torment, or annoyance which had the potential to injure a marine mammal or marine mammal stock in the wild," and, therefore, it concludes that Respondents took a marine mammal by Level A harassment. Ag. In. Br. at 11. The Agency contends that Respondents engaged in "pursuit" of marine mammals by "seeking out the pod of spinner dolphins and driving the vessel into that pod." Ag. In. Br. at 11. Further, it asserts that "the act of repeatedly circling the smaller group of dolphins the vessel had corralled in its wake was an act of torment." Ag. In. Br. at 11. Relying upon the testimony of its expert witness, Ms. McCue, the Agency argues that Respondents' actions had the potential to injure dolphins through potential vessel strikes from operating the vessel in close proximity to the dolphins. Ag. In. Br. at 11-12. The Agency additionally argues that based upon Ms. McCue's testimony, Respondents' actions also had the potential to injure dolphins, or the dolphin stock, by depleting the "energy stores" of the dolphins by forcing them to expend energy to avoid people and vessels, rather than engaging in resting behaviors needed to prepare for evening foraging. Ag. In. Br. at 12. Finally, the Agency argues, based upon Ms. McCue's testimony, that Respondents' actions had the potential to injure dolphins, or the dolphin stock, by distracting dolphins from predators and displacing dolphins from preferred resting areas into areas where they are more likely to be susceptible to predators. Ag. In. Br. at 12.

Additionally, the Agency argues that Respondents' actions in repeatedly circling the dolphins in the tour boat and engaging in "leapfrogging"—by placing swimmers in the water, ahead of the dolphins and in their path—constitute Level B harassment, as such actions are "pursuit, torment, or annoyance" that had the "potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, resting, breathing, nursing, breeding, feeding, or sheltering." Ag. In. Br. at 12. Again relying upon the testimony of Ms. McCue, the Agency contends that given the "spinner dolphins' rigid behavioral pattern" and their "essential daytime resting period," Respondents' activities, at a

[15] Defined, as previously noted, as any act of pursuit, torment, or annoyance which "has the potential to injure a marine mammal or marine mammal stock in the wild." 16 U.S.C. § 1362(18)(A)(i); 50 C.F.R. § 216.3.

[16] Defined, as previously noted, as any act of pursuit, torment, or annoyance which "has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering." 16 U.S.C. § 1362(18)(A)(ii); 50 C.F.R. § 216.3.

minimum, had the potential to disturb the dolphins, if not actually disturbing them. Ag. In. Br. at 12-13. Specifically, in addressing how the Respondents' actions had the potential to disturb the dolphins, the Agency cites to testimony from Ms. McCue regarding the year-round breeding and nursing activities of spinner dolphins, the changes in breathing patterns and energy expenditures that occur when dolphins are disturbed, and the displacement of dolphins from their preferred sheltering habitat that occurs with the presence and invasion of vessels and swimmers. Ag. In. Br. at 12. Further, the Agency argues, the manner in which Respondents operated the tour boat, by, for example, encircling the dolphins, did in fact disturb the dolphins, as evidenced by their resulting engagement in "aerial displays that were inconsistent both with their earlier behavior and with their rigid behavioral pattern." Ag. In. Br. at 8.

Finally, the Agency argues that Respondents committed a taking of a marine mammal by temporarily detaining dolphins in the wake of the tour boat. Ag. In. Br. at 11. In support of this proposition, the Agency cites to testimony from Officer Ridzon stating that the dolphins appeared to be corralled in the wake of the tour boat and otherwise looked "[a]lmost like they were just kind of stuck in that area." Ag. In. Br. at 11 (citing Tr. 141-42); Tr. 142.[17] The Agency additionally cites to testimony from Ms. McCue describing how a dolphin would be unable to leave a boat encircling it, and how such activity would disrupt a dolphin's breathing. Ag. In. Br. at 11 (citing Tr. 223-25); Tr. 223-25. The Agency states that "[a]lthough the animals could theoretically have escaped, the facts adduced at hearing show that they in fact did not." Ag. In. Br. at 11. As a result, the Agency concludes that Respondents' temporarily detained the dolphins in the wake of the tour boat, and that this detention constitutes a taking. Ag. In. Br. at 11.

In response to the liability arguments presented in the Agency's Initial Post-Hearing Brief, Respondents argue that the Agency has failed to meet its burden of proof. Resps. In. Br. at 15. Respondents characterize the Agency's "theory of the case" as based on three factual allegations regarding the Respondents' conduct: (1) that Respondents "operated the vessel at a high rate of speed while doing circles," (2) that Respondents "made circles corralling the dolphins," and (3) that Respondents "split a pod of dolphins by driving the vessel through the pod." Resps. In. Br. at 2. Respondents challenge the evidence supplied by the Agency's witnesses supporting these allegations. *See* Resps. In. Br. at 2-12. Furthermore, in addition to their arguments regarding factual allegations, Respondents also challenge the expert testimony of Ms. McCue regarding the behavior of spinner dolphins as speculative and insufficiently founded. *See* Resps. In. Br. at 11-12. As a consequence of these deficiencies, Respondents conclude that the Agency failed to establish liability for the charged violation. *See* Resps. In. Br. at 15.

Addressing the testimony of Officer Ridzon, Respondents challenge his reported observations. Resps. In. Br. at 2-5. Respondents assert that Officer Ridzon testified "that he did not observe dolphins until he used his binoculars as the vessel was at least 400-450 yards from the shore." Resps. In. Br. at 2. Respondents suggest that Officer Ridzon's observation of the dolphins during the relevant incident was limited, as his observation of the dolphins with the aid of binoculars was "at most a couple of minutes of the seven minute time span" during which he reported observing the tour boat. Resps. In. Br. at 4. Respondents also challenge Officer

[17] The Agency misquotes Officer Ridzon's testimony as stating the dolphins appeared "almost like they were stuck" in the wake of the tour boat. Ag. In. Br. at 11.

Ridzon's perception of the speed the tour boat was traveling, noting that this perception was based upon his observation of the wake, and asserting that such evidence is insufficient to establish that the tour boat was traveling at a high rate of speed. Resps. In. Br. at 5. Respondents further assert that although Officer Ridzon stated in his report that the dolphins "appeared" to be corralled by the tour boat, he testified that he did not know whether the wake of the tour boat was corralling the dolphins, and he acknowledged that the dolphins could have been playing in the wake. Resps. In. Br. at 2, 4-5.

As to Mr. Vasquez, Respondents urge that I afford no weight to his testimony. Resps. In. Br. at 6. They challenge the veracity of Mr. Vasquez's testimony on the basis that his report of observing the dolphins without the use of binoculars is contrary to Officer Ridzon's testimony that binoculars were necessary to observe the dolphins. Resps. In. Br. at 6. With regard to the testimony of Mr. Stumph, Respondents do not challenge Mr. Stumph's credibility, but argue that his testimony "confirms that none of the activities that Officer Ridzon stated that it 'appeared' or 'seemed' to be the case was [sic] in fact not [sic] accurate and true as such there should be no finding of any violation." Resps. In. Br. at 8.

Turning to the expert testimony offered by the Agency, Respondents argue that the testimony of Ms. McCue regarding the behavior of spinner dolphins, is speculative, and that Ms. McCue "does not possess sufficient education, research, or experience to opine of behaviors that are based on conflicting theories and for which her opinions rely on facts for which there is no consensus and by the Agencies [sic] own witnesses a conflict of facts." Resps. In. Br. at 12. In support of this assertion, Respondents challenge the extent of Ms. McCue's experience with spinner dolphins, in particular, and argue that she has not been the primary investigator or primary author on any research concerning spinner dolphins. Resps. In. Br. at 10. Further, they argue that Ms. McCue "admitted that her professed expertise on aerial behavior was a 'theory' and there was no consensus or specific reason that [spinner dolphins] do such an activity." Resps. In. Br. at 11. Respondents reference videos taken by Respondent Cho that depict dolphins engaging in aerial behavior without visible human presence, admitted into evidence in Respondents' Exhibit A, and they argue that such videos "demonstrate[] that jumping and spinning is a[] behavior of the dolphin for which the dolphin does regularly with or without human contact." Resps. In. Br. at 11. Respondents also indicate that Ms. McCue stated that her opinion testimony relied upon, and assumed that, the testimony of the Agency's witnesses was accurate and truthful. Resps. In. Br. at 11.

Respondents also note that Ms. McCue referred to a "Tyne 2015" study during her testimony that was not previously supplied by the Agency as a proposed exhibit, and for which Respondents had not been given notice of prior to the hearing. Resps. In. Br. at 10. While a Tyne 2014 study was referenced in Agency's Exhibit 3, Respondents assert that Ms. McCue expanded her testimony to address a more recent Tyne 2015 study that was not included as part of the documentary evidence. Resps. In. Br. at 10. In response, Respondents have included with their Initial Post-Hearing Brief "an article that references the Tyne 2015 study" that they identify

as “Attachment 1”[18] (hereinafter referred to as “Murdoch University Bulletin”), presumably in an effort to have this document included in the evidentiary record, which was closed at the conclusion of the hearing. Resps. In. Br. at 10-11; *see also* Tr. 281-83 (reflecting closure of the record at the conclusion of the hearing). Respondents argue that the contents of the Murdoch University Bulletin addressing the Tyne 2015 study contradict Ms. McCue’s testimony.[19] Resps. In. Br. at 10.

Lastly, Respondents recount the testimony offered by Respondent Cho in which he asserted that he “has never separated a pod of dolphins using his boat . . . nor has he ever kept dolphins corralled by the use of circulars.” Resps. In. Br. at 13. Further, Respondents note that Respondent Cho denied making “large circles at a high rate of speed” with the tour vessel in his hearing testimony. Resps. In. Br. at 13. Rather, Respondents assert that it is Respondent Cho’s belief “that the dolphins come to the wake and play in the wake of the boat and that this has been his experience over the years.” Resps. In. Br. at 13. Respondents further note that, in his hearing testimony, Respondent Cho stated that he does not believe he harasses dolphins, and he otherwise maintained that his “circles [were] not keeping the dolphins from leaving the area.” Resps. In. Br. at 13.

In its Reply Brief, the Agency contends that Respondents have mischaracterized the Agency’s position regarding liability. Ag. Rep. Br. at 1. The Agency, in doing so, “reasserts the multiple theories of ‘take’ identified in its [Initial] Post-Hearing Brief and urges the court to consider all of the testimony and documentary evidence produced at hearing in support of [its] case, not simply the limited theory posited by Respondents.” Ag. Rep. Br. at 1. The Agency additionally contests the arguments made by Respondents regarding the testimony of Officer Ridzon and Mr. Vasquez. With regard to Officer Ridzon, the Agency challenges the statement Respondents made in their Initial Post-Hearing Brief asserting that the vessel was at least 400-450 yards away from Officer Ridzon’s location on the shore during his observation. Ag. In. Br. at 2 (citing Resps. In. Br. at 2). The Agency states that “Officer Ridzon’s actual testimony was that he estimated the distance to be between 400-450 yards,” and argues that any reference to “at least” in this context is “contrary to the evidence produced at hearing.” Ag. Rep. Br. at 2 (citing Tr. 130).

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[18] Attached to Respondents’ Initial Post-Hearing Brief is Julian Tyne, David Johnston, Robert Rankin, Neil Loneragan & Lars Bejder, *Identifying Important Resting Habitats for the Protection of Hawaiian Spinner Dolphins*, *in* 2016 Research Findings in the School of Veterinary & Life Sciences (Murdoch University, Bulletin 6.13, Summer 2016), *available at* http://www.murdoch.edu.au/School-of-Veterinary-and-Life-Sciences/_document/Research-Bulletins/bulletin-6_13.pdf. Notably, this is a two-page article summarizing a research study regarding the resting habitat of Hawaiian spinner dolphins that was published by the authors in 2015. *See id.*

[19] As noted, Respondents assert various arguments regarding the content of the Murdoch University Bulletin. *See* Resps. In. Br. at 10-11. However, as this document was not offered as an exhibit at hearing, and has only been supplied by Respondents after the evidentiary record was closed, I have determined to exclude this document, and arguments regarding this document, from consideration in this matter. *See infra* pp. 12-13. As a result, I need not detail Respondents’ arguments with regard to this document. I do, however, note that Respondents’ claims regarding the content of this document are not fully consistent with the actual content of the document. *See* Resps. In. Br. at 10-11; Resps. Rep. Br. at 11-12 (reflecting Respondents’ claims regarding the content of the Murdoch University Bulletin).

With regard to the testimony of Mr. Vasquez, which Respondents urge should be afforded no weight, the Agency contends that Respondents' arguments mischaracterize the evidence, and that Mr. Vasquez is, in fact, a credible witness. Ag. Rep. Br. at 2-3. In particular, the Agency challenges Respondents' assertion that Officer Ridzon was unable to see the dolphins without the use of binoculars, asserting that the testimony of Officer Ridzon was that he "did not *initially* see the dolphins before looking at the boat through his binoculars." Ag. Rep. Br. at 3 (citing Tr. at 131). Furthermore, the Agency asserts that even if Officer Ridzon was unable to see the dolphins without binoculars, that does not establish that Mr. Vasquez' eyesight was similarly limited so as to require the use of binoculars to see the dolphins. Ag. Rep. Br. at 3. Highlighting that Mr. Vasquez was a "neutral and detached" witness who provided sworn testimony about what he observed, the Agency contends that for all these reasons Mr. Vasquez' testimony should not be disregarded. Ag. Rep. Br. at 3.

In its Reply Brief, the Agency also takes exception to the arguments Respondents make with regard to matters not in evidence, namely the arguments that relate to Respondents' inclusion of "material as an attachment to their Post-Hearing Brief that is not part of the record," and urges rejection of the attached material and related arguments. Ag. Rep. Br. at 4, 6 (referring to the Murdoch University Bulletin). In support of such rejection, the Agency cites to procedural regulations that govern this proceeding in 15 C.F.R. §§ 904.253, 904.251(a)(1), and 904.271(a), as well as this Tribunal's "orders regarding the production of evidence," and asserts that consideration of the contested extra-record material would contravene such regulations and orders, and would therefore be "completely inappropriate." Ag. Rep. Br. at 4. The Agency argues that Respondents "conducted a vigorous cross-examination of Agency's expert at hearing but failed to seek to introduce their attachment into evidence at hearing, where it would have been subject to challenge and where the Agency would have had an opportunity to respond to its contents if it were admitted by the court." Ag. Rep. Br. at 4. In addition to its procedural objections to the Murdoch University Bulletin, the Agency also asserts that the conclusions posited by Respondents about this material are "either false or misleading," highlighting the "wisdom of the prohibition on considering evidence outside of the record that has not had the benefit of being tested in the crucible of an adversarial hearing."[20] Ag. Rep. Br. at 5.

In their Reply Brief, Respondents largely reiterate the same arguments as previously articulated in their Initial Post-Hearing Brief, particularly with regard to the testimony of Officer Ridzon, Mr. Vasquez, and Ms. McCue, that need not be repeated here. Resps. Rep. Br. at 3-9, 11-12. Respondents additionally clarify their assertion that Officer Ridzon observed the tour boat at distance of at least 400-450 yards from his position on the shore, noting that their estimation is based upon the elevation of Officer Ridzon's location on the shore at the time of observation. Resps. Rep. Br. at 3. Likewise, Respondents cite to a portion of Officer Ridzon's testimony, in which he reported that he did not see any dolphins with his naked eye, but that he did see dolphins with the use of binoculars as "conclusive of the issue as to whether dolphins could be seen with the naked eye."[21] Resps. Rep. Br. at 5 (citing Tr. 148). Further, Respondents

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[20] In contesting the claims asserted by Respondents regarding the Murdoch University Bulletin, the Agency asserts specific challenges based upon the contents of this material. As previously noted, I have decided to exclude the Murdoch University Bulletin from consideration in this matter. *See infra* pp. 12-13; *supra* note 19. As a result, I need not detail the arguments asserted by the Agency regarding the contents of this document.

[21] References to a "naked eye" here refer to unassisted vision.

argue that there is insufficient evidence to support that they engaged in the activity of leapfrogging, as asserted in the Agency's Post-Hearing Brief, and they point out that the "only witnesses that testified about what was done and observed as it related to the activities of Respondents on October 23, 2014, were . . . Officer James Ridzon, Michael Vasquez, Bradley [Stumph], and [Respondent] Cho." Resps. Rep. Br. at 2.

With regard to their inclusion of the Murdoch University Bulletin with their Initial Post-Hearing Brief, Respondents reiterate that they only became aware of the Tyne 2015 study addressed in this document when Ms. McCue referred to it in her testimony at hearing. Resps. Rep. Br. at 11. Respondents reiterate that "reliance and notice regarding [the] Tyne 2015 [study] was [sic] not provided previously," and note that they objected at the hearing to testimony from Ms. McCue "regarding matters that she did not research or reference in any prehearing report." Resps. Rep. Br. at 11. Respondents contend that Ms. McCue provided testimony that was "inaccurate and misleading," which only became apparent after their review of the Tyne 2015 study following the hearing.[22] Resps. Rep. Br. at 11.

c. Evidentiary Issues Regarding Expert Testimony

At the hearing, Respondents objected to testimony from Ms. McCue, the Agency's expert witness, on matters not contained in the material provided to Respondents prior to hearing. Tr. 180-81. Respondents requested that I limit Ms. McCue's testimony to material provided to Respondents prior to hearing, or, alternatively, that Ms. McCue "at least annotate her testimony by the specific reference." Tr. 181. I sustained Respondents' objection with regard for the need to provide identification of materials referenced in testimony, and directed Ms. McCue to identify the materials she referred to in her testimony, and if such materials were not provided to Respondents, to provide a citation to such materials so that Respondents could examine them. Tr. 182-183. Following this instruction, Ms. McCue referenced numerous studies in her testimony that were not addressed in the materials provided to Respondents by the Agency, and that were merely identified by author surname and year of publication, or simply author surname. *See, e.g.*, 184-85, 187-90, 194, 196, 198, 220-21, 217, 226-28 (testimony referencing and discussing studies identified by author surname and year of publication, or only author surname). Such testimony included testimony regarding a study identified by Ms. McCue as "Tyne 2015." *See* Tr. 184-85, 188-90, 220-21, 226-28.

As previously discussed, Respondents submitted the Murdoch University Bulletin, an article purportedly discussing the Tyne 2015 study referenced by Ms. McCue in her testimony, with their Initial Post-Hearing Brief, following the closure of the evidentiary record at the hearing. Respondents assert that the Murdoch University Bulletin rebuts the testimony of Ms. McCue regarding the Tyne 2015 study, and argue that the inclusion of this article is warranted because the Tyne 2015 study was not referenced in materials supplied by the Agency prior to the hearing, and Respondents were not otherwise given notice of the study prior to the hearing. *See supra* pp. 9-10; Resps. In. Br. at 10; Resps. Rep. Br. at 11-12. The Agency, as previously noted, objects to the consideration of the Murdoch University Bulletin on the procedural grounds

[22] In their discussion of the Tyne 2015 study, Respondents at times appear to mistakenly refer to the Murdoch University Bulletin as the Tyne 2015 study.

previously discussed, and further challenges the substantive arguments asserted by Respondents regarding this article. *See supra* p. 11; Ag. Rep. Br. at 4-6.

Consistent with my ruling at the hearing, I did not consider the testimony of Ms. McCue with regard to the numerous studies that were not addressed in the materials provided to Respondents by the Agency prior to the hearing and were identified by Ms. McCue by author surname and year of publication or only author surname. As these studies were not supplied or addressed in the materials provided by the Agency prior to the hearing, and Ms. McCue's identification of these studies was not sufficient to inform Respondents of the source of information being discussed, her testimony regarding these studies was not considered in this decision.

Further, I did not consider the Murdoch University Bulletin submitted by Respondents with their Initial Post-Hearing Brief. This material was not offered as an exhibit at the hearing. Rather, it has been submitted post-hearing, following the closure of the evidentiary record, and without approval by this Tribunal to permit the introduction of post-hearing evidence. Pursuant to the regulations that govern this proceeding, found at 15 C.F.R. Part 904 ("Rules of Practice"), "[o]nce the record is closed, no additional evidence shall be accepted except upon a showing that the evidence is material and that there was good cause for failure to produce it in a timely fashion." 15 C.F.R. § 904.253. Although Respondents indicate that they did not have notice of the Tyne 2015 study discussed in the Murdoch University Bulletin until this study was referenced in Ms. McCue's testimony, Respondents notably did not request that the record be left open following the conclusion of the hearing for submission of additional evidence regarding this material. Furthermore, as previously discussed, the testimony of Ms. McCue with regard to this study has not been considered, and therefore, this document, offered by Respondents for the purpose of rebutting such testimony, is inconsequential. Accordingly, the Murdoch University Bulletin submitted by Respondents with their Initial Post-Hearing Brief is not accepted as additional evidence, and the arguments made by the parties regarding this document were not considered in this determination.

d. Discussion of Liability

i. Evaluation of Witnesses with Regard to Liability

As previously discussed, the parties raised numerous arguments regarding the credibility of evidence presented by witnesses with regard to liability. In making a determination as to liability in this proceeding, I considered all of the relevant evidence of record. In so doing, I carefully evaluated the credibility of such evidence, including the evidence presented by the witnesses at hearing. Accordingly, my analysis of the credibility of the evidence presented by the witnesses at hearing relating to liability are briefly discussed below.

Special Agent Tomson provided thorough testimony regarding his investigation of Respondents' alleged violation on October 23, 2014, and I found his account of the investigation to be credible. Notably, Special Agent Tomson recorded his investigative activity and findings in contemporaneously recorded reports, and these reports were consistent with his testimony. *See* A1; A2; Tr. 30-59. Nevertheless, as noted by Respondents, Special Agent Tomson was not

an eyewitness to the events at issue on October 23, 2014. *See* Tr. 46. Additionally, Special Agent Tomson did not interview Respondent Cho, or any eyewitnesses other than Officer Ridzon in the course of his investigation. *See* Tr. 47-51; A1; A2. Accordingly, the evidence submitted by Agent Tomson is limited in scope, and, as a result, had lesser significance in making factual determinations regarding the events at issue on October 23, 2014, than the eyewitness accounts.

Contrary to the assertions of Respondents, I found the reports of Officer Ridzon and Mr. Vasquez regarding their observations of the tour on October 23, 2014, credible. Officer Ridzon recorded his observations within his investigative report, and his testimony is generally consistent with his written record of events. *See* Tr. 124-64; A1 at 6-8. Further, as Officer Ridzon testified that he observed the tour from an elevated and unobstructed vantage point on the shoreline, *see* Tr. 127-30, and he further employed the use of binoculars in his observation of the tour, Tr. 130-31, I did not find his observations impaired or of otherwise limited usefulness, as suggested by Respondents. Likewise, Mr. Vasquez is a disinterested witness in this matter, and his eyewitness account of the tour was credibly supported by his observations of the tour from an elevated vantage point, *see* Tr. 63. Although Mr. Vasquez's observation of the tour boat was not assisted by binoculars, Tr. 73, he credibly and consistently testified as to his observations and that he had a clear and unobstructed view of the tour boat, Tr. 63. Counter to the arguments of Respondents, Officer Ridzon's testimony does not support the conclusion that dolphins could not possibly be viewed without the assistance of binoculars, but rather describes Officer Ridzon's use of binoculars and his observations with the use of binoculars. *See* Tr. 130-31, 148, 159 (testimony from Officer Ridzon regarding his use of, and observations with, binoculars). As a result, Officer Ridzon's testimony is not inconsistent with Mr. Vasquez's reported observation of dolphins without binoculars.

Additionally, as with the testimony of eyewitnesses Officer Ridzon and Mr. Vasquez, I found Mr. Stumph's testimony to be credible. As a passenger of the tour at issue, Mr. Stumph was present on the tour boat for the duration of the tour, and was able to candidly recount his experience with detail. *See* Tr. 84-101. Mr. Stumph is also a disinterested witness in this matter, and despite Respondents' assertions suggesting otherwise, his testimony is largely congruent with the eyewitness accounts of Officer Ridzon and Mr. Vasquez. Notably, although he was called as a witness by the Agency, Mr. Stumph was initially proposed as a witness by Respondents,[23] and Respondents did not contest his credibility. *See* Resps. In. Br. at 7; Resps. Rep. Br. at 9 (Respondents' post-hearing arguments regarding the testimony of Mr. Stumph).

In contrast, I found Respondent Cho's account of events to be generally less credible than the eyewitness accounts of Officer Ridzon, Mr. Vasquez, and Mr. Stumph. Respondent Cho's account of events was self-interested, and at times his responses were vague or inconsistent. Notably, as discussed below, Respondent Cho's denials were at times inconsistent with his reported practices in operating the tour boat. *See infra* pp. 16, 19. Furthermore, in his testimony, Respondent Cho acknowledged having difficulty with his memory, reporting "I'm kind of forgetful in my old age. I kind of – no, I'm not kidding. I kind of forget stuff." Tr. 272. As a result, I found Respondent Cho's recollection of events less reliable than that of the other witnesses.

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[23] In both their PPIP ("R. PPIP") and Amended PPIP ("R. Amend. PPIP"), Respondents identified Mr. Stumph as a witness, but mistakenly identified his name as "Brad Stoumph." R. PPIP at 4; R. Amend. PPIP at 6.

With regard to the evidence presented by the Agency's expert witness, I did not find the evidence presented by Ms. McCue to be speculative and insufficiently founded, as argued by Respondents. As discussed earlier, I did not consider Ms. McCue's testimony about the studies that were not provided to Respondents by the Agency prior to the hearing and that were identified only by author surname and year of publication or only author surname. I also did not afford her opinions great weight for the reasons addressed below. Nevertheless, I otherwise found Ms. McCue's expert testimony to be supported by her professional knowledge, training, and experience, which includes over five years of experience with spinner dolphin conservation work with the Agency, incorporating public outreach, regulatory development, and field work. *See* A7 at 1-2; *see also* Tr. 167-75,177-79 (discussion of Ms. McCue's relevant experience). Notably, Ms. McCue's testimony is consistent with an informational primer on spinner dolphins that she authored for the Agency and incorporated within her testimony. *See* A3 (informational primer); Tr. 210-11 (testimony incorporating informational primer).

ii. Liability Analysis and Determination

The evidence of record establishes, by a preponderance of evidence, that on October 23, 2014, Respondents violated the MMPA, at 16 U.S.C § 1372, and implementing regulations, at 50 C.F.R. § 216.11, by unlawfully taking a marine mammal though conduct constituting Level B harassment. As stipulated by the parties, Respondents are persons under the MMPA. J1 at ¶ 1. Additionally, the evidence establishes that the incident at issue in this proceeding occurred in waters under the jurisdiction of the United States, specifically in the vicinity of Kauna'oa Point, Hawaii. J1 at ¶ 4. Further, it has been established that the incident at issue in this proceeding involved spinner dolphins, which fall within the definition of marine mammals pursuant to the MMPA. *See* 16 U.S.C. § 1362(6); 50 C.F.R. § 216.3 (specifically incorporating Cetacea, including dolphins, in the definition of a marine mammal for the MMPA).

The primary contention in this proceeding surrounds whether Respondents' actions on October 23, 2014, constituted a "taking" under the MMPA. After thorough review of all the credible evidence of record, I conclude that Respondents did unlawfully take a marine mammal on October 23, 2014, and that their actions in doing so constituted Level B harassment pursuant to the MMPA and its implementing regulations.

As previously noted, the definition of "take" under the MMPA and its implementing regulations incorporates harassment of any marine mammal. 16 U.S.C. § 1362(13); 50 C.F.R. § 216.3. The definition of harassment under the MMPA encompasses any act of pursuit, torment, or annoyance, which "has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering." 16 U.S.C. § 1362(18). Such harassment is defined by the regulations as Level B harassment. 50 C.F.R. § 216.3.

The evidence establishes that Respondent Cho harassed dolphins during the dolphin swim excursion on October 23, 2014, through Level B harassment, by engaging in acts of pursuit and annoyance that had the potential to disturb a marine mammal, as evidenced by the actual disturbance of the spinner dolphins encountered on the tour. First, the evidence establishes that

Respondent Cho engaged in an act of pursuit that resulted in the disturbance of dolphins when he moved the tour boat in front of a pod of dolphins and offloaded passengers to swim in the path of the dolphins. Additionally, the evidence also establishes that Respondent Cho engaged in an act of annoyance that resulted in the disturbance of dolphins when he operated the tour boat in circles in a manner that generated significant wake and encircled dolphins. The evidence further establishes that Respondent Auwana Hawaii is vicariously liable for Respondent Cho's Level B harassment of marine mammals through the aforementioned acts of pursuit and annoyance, as Respondent Cho's employer.

The evidence demonstrates that Respondent Cho harassed dolphins encountered on the tour by moving the tour boat in front of a pod of dolphins and offloading passengers to swim in the path of the dolphins. Respondent Cho's conduct in approaching a pod of dolphins, and then moving the tour boat in front of this pod of dolphins to unload passengers, clearly constitutes an act of pursuit, consistent with the MMPA's definition of harassment. *See* 16 U.S.C. § 1362(18). Testimony from Mr. Stumph reflects that tour approached a pod of dolphins, that the tour boat moved in front of this pod of dolphins, and that passengers were allowed to swim after the tour boat moved in front of the pod.[24] Tr. 88-89. Although Respondent Cho offered vague testimony that, after observing dolphins, he moved the tour to a place where he hoped the dolphins would come, Tr. 241, Mr. Stumph's testimony more credibly revealed the tour boat moved in front of the pod of dolphins and the passengers were allowed to swim at that time, *see* Tr. 88. This testimony establishes that Respondent Cho's conduct in moving the tour boat in front of a pod of dolphins and offloading passengers to swim in their path was an act of pursuit.

Respondent Cho's conduct of pursuit—in moving the tour boat in front of a pod of dolphins and offloading passengers to swim in their path—is further supported by testimony establishing that this conduct was recurring and part of a sequence Respondent Cho engaged in throughout the course of the tour. Testimony from Mr. Stumph and Respondent Cho establishes that the tour completed the sequence of moving in front of the dolphin pod, offloading passengers to swim, and then reboarding passengers after the dolphins traveled passed the passengers, multiple times. *See* Tr. 89-90, 93, 242. Although Respondent Cho recalled unloading and reboarding passengers twice in his testimony, Tr. 242, Mr. Stumph credibly testified that the sequence of moving in front of the dolphin pod, offloading passengers to swim, and then reboarding passengers after the dolphins traveled passed the passengers, occurred three to four times during the tour, Tr. 88-90. Despite these differing estimates in the precise number of times this sequence occurred, the testimony of both Mr. Stumph and Respondent Cho reflects that this sequence was repeated during the course of the tour, and further supports the finding that this activity constitutes an act of pursuit. The testimony regarding the aforementioned sequence on the tour on October 23, 2014, is consistent with Respondent Cho's account of his general practices on dolphin swim excursions, in which he stated that after he encounters a dolphin pod, he will "go up ahead and find a place, a shallow, reefy area and let the passengers in the water there," Tr. 257, and subsequently reload passengers once the dolphins have passed the area, Tr. 242-43. This conduct constitutes an act of pursuit, and is notably also consistent with the practice of "leapfrogging" as described by the Agency's expert witness, Ms. McCue, Tr. 221, and informational material supplied by the Agency, A4 at 1.

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[24] Notably, in their Initial Post-Hearing Brief, Respondents acknowledge this testimony, but do not contest it. Resps. In. Br. at 7.

In addition, the evidence shows that Respondent Cho's act of pursuit in moving the tour boat in front of the pod of dolphins and offloading passengers to swim in their path actually disturbed dolphins, consistent with Level B harassment as defined in by the MMPA and its implementing regulations. *See* 16 U.S.C. § 1362(18); 50 C.F.R. § 216.3 (defining Level B harassment). Testimony from both Mr. Stumph and Respondent Cho reflects that the dolphins passed through the area where the passengers were deposited in the water. Tr. 89-90, 241-42. Mr. Stumph testified that as the dolphin pod approached passengers swimming in the water, only a few of the dolphins in the pod were visible at the surface, Tr. 90, and he described the dolphins as swimming and traveling as a group, 91-92. As the pod of dolphins traveled underneath the tour boat and the passengers swimming in the water, *see* Tr. 89-90, 92, Mr. Stumph reported that a number of dolphins were seen returning to the surface in the process, Tr. 90. This testimony reflects that some dolphins in the pod were disturbed by Respondent Cho's conduct in placing the tour boat and passengers in their path, as it provides evidence that the behavior of some of the dolphins encountered on the tour was disrupted by the presence of the tour boat and passengers swimming in their path. This disruption is evidenced by the change in the dolphins' behavior, from swimming below the surface, to returning to the surface with the presence of the tour boat and passengers swimming in their path. Notably, the finding that the behavior of the dolphins encountered on the tour was disrupted by Respondent Cho moving the tour boat in front of them and offloading passengers to swim in their path is consistent with Respondent Cho's characterization that the dolphins "were very interactive and very friendly with the guests" on the tour. Tr. 242.

Likewise, the finding that Respondent Cho's act of pursuit in moving the tour boat in front of the pod of dolphins and offloading passengers to swim in their path disturbed some of the dolphins, is consistent with evidence supplied by Ms. McCue, the Agency's expert witness. In both her testimony, and the informational primer she authored for the Agency and incorporated within her testimony, Ms. McCue reported that spinner dolphins engage in resting behavior during the day as part of fixed or rigid behavioral pattern. Tr. 185-86; A3 at 1. She further testified that during rest, spinner dolphins engage in relatively synchronized, slow movements, and are underwater for the majority of the time. Tr. 187, 216. Additionally, Ms. McCue described how changes in dolphin behavior within the context of potentially disturbing natural or human activity are indicative of disturbance, s*ee* Tr. 192-93, 234; A3 at 2. The resting behavior of spinner dolphins described by Ms. McCue is notably consistent with Mr. Stumph's description of the behavior he observed of the dolphins in the pod as the tour approached. *See* Tr. 91-92. Furthermore, Ms. McCue's testimony regarding how changes in dolphin behavior are indicative of disturbance within the context of disturbance activity is consistent with the finding that the observed change in the dolphins' swimming behavior demonstrates disturbance.

It is notable that Ms. McCue specifically opined that the conduct of moving the tour boat in the path of the dolphins, as described in the testimony of Mr. Stumph, can cause disturbance to dolphins, by causing disruption to behavioral patterns, including breathing. *See* Tr. 212-13, 216. While I considered this opinion and note that it is consistent with the finding that Respondent Cho's conduct in moving the tour boat in front of the pod of dolphins and offloading passengers to swim in the path of the dolphins disturbed dolphins, I did not afford her opinion great weight,

as this opinion was not based upon the entire evidentiary record, and notably did not specifically address the disruption of behavioral patterns observed by Mr. Stumph, discussed above.

As the evidence demonstrates that Respondent Cho's conduct in moving the tour boat in front of a pod of dolphins and offloading passengers to swim in the path of the dolphins constitutes an act of pursuit that had the potential to disturb a marine mammal, as demonstrated by the actual disturbance of dolphins, this conduct is Level B harassment, as defined by the MMPA and implementing regulations. As a result, Respondent Cho violated the MMPA and implementing regulations, as charged by the Agency, by unlawfully taking a marine mammal through this conduct alone. Nevertheless, the record additionally reflects that Respondent Cho also harassed dolphins during the dolphin swim excursion on October 23, 2014, through Level B harassment, by operating the tour boat in circles in a manner that generated significant wake and encircled dolphins.

Respondent Cho's conduct in operating the tour boat in circles in a manner that generated significant wake and encircled dolphins, constitutes Level B harassment, as this conduct is an act of annoyance that has the potential to disturb a marine mammal, as evidenced by the actual disturbance of dolphins encountered on the tour. Testimony from Officer Ridzon, Mr. Vasquez, Mr. Stumph, and Respondent Cho establishes that Respondent Cho made multiple large circles with the tour boat in the water prior to returning the tour to shore. *See* Tr. 63-64, 68-69, 93-94, 97, 130-32, 243. Although the estimated number of circles made by Respondent Cho with the tour boat varied by eyewitness account, from a couple of circles to a dozen, the evidence establishes that Respondent Cho performed repeated circles with the tour boat. *See* Tr. 69, 97, 147; A1 at 7; A9 (witness estimates of the number of circles). Additionally, the evidence further establishes that Respondent Cho made these circles with the tour boat in a manner that generated significant wake and encircled dolphins. Although the exact speed at which Respondent Cho was operating the tour boat while making circles was not clearly established,[25] testimony from Officer Ridzon, Mr. Vasquez, and Mr. Stumph reflects that the circles were made in a manner that generated significant wake. Officer Ridzon observed that the tour boat's circles created a large wake line associated with whitewash, Tr. 131, and Mr. Vasquez similarly testified that the tour boat made a "larger wake," associated with white water, Tr. 78. Likewise, both Officer Ridzon and Mr. Stumph reported that the circles made by the tour boat rendered the water choppy. Tr. 93-94, 132, 162. Additionally, testimony from Officer Ridzon and Mr. Stumph reflects that Respondent Cho made these circles with the tour boat around dolphins in the water. *See* Tr. 97, 131. Officer Ridzon specifically testified that observing the tour with the use of binoculars, he "saw the boat doing circles with dolphins in the center." Tr. 131.

In his testimony, Respondent Cho denied "corralling" dolphins both during the tour at issue, Tr. 249, and as a general practice, Tr. 256. He further stated that the dolphins had "moved off" before he operated the tour boat in circles, but "came back to the wake of the boat" when he

[25] The exact speed at which Respondent Cho was operating the tour boat while making circles is unclear from the evidence. Although Officer Ridzon characterized the speed as being a high rate of speed, he reported that his perception of the speed was based on his observation of the wake. Tr. 131. In contrast, Mr. Vasquez testified that he didn't know how fast the tour boat was traveling, Tr. 63, and Mr. Stumph denied that the tour boat was traveling at a high rate of speed when the circles were made, Tr. 99. Respondent Cho reported that he typically conducts the circles at a "slow speed," which he estimated as eight to ten knots. Tr. 244. However, Respondent Cho did not specifically estimate the rate of speed of the tour boat while making circles on the October 23, 2014 tour.

"started to go in circles." Tr. 249. This testimony suggests that the dolphins were in fact present in the wake of the tour boat while Respondent Cho was operating it in circles in the water. Notably, Respondent Cho did not contest that he generated significant wake by operating the tour boat in circles, nor did he specifically deny encircling dolphins when operating the tour boat in circles. Furthermore, the observations of Officer Ridzon, Mr. Vasquez, and Mr. Stumph regarding the tour boat making circles in the water that generated significant wake and encircled dolphins are not inconsistent with Respondent Cho's own description of his practices in operating dolphin swim excursions. Respondent Cho reported that on tours he does a couple of circles in the water with the tour boat in a manner "that throws a big wake," and he further stated that if he sees dolphins play in the wake he "might do another circle." Tr. 243-44. Additionally, the reported observations are further consistent with comments Officer Ridzon reported that Respondent Cho made in a conversation following the tour at issue in this matter. In this conversation, Officer Ridzon recalled that Respondent Cho acknowledged "doing donuts like I normally do," and further stated that he saw the dolphins in the water behind his boat, and believed that they were playing in the wake, so he continued to circle them. A1 at 8; Tr. at 136. Accordingly, the evidence establishes that Respondent Cho operated the tour boat in circles in a manner that generated significant wake and encircled dolphins on October 23, 2014. Given the manner of this conduct, it constitutes an act of annoyance, consistent with the MMPA's definition of harassment. *See* 16 U.S.C. § 1362(18).

Additionally, the evidence demonstrates that Respondent Cho's conduct in operating the tour boat in circles in a manner that generated significant wake and encircled dolphins actually disturbed the behavioral patterns of dolphins, consistent with Level B harassment as defined in by the MMPA and its implementing regulations. *See* 16 U.S.C. § 1362(18); 50 C.F.R. § 216.3 (defining Level B harassment). As previously discussed, Mr. Stumph testified that only a few dolphins were visible at the surface when the pod approached the tour, Tr. 90, and he described the dolphins as swimming and traveling as a group, Tr. 91-92. Likewise, Officer Ridzon and Mr. Vasquez testified that they did not observe dolphins jumping out of the water prior to the tour boat making circles in the water. Tr. 64, 133. After Respondent Cho made circles with the tour boat, Officer Ridzon, Mr. Vasquez, and Mr. Stumph observed dolphins in the wake engage in aerial displays, jumping out of the water and spinning. *See* Tr. 63-64, 93-94, 131-32. Officer Ridzon further testified that while he was observing the tour boat make circles, he saw another group of dolphins about 50 to 100 yards from the dolphins in the wake and the tour boat, Tr. 132, 159, and he observed these dolphins "breaching the water, like kind of leaping out" while traveling north, Tr. 132. The aforementioned evidence reflects a substantial change in the observed behavior of the dolphins in conjunction with Respondent Cho's conduct in operating the tour boat in circles. Considered in the context of Respondent Cho's act of annoyance in operating the tour boat in circles in a manner that generated significant wake and encircled dolphins, this substantial change in behavior demonstrates that Respondent Cho's conduct disrupted the behavioral patterns of these dolphins, and, therefore, actually disturbed these dolphins.

As with the prior finding of disturbance, the finding that Respondent Cho's act of annoyance in operating the tour boat in circles in a manner that generated significant wake and encircled dolphins actually disturbed dolphins by disrupting their behavioral patterns is consistent with evidence supplied by the Agency's expert witness, Ms. McCue. Ms. McCue

specifically identified aerial behaviors, spinning, and breaching as signs of disturbance when such activity reflects a change in behavior. *See* Tr. 193-94, 213; A3 at 2. Although Ms. McCue noted that disturbance can be caused by both natural and human activity, Tr. 192-93, she noted that disturbance is contextual, and that changes in behavior following a given activity are indicative of disturbance associated with that activity, *see* Tr. 193, 234. This is consistent with the finding that Respondent Cho's conduct in operating the tour boat in circles caused the observed disruption to the dolphins' behavioral pattern, as this conduct occurred immediately prior to the observed disruption of the dolphins' behavior, and there was no evidence presented supporting an alternative cause for the behavioral disruption.

Notably, at the hearing, Ms. McCue specifically opined that operation of the tour boat in circles "especially . . .at a high rate of speed" would disturb marine mammals. Tr. 212-14. Given that the evidence did not conclusively establish the rate of speed at which Respondent Cho performed circles in the water with the tour boat,[26] I did not afford great weight to the portion of Ms. McCue's opinion that was conditioned upon "especially high" or "high" rates of speed of the vessel. Rather, what I deemed more compelling than a focus on the actual rate of speed of the vessel was the uncontroverted evidence revealing that only after Respondent Cho's intervening conduct did the dolphins begin to show signs of disturbance through changes in behavior like breaching and aerial activity.

Attempting to refute that the dolphins were disturbed by the Respondent Cho's conduct in operating the tour boat, Respondents submitted videos reportedly taken by Respondent Cho around 8:30 a.m. to 9:00 a.m., which appear to depict dolphins breaching and jumping out of the water in the absence of visible human activity.[27] *See* RA (containing multiple videos); Tr. 246-48 (testimony of Respondent Cho discussing videos). Respondents argue that these videos demonstrate that such activity is natural for dolphins, and thereby not reflective of disturbance. I do not find Respondents' arguments regarding these videos persuasive. Simply because the videos display such behavior without the visible presence of human activity in the immediate area or other visibly disturbing activity does establish that these behaviors were not signs of other disturbance triggered by earlier activity or by other behaviors not immediately visible, for example by possible predatory disturbances from under the water and out of view, Tr. 234-35, or that such behavior was the product of juvenile dolphins or calves that are resistant to a resting period, Tr. 235-36. Indeed, such explanations were touched upon by the Agency's expert, Ms. McCue. *See* Tr. 233-36. Nevertheless, noteworthy was Ms. McCue emphasis that behavioral signs of disturbance are contextual, and that such activity is indicative of disturbance when it reflects a change in behavior. *See* Tr. 192-94, 236. As previously discussed, the aerial and breaching behaviors observed following Respondent Cho driving in circles with the tour boat reflected a change in the observed behavior of the dolphins. *See supra* p. 19; *see also* Tr. 64, 90-92, 133 (testimony regarding the observed behavior of dolphins). As a result, these behaviors, as exhibited in this instance, are signs of disturbance.

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[26] *See supra* note 25.

[27] The record reflects that these videos were filmed by Respondent Cho, not at the location of the incident at issue in this proceeding, but at a location within the vicinity of Kawaihae Harbor, Hawaii. *See* Tr. 247-48.

As the evidence reflects that Respondent Cho's conduct in operating the tour boat in circles in a manner that generated significant wake and encircled dolphins is an act of annoyance that had the potential to disturb a marine mammal, as demonstrated by the actual disturbance of dolphins, this conduct is Level B harassment. Accordingly, Respondent Cho violated the MMPA and implementing regulations, as charged by the Agency, by unlawfully taking a marine mammal through this conduct, in addition to his conduct in moving the tour boat in front of a pod of dolphins and offloading passengers to swim in the path of the dolphins.

In finding that Respondent Cho's conduct on October 23, 2014, constitutes Level B harassment, I considered the arguments made by the Agency that such conduct also constitutes Level A harassment. However, the evidence of record does not support a finding that Respondent Cho's behavior on the tour at issue constitutes Level A harassment. As previously discussed, Level A harassment is any act of pursuit, torment, or annoyance, which has the potential to injure a marine mammal or marine mammal stock in the wild. *See* 16 U.S.C. § 1362(18); 50 C.F.R. § 216.3. The Agency offers three bases for finding that Respondent Cho's conduct constitutes Level A harassment: (1) the conduct had the potential to injure dolphins through possible vessel strikes; (2) the conduct had the potential to injure dolphins, or the dolphin stock, by causing depletion of energy; and (3) the conduct had the potential to injure dolphins, or the dolphin stock, by distracting dolphins from predators and displacing dolphins from preferred resting areas into areas where they are more likely to be susceptible to predators. *See* Ag. In. Br. at 11-12. I do not find the Agency's arguments for finding Level A harassment to be supported by the facts established in this matter. Although Respondent Cho's conduct in operating the tour boat disturbed dolphins, as discussed above, the evidence does not clearly establish that the tour boat was within the proximity of the dolphins to potentially injure them as the result of boat strikes. Likewise, the evidence does not establish that Respondent Cho's conduct on October 23, 2014, had the potential to injure a dolphin through depleting its energy, distracting it from a predator, or displacing it into waters where it would be susceptible to predators. Although Ms. McCue indicated in her testimony that ongoing disturbance to spinner dolphins could possibly lead to negative long-term consequences such as reduction in energy and displacement, *see* Tr. 194-96, this testimony does not support that disturbance to dolphins on a single date, such as that at issue here, has the potential to cause such long-term injuries. Accordingly, contrary to the Agency's assertions, I do not find that Respondent Cho's conduct constitutes Level A harassment.

Having determined Respondent Cho's liability for the alleged violation, I address the liability of Respondent Auwana Hawaii. Though not specifically addressed by the parties, it is a well-established principle that an employer may be vicariously liable for an employee's acts when such acts are committed in the scope of employment and in furtherance of the employer's business, pursuant to the theory of respondeat superior. *See United States v. Kaiyo Maru Number 53*, 503 F. Supp. 1075 (D. Alaska 1980), aff'd, 699 F.2d 989 (9th Cir. 1983) (finding a vessel owner vicariously liable for violations of captain and crew); *Nguyen*, 2012 NOAA LEXIS 2 (NOAA Jan. 18, 2012) (finding a vessel owner vicariously liable for the actions of an employee operator under respondeat superior); *Kim*, 2003 NOAA LEXIS 4, at * 26 (NOAA Jan. 7, 2003) ("The idea behind respondeat superior is to subject an employer to liability for whatever is done by the employee in virtue of his employment and in furtherance of its ends."); *Raposa*, 1995 NOAA LEXIS 43 (NOAA App. Aug. 31, 1995) (upholding determination that operator

was the owner's agent and owner could be held liable under respondeat superior); *Peterson*, 6 O.R.W. 486 (NOAA 1991) (finding that owner and operator of a vessel were engaged in a joint venture, and therefore, each was vicariously liable for the violations of the other); Restatement (Third) of Agency § 7.03(2) (2006) (providing that a principal is subject to vicarious liability for an agent's conduct when that agent is an employee who commits a tort while acting the scope of employment). Nothing in the record supports a deviation from this principle in the present proceeding. Rather, the evidence in this matter supports a finding that Respondent Auwana Hawaii is vicariously liable for Respondent Cho's violative conduct under the theory of respondeat superior.

Pursuant to the theory of respondeat superior, "an employer may be vicariously liable for its employee's acts committed in the scope of employment while furthering the employer's business." *Nguyen*, 2012 NOAA LEXIS 2, at *12-13. The facts in this case support that Respondent Cho's violative conduct was committed in the scope of his employment for Respondent Auwana Hawaii, and in furtherance of Respondent Auwana Hawaii's tour business. The record reflects that Respondent Cho is the owner and manager of Respondent Auwana Hawaii, Tr. 38-39, 239; A2 at 1, 3, 5-9, and that he operated the dolphin swim excursion on October 23, 2014, along with two other crew members, on behalf of Respondent Auwana Hawaii, Tr. 240-41; RB at 1. Thus, there is support in the record to demonstrate that Respondent Cho conducted the violative conduct in the scope of his employment, and in furtherance of Respondent Auwana Hawaii's tour business. I conclude, therefore, that Respondent Auwana Hawaii is vicariously liable for unlawfully taking a marine mammal on October 23, 2014, in violation of 16 U.S.C § 1372 and 50 C.F.R. § 216.11.

As I have determined that Respondents are liable for unlawfully taking a marine mammal on October 23, 2014, the sole count charged in this proceeding, I need not address the Agency's remaining alternative theory that Respondents committed an unlawful take of a marine mammal by temporarily detaining dolphins in the wake of the tour boat, as liability has been established for the charged violation. Likewise, it notable that Respondents' violative conduct, which resulted in disturbance to dolphins, may also constitute a taking of a marine mammal though negligent operation of a vessel resulting in disturbing or molesting a marine mammal, pursuant to the definition of take in 50 C.F.R. § 216.3. However, as the Respondents are found to have committed an unlawful take of a marine mammal though Level B harassment, in violation of 16 U.S.C § 1372 and 50 C.F.R. § 216.11, I need not address liability under this theory.

V. CIVIL PENALTY

a. Principles of Law and Policy Relevant to Civil Penalty

In making a determination as to a civil penalty, 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; *see also* 15 C.F.R. § 904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631 (June 23, 2010). The Administrative Law Judge must independently determine an appropriate penalty "taking into

account all of the factors required by applicable law." 15 C.F.R. § 904.204(m); *see also* 15 C.F.R. § 904.108 (enumerating factors that may be considered in assessing a penalty).

The MMPA provides that any person who violates any provision of the Act or implementing regulation may be assessed a civil penalty not to exceed $10,000 for each such violation. *See* 16 U.S.C. § 1375(a)(1). However, consistent with the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990), as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996), the maximum civil penalty available under the MMPA has been increased to $27,950 per violation to adjust for inflation. Civil Monetary Penalty Adjustments for Inflation, 81 Fed. Reg. 95,432, 95,434 (Dec. 28, 2016).

To determine the appropriate amount of civil penalty to assess, 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 utilizes the Penalty Policy that is publicly available on the Internet.[28] *See* http://www.gc.noaa.gov/documents/Penalty%20Policy_FINAL_07012014_combo.pdf; http://www.gc.noaa.gov/enforce-office3.html.

Under the Penalty Policy, penalties are based on:

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

Penalty Policy at 4. As mentioned above, the "initial base penalty" amount consists of two factors, collectively constituting the seriousness of the violation: "(1) the gravity of the prohibited act that was committed; and (2) the alleged violator's degree of culpability" (assessing the mental culpability in committing the violation). *Id.* The "gravity" factor (also referred to as "gravity of the violation" or "gravity-of-offense level") is comprised of four or six (depending

[28] As discussed earlier in this decision, I took official notice of the Agency's Penalty Policy and have considered it in rendering this decision. *See supra* p. 2; Tr. 10-11.

upon the particular statute at issue) different offense levels, reflective of a continuum of increasing gravity, taking into consideration the nature, circumstances, and extent of a violation.[29] *Id.* at 6-8. Thus, offense level I represents the least significant offense level and offense level VI represents the most significant offense level. *Id.* at 8.

The "culpability" factor (also referred to as "degree of culpability") is comprised of four levels of increasing mental culpability: unintentional activity (such as an act that is inadvertent, unplanned, and the result of accident or mistake); negligence (such as carelessness or a lack of diligence); recklessness (such as a conscious disregard of substantial risk of violating conservation measures); or an intentional act (such as a violation that is committed deliberately, voluntarily, or willfully). Penalty Policy at 8-9.

These factors are depicted in a penalty matrix, with the "gravity" factor represented by the vertical axis of the matrix and the "culpability" factor represented by the horizontal axis of the matrix. Penalty Policy at 6. The intersection point from the levels used in each factor then identifies a penalty range on the matrix. *Id.* at 7. The midpoint of this penalty range determines the "initial base penalty" amount. *Id.* Once an "initial base penalty" amount is determined, "adjustment factors" are considered in order to increase or decrease the initial base penalty amount from the midpoint of the penalty range, or to move to an altogether different penalty range, where appropriate. *Id.* at 9-10. The "adjustment factors" consist of an alleged violator's history of prior offenses, and "other matters as justice may require," which includes consideration of the good or bad faith activities of the alleged violator after a violation occurs as well as "other considerations." *Id.* at 9, 12. After the application of any adjustment factors, the resulting figure constitutes the "base penalty." *Id.* at 9. Next, the proceeds gained from unlawful activity and any additional economic benefit of non-compliance to an alleged violator are considered and factored into the penalty calculation (such as the gross value of fish, fish product, or other product illegally caught, or revenues received; delayed costs; and avoided costs). *Id.* at 13-14. Finally, the Agency "will consider at the appropriate stage the ability of the alleged violator to pay a penalty" when requested information that is "verifiable, accurate, and complete" has been provided. *Id.* at 14-15.

In making the following determination regarding the amount of civil penalty to assess Respondents for their violation of the MMPA, I considered the factors set forth in the Rules of Practice, at 15 C.F.R. § 904.108(a), and the Penalty Policy, as substantively discussed below.

b. Parties' Arguments as to Civil Penalty

Addressing the nature and circumstances of the charged violation, the Agency asserts that "Respondents operate a business based on the exploitation of wild Hawaiian spinner dolphins." Ag. In. Br. at 13. The Agency argues that Respondents' violative conduct has a short-term negative impact on spinner dolphins, but also has the potential to cause long-term problems, such as displacement. Ag. In. Br. at 14. The Agency suggests the admission made by Respondent Cho to Officer Ridzon following the incident indicates that the conduct associated with the

[29] 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 "is common and frequent behavior for Respondents." Ag. In. Br. at 14. While noting that this case involves one incidence of violation, the Agency argues that "the repetitious nature and the frequency of this kind of behavior by Respondent[s] and others lends to the gravity of the offense." Ag. In. Br. at 14.

With regard to culpability, the Agency argues that

> Respondents intentionally engaged in conduct they knew was detrimental to the health of the animals, despite the educational and outreach materials provided them by the Agency and despite Respondent Cho's having been issued a summary settlement for similar conduct a short time before the incident giving rise to this case.

Ag. Br. at 14. The Agency additionally argues that evidence of a prior violation of the MMPA by Respondent Cho, addressed in the testimony of Officer Viloria, should be considered in determining the penalty for Respondents in this matter.[30] Ag. Rep. Br. at 2. In support of this argument, the Agency references evidence establishing that Respondent Cho was the operator of the jet ski used in the prior violation, as well as evidence indicating that the jet ski associated with the prior violation was registered to Respondent Auwana Hawaii.[31] Ag. Rep. Br. at 2. The Agency further notes that Respondent Cho paid the fine associated with the prior violation with a check drawn from the account of Respondent Auwana Hawaii.[32] Ag. Rep. Br. at 2.

Finally, the Agency urges that I consider that Respondents derived an economic benefit of $1,605 from the tour at issue, arguing that "[j]ustice requires that Respondents should be divested of this amount in addition to the imposition of a penalty that adequately recognizes the harm to the resource and the intentional nature of Respondents conduct." [33] Ag. In. Br. at 14. The Agency asserts that this economic benefit should be added to the penalty, as "[c]ivil penalties should serve to remove any incentive to violate the law." Ag. In. Br. at 14.

Respondents, in addressing arguments relating to penalty, do not specifically address the nature, circumstances, extent, and gravity of the violation, or the Respondents' degree of

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[30] It is notable that the Agency did not include an increase in penalty for Respondent Cho's prior violation in the worksheet submitted with the NOVA reflecting the recommended penalty assessment.

[31] There appears to be some discrepancy in the documentary evidence as to the registered owner of the jet ski involved in Respondent Cho's prior violation. In the Division of Conservation and Resources Enforcement Investigation Report addressing Respondent Cho's prior violation, one portion of the report identifies Respondent Cho as the registered owner of the jet ski, A5 at 4, whereas another section of the report refers to the registered owner (presumably abbreviated as "RO" in the report) as Respondent Auwana Hawaii, A5 at 6.

[32] Notably, the record reflects that Respondent Auwana Hawaii paid the fine associated with Respondent Cho's prior violation in January 2015, following the violation at issue in this matter, which occurred in October 2014.

[33] As with consideration of Respondent Cho's prior penalty, the Agency notably did not include proceeds from unlawful activity or economic benefit in the worksheet submitted with the NOVA reflecting the recommended penalty assessment.

culpability in the violation. However, Respondents cite testimony from Respondent Cho stating his belief that his conduct is not harassing dolphins and that he is respectful of dolphins. Resps. Rep. Br. at 10. Furthermore, Respondents argue that information provided by Officer Viloria to Respondent Cho at the time of Respondent Cho's prior violation would not have caused Respondent Cho to be aware that the dolphins were at rest during the incident at issue in this matter. Resps. In. Br. at 9; Resps. Rep. Br. at 14.

With regard to Respondent Cho's prior violation, in both their Initial Post-Hearing Brief and Reply Brief, Respondents argue that Respondent Cho's prior violation, addressed in the testimony of Officer Viloria, "should not be considered for any matter as it was a recreational matter and did not involve [Respondent] Auwana [Hawaii] nor did [it] involve Respondent Cho as a captain of a vessel." Resps. In. Br. at 9; Resps. Rep. Br. at 13. Respondents further argue that the circumstances of the two violations differ, noting differences between Respondent Cho's prior violation and the violation at issue in this matter with regard to the distance of the dolphins from the vessels and the activity exhibited by the dolphins at the time of violation. Resps. In. Br. at 9; Resps. Rep. Br. at 13-14.

c. Discussion of Civil Penalty and Assessment

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

I have considered the ample information of record regarding the nature, circumstances, extent, and gravity of Respondents' violation in making the penalty assessment. The record reflects that the Respondents' violative conduct occurred during daytime hours, when spinner dolphins are typically resting. *See* Tr. 246, 261 (reflecting conduct at issue occurred during daytime hours); Tr. 185-87; A3 at 1; A4 at 3 (discussing the rest habits of spinner dolphins). The Agency established that disturbance to spinner dolphins during resting hours is a pervasive conservation concern, *see* Tr. 191-92, particularly due to the rigid or fixed nature of spinner dolphins' behavior, *see* Tr. 185-86; A3 at 1, and the substantial overlap between the resting habitat of spinner dolphins and recreational areas for humans, *see* Tr. 188. Furthermore, the evidence reflects that disturbance to spinner dolphins during resting hours, such as that established in this matter, can detriment the ability of these dolphins from getting adequate rest, *see* Tr. 190; A3 at 2, and that such impaired rest could possibly lead to negative long-term consequences for the dolphins over time, such impaired nutrition, reduced reproductive success, and displacement, s*ee* Tr. 194-96; A3 at 2.

Additionally, with regard to the extent and gravity of the violation, it is significant that the violative conduct at issue involved two different actions within one day, both of which actually disturbed dolphins. Further, it is notable that acts of pursuit and annoyance involved in the violation are consistent with Respondents' admitted practices, which suggests these acts are commonplace for Respondents. *See* Tr. 242-44, 257 (testimony of Respondent Cho indicating the acts of pursuit and annoyance at issue are consistent with general practices). Accordingly, the evidence warrants the gravity level of II reflected in the Penalty Policy for the associated violation. *See* Penalty Policy at 54 (reflecting a gravity level of II for harassment of a marine mammal under the MMPA).

ii. Respondents' Culpability, History of Violations, and Ability to Pay

With regard to the culpability of Respondents, the evidence establishes that Respondents acted with recklessness, consciously disregarding the substantial risk of violating the MMPA through their actions. The record reflects that Respondents should have known that there was a substantial risk that their violative conduct would harass marine mammals, but that Respondents engaged in such conduct on October 23, 2014, regardless of this risk. This culpability finding is supported by both information the Agency sent Respondent Auwana Hawaii regarding observation of marine mammals in the wild under the MMPA, and Respondent Cho's prior violation of the MMPA for similar conduct.

The Agency established that it mailed Respondent Auwana Hawaii, under its trade name, Adventure X Rafting, an outreach letter and accompanying informational material regarding observation of marine mammals in the wild under the MMPA, which specifically address the behavioral patterns of spinner dolphins and appropriate wild dolphin viewing. *See* Tr. 200 (testimony discussing mailing this information); A6 (Agency records regarding mailing); A6; A10 (outreach letter and accompanying informational materials). Notably, the record reflects that the outreach letter and accompanying informational materials were delivered on March 28, 2012, substantially prior to the violation at issue. A6 at 2; *see also* Tr. 203-04 (testimony discussing delivery of the relevant materials by certified mail). The outreach letter provided guidelines to avoid harassment when viewing wild dolphins, which included guidance to "maintain a vessel position slightly parallel to, and behind, the dolphin," and "[d]o not place yourself, your guests, or your watercraft in the predictable path of the dolphins (also known as 'leapfrogging')." A4 at 1. The outreach letter also advised that "[d]olphins should not be encircled." A4 at 1. Likewise, the informational materials enclosed with the outreach letter informed that spinner dolphins rest "from sunrise until late afternoon," A4 at 3, and further advised:

> Any act of pursuit, torment, or annoyance that has the potential to change a marine mammal's behavior is considered to be harassment under the Marine Mammal Protection Act (MMPA), and therefore, against the law. When people swim with resting wild spinner dolphins, the dolphins may be drawn out of their resting state to investigate swimmers. This may be a change in behavior which is considered harassment and is illegal.

A4 at 4. Accordingly, from the information provided in the outreach letter and accompanying material, Respondent Auwana Hawaii, and its owner and manager, Respondent Cho, should have known that there was a substantial risk that moving a tour boat in front of a pod of spinner dolphins to offload passengers to swim in the path of the dolphins, and operating a tour boat in circles in a manner that generates significant wake and encircles dolphins, during the daytime, would result in harassing marine mammals. As a result, Respondents' decision to engage in this violative conduct following receipt of such information reflects that Respondents acted recklessly.

Likewise, the record reflects that Respondents should have known that there was a substantial risk their violative conduct would harass marine mammals from Respondent Cho's prior violation of the MMPA for taking a marine mammal through conduct constituting harassment on September 8, 2014. *See* A5 (investigation report and summary settlement). Given the extent of similarity between the conduct in the violation at issue in this matter and that at issue in Respondent Cho's prior violation, Respondents should have known that there was a substantial risk that their violative activity on October 23, 2014, would result in harassing marine mammals.

At the time of the prior violation, approximately 11:05 a.m. on September 8, 2014, Officer Viloria observed Respondent Cho operating a jet ski with a passenger in the vicinity of Kawaihae, Hawaii. A5 at 5; Tr. 105. Officer Viloria reported that he saw Respondent Cho approach the outer edge of a pod of spinner dolphins moving in a clockwise circular pattern nearby the shore. A5 at 5; Tr. 110, 112. Officer Viloria subsequently observed a portion of the pod of dolphins move south, away from the jet ski, and he saw Respondent Cho drive the jet ski into the remaining pod, separating the remaining pod. A5 at 5; Tr. 110. When Respondent Cho separated the remaining pod of dolphins, the passenger on the jet ski entered the water, and Officer Viloria observed Respondent Cho drive the jet ski slowly in circles around dolphins and the passenger in the water. A5 at 5; Tr. 110-11. After a few circles, Officer Viloria saw the remaining pod of dolphins travel south, away from the jet ski, and noticed the dolphins jumping, swimming on their sides, and breaking the water while they were traveling. A5 at 5. Once the dolphins traveled away from the jet ski, the passenger returned to the jet ski, and Respondent Cho followed the dolphins. *Id.*

After observing Respondent Cho's conduct, Officer Viloria advised Respondent Cho that he violated the MMPA by disrupting spinner dolphins at rest, and informed him that he would prepare a report regarding Respondent Cho's conduct towards the pod of dolphins for NOAA to review. *See* A5 at 6; Tr. 112-14. Officer Viloria further advised Respondent Cho that spinner dolphins are typically at rest when swimming in a clockwise pattern, and that breaking from that pattern is usually a sign of disruption to them. Tr. 113. In response to Officer Viloria's report, Respondent Cho and his passenger were charged with the unlawful taking of a marine mammal for the aforementioned conduct on September 8, 2014, and Respondent Cho was provided with an Enforcement Action Report reflecting the charged violation. A5 at 1-3, 8-10. Respondent Cho entered a summary settlement for this violation, and Respondent Auwana Hawaii paid the associated fine by check executed by Respondent Cho. A5 at 2, 9-11.

The conduct involved in Respondent Cho's prior violation had similar characteristics to the conduct at issue in the current proceeding. Although Respondent Cho's prior violation involved the use of a jet ski, rather than a tour boat, and was recreational, rather than commercial, in nature, both violations involved disturbing spinner dolphins in the daytime by approaching dolphins and placing a passenger, or passengers, in the water near dolphins, as well as operating a watercraft in circles around dolphins. Accordingly, from Respondent Cho's prior violation involving similar conduct, Respondents should have known that there was a substantial risk that the conduct at issue in this proceeding would harass marine mammals. Notably, although Respondent Cho's prior violation appears to involve conduct outside of the scope of his employment with Respondent Auwana Hawaii, Respondent Auwana Hawaii was clearly aware

of the prior violation, as Respondent Cho is the owner and a manager of Respondent Auwana Hawaii.[34] Tr. 38-39, 239; A2 at 1, 3, 5-9.

Although Respondent Cho indicated in his testimony that he believed the fine paid for summary settlement of the prior violation was associated with a related jet ski violation, and not for violation of the MMPA, Tr. 250, 266-67, I find this testimony lacking in credibility, given that Officer Viloria informed Respondent Cho that he violated the MMPA directly following the prior violation, *see* A5 at 6; Tr. 112-14, and also that the Enforcement Action Report identifying the prior violation as a prohibited taking of a marine mammal was attached to the Summary Settlement executed by Respondent Cho, *see* A5 at 8-11.[35] Likewise, I do not find Respondents' argument that the information provided by Officer Viloria at the time of Respondent Cho's prior violation was insufficient for Respondent Cho to be aware that the dolphins were at rest during the incident at issue in this matter to be compelling for purposes of negating Respondents' culpability. The fact that Respondent Cho previously violated the MMPA by harassing dolphins through conduct similar to that at issue, and that he was informed of this violation by Officer Viloria, was sufficient to inform Respondents that there was a substantial risk such conduct would harass marine mammals, even in the absence of Officer Viloria relaying information regarding the resting patterns of spinner dolphins.

In making a determination regarding Respondents' culpability for the violation at issue, I considered the testimony of Respondent Cho regarding his affinity for marine mammals, and his belief that his conduct does not harass dolphins. *See* Tr. 251, 256. Nevertheless, I find that the record reflects that Respondents acted with recklessness in committing the violation at issue, as Respondents should have known that there was a substantial risk that their violative conduct would harass marine mammals given the information the Agency sent to Respondent Auwana Hawaii regarding observation of marine mammals in the wild under the MMPA, and Respondent Cho's prior violation of the MMPA for similar conduct. I note that while this evidence reflects that Respondents acted recklessly in committing the violation at issue in this matter, the record does not, as the Agency suggests, support a finding that Respondents intentionally violated the MMPA. Accordingly, applying the finding of Respondents' reckless culpability in committing the violation at issue, with the established gravity level of II for the violation, results in a base penalty range of $1,500 to $2,000, with an initial base penalty amount of $1,750, under the Penalty Policy framework. *See* Penalty Policy at 27; *see also* Penalty Policy at 4-5, 7 (discussing calculation of the initial base penalty).

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[34] Additionally, as previously noted, a portion of the Division of Conservation and Resources Enforcement Investigation Report, identifies Respondent Auwana Hawaii as the registered owner (presumably abbreviated as "RO" in the report) of the jet ski. A5 at 6. However, this information is otherwise contradicted by another portion of the same report, which identifies Respondent Cho as the registered owner of the jet ski. A5 at 4. As a result, the ownership of the jet ski involved in the prior violation remains unclear.

[35] Although the Summary Settlement for Respondent Cho's prior violation appears to have been entered following the violation at issue in this proceeding, *see* A5 at 10, the fact that the Enforcement Action Report identifying the prior violation as a prohibited taking of a marine mammal was attached to this document is relevant to the credibility of Respondent Cho's testimony that he believed the fine he paid for the prior violation was associated with a jet ski violation.

After determining the appropriate initial base penalty amount for Respondents' violation, I next consider whether Respondents' history of prior violations warrants adjustment of that amount. As discussed above, Respondent Cho previously violated the MMPA on September 8, 2014, by taking a marine mammal through conduct constituting harassment. *See* A5. I disagree with Respondents' contention that this prior violation should not be considered in calculating the penalty, and instead, find that this prior violation warrants an increase in the penalty amount. Notably, the close temporal proximity of Respondent Cho's prior violation to the violation at issue in this matter supports upward modification of the penalty amount.

Likewise, contrary to the argument of Respondents otherwise, the similarity between the violations warrants an increase in the penalty amount. As previously discussed, Respondents argue that Respondent Cho's prior violation is dissimilar to the current violation, and therefore should not be considered, because it was recreational in nature, and the current violation involves commercial activity. *See* Resps. In. Br. at 9; Resps. Rep. Br. at 13. In considering prior violations for penalty adjustment purposes, the Penalty Policy does not distinguish between whether prior violations were recreational or commercial in nature. *See* Penalty Policy at 10-11. Likewise, I find no reason to make such a distinction in considering Respondent Cho's prior violation for penalty adjustment purposes, particularly given the substantially similar conduct involved in the prior violation to the violation at issue. As previously discussed, both violations involved disturbing spinner dolphins in the daytime by approaching dolphins and placing a passenger, or passengers, in the water near dolphins, as well as operating a watercraft in circles around dolphins. *See supra* pp. 15-20; *see also* A5 at 1-3, 5-6 (investigative reports from prior violation that document similar characteristics to violation at issue). Although there are some differences between the conduct involved in Respondent Cho's prior violation, and the conduct involved in the violation at issue in this matter, the substantial similarity in the conduct involved in both violations supports upward modification of the penalty amount.

Additionally, although Respondent Cho's prior violation appears to involve conduct outside of the scope of his employment with Respondent Auwana Hawaii, the record nevertheless supports an increase of the penalty for both Respondents, as Respondent Auwana Hawaii was clearly aware of Respondent Cho's prior violation, and there is no evidence that it exercised due diligence in addressing this prior violation. As previously noted, the record demonstrates that Respondent Auwana Hawaii was aware of Respondent Cho's prior violation, as Respondent Cho is the owner and a manager of Respondent Auwana Hawaii.[36] Tr. 38-39, 239; A2 at 1, 3, 5-9. Despite such awareness, no evidence was presented that Respondent Auwana Hawaii exercised due diligence in addressing the prior violation.[37] Accordingly, consistent with the Penalty Policy, Respondent Cho's prior violation warrants increasing the penalty for both Respondents. *See* Penalty Policy at 11 (directing the application of an increase in penalty to a vessel owner for a prior violation of a crewmember unless the owner exercised due diligence in addressing the prior violation). Given the similarity between the prior violation and the violation at issue, the prior violation warrants an increase in penalty by one box under the

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[36] It is further notable that the passenger involved in the prior violation was also an employee of Respondent Auwana Hawaii. *See* A5 at 6.

[37] As noted by the Agency, the record reflects that Respondent Auwana Hawaii paid the fine associated with Respondent Cho's prior violation. *See* A5 at 11. Nevertheless, the record does not reflect that Respondent Auwana Hawaii exercised due diligence in addressing this prior violation.

Penalty Policy framework, resulting in an adjusted base penalty range of $2,000 to $3,000, with an adjusted base penalty amount of $2,500. *See* Penalty Policy at 10 (discussing increase for similar prior violations), 27 (matrix framework for MMPA violations). I find that the adjusted base penalty amount of $2,500 adequately reflects both Respondents' culpability and the warranted increase in penalty for Respondent Cho's prior violation.

Turning to Respondents' ability to pay, the Rules of Practice provide that if a respondent wants the presiding judge to consider his inability to pay the penalty, he must submit "verifiable, complete, and accurate financial information" to the Agency in advance of the hearing. 15 C.F.R. § 904.108(e). Respondents did not assert an argument of inability to pay a penalty, and did not supply evidence of an inability to pay a penalty in this proceeding. Accordingly, this factor was not a consideration in my assessment of the penalty for the violation at issue.

iii. Other Matters as Justice may Require

In considering other matters as justice may require in determining the penalty amount, I do not find that any such factors warrant penalty adjustment. For example, although I considered the conduct of Respondents following the violation, the circumstances present in this matter do not reflect good or bad faith activities following the violation that would warrant either downward or upward adjustment of the penalty amount. After discussing the violation with Officer Ridzon immediately following the violation, *see* A1 at 8; Tr. at 136, Respondents had limited involvement with the ensuing investigation into the violation, *see, e.g.*, A1; A2 (investigative reports for violation, reflecting limited involvement of Respondents in investigation); Tr. 47-51 (testimony from Special Agent Tomson reflecting he did not interview Respondent Cho during investigation). Such limited contact following the violation does not warrant an adjustment in the penalty amount. As a result, I did not adjust the penalty amount for such other matters.

iv. Proceeds of Unlawful Activity and Economic Benefit of Non-Compliance

Although the Agency urges that I add the amount of $1,605 to the penalty amount in consideration of Respondents' economic benefit from the violation, I do not find that the record supports the inclusion of this sum in the penalty. Although the record indicates that Respondent Auwana Hawaii received $1,605 in payment from passengers for the tour at issue in this matter, *see* Tr. 261; RB at 1, the record does not reflect that this amount constitutes either proceeds from unlawful activity or an economic benefit of non-compliance. The record reflects that the passengers of the tour at issue paid Respondent Auwana Hawaii for a dolphin swim excursion, and the Agency did not establish that such activity is inherently violative of the MMPA. Likewise, as Respondent Cho advised passengers that he could not guarantee that dolphins would even be viewed on the tour, Tr. 96, the record does not reflect that the collected ticket sales were proceeds from the unlawful activity of harassing the dolphins, as the circumstances do not reflect that passengers paid for tickets for the purpose of Respondents violating the MMPA, and, in fact, otherwise suggest that the passengers would have paid this sum if Respondents did not violate the MMPA on the tour by harassing dolphins. Furthermore, the Agency did not present even inferential evidence that Respondents derived an economic advantage by violating the MMPA, for example, by demonstrating that Respondents were able to make more for their

dolphin swim excursion than similarly situated tour companies that did not violate the MMPA. Accordingly, as the record does not establish that Respondents received proceeds from unlawful activity, or derived economic benefit from non-compliance, I do not find support for increasing the penalty on this basis.

Upon consideration of all the forgoing, including the aforementioned consideration of the factors listed in 15 C.F.R. § 904.108(a), and the Penalty Policy, it is hereby determined that for Respondents' unlawful taking of a marine mammal on October 23, 2014, a civil penalty in the amount of $2,500 is appropriate.

VI. DECISION AND ORDER

Respondents are liable for the charged violation in this case. A civil monetary penalty of $2,500 is imposed on Respondents for the charged violation.

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

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

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

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

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

SO ORDERED.

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

Dated: May 31, 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.