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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,)	No. CR 12-0002 EJD
)	
Plaintiff,)	
)	
v.)	
)	
NANCY BLACK,)	
)	
Defendant.)	
)	

**DEFENDANT NANCY BLACK'S SENTENCING MEMORANDUM
(WITH CONDITIONAL REQUEST FOR AN EVIDENTIARY HEARING)**

Date: January 13, 2014
Time: 1:30 p.m.

INTRODUCTION / OVERVIEW

Defendant Nancy Black, through counsel, submits this memorandum in connection with sentencing. Ms. Black has pled guilty to a misdemeanor violation of 16 U.S.C. § 1375(b), 50 C.F.R. §§ 216.3, 216.11(b) (feeding or attempting to feed a marine mammal in the wild) in violation of Marine Mammal Protection Act (“MMPA”) regulations. The *Plea Agreement* (Doc. 41) is entered pursuant to Rule 11(c)(1)(C). The parties agree on the Guidelines calculations, resulting in an Adjusted Offense Level of 6, a Criminal History Category of I, and a resulting sentencing range of 0-6 months. The parties also agree on several other aspects of the plea: that no incarceration should be imposed, that five special conditions of probation should be imposed, that Ms. Black should complete 300 hours of community service, and that she’ll pay a \$25 special assessment. The terms upon which agreement has not been reached are the length of probation (which may range from 1 year to 5 years) and the fine (which may range from \$0 to \$100,000).

While the Probation Office’s ultimate recommendation regarding most aspects of the sentence is in line with the above agreement, the Probation Office arrives there through different Guidelines calculations. The parties respectfully disagree with the Probation Office’s Guidelines calculations. The defense further disagrees sharply with a number of points stated as facts and conclusions in the Presentence Report (“PSR”), and while the defense does not wish to prolong or further complicate these misdemeanor proceedings, there may be a need to address these points substantively if they were to remain in the final PSR. *See United States v. Carter*, 219 F.3d 863, 866 (9th Cir. 2000) (an important purpose of resolving disputed facts and allegations in the PSR is to eliminate the unfairness that would result if probation or prison officials were later to rely on false allegations or incorrect information in the PSR in making post-sentencing determinations); *United States v. Hardy*, 289 F.3d 608, 614 (9th Cir. 2002) (doubts about disputed facts affecting punishment must be resolved in favor of the defendant).

1 To the defense's knowledge, Ms. Black is the first person to face federal criminal charges for
2 "feeding" a marine mammal in violation of MMPA regulations. Violations enforced by the National
3 Oceanic and Atmospheric Administration ("NOAA") against other citizens (many which involve acts far
4 more egregious than Ms. Black's) have resulted simply in the issuance of an administrative Notice of
5 Violation and Assessment of Civil Penalty ("NOVA") and the payment of a moderate fine of a few
6 thousand dollars. By contrast, Ms. Black has been the subject of a NOAA and Department of Justice
7 ("DOJ") investigation and prosecution running from 2005 to the present, she has had to pay considerable
8 sums to defend herself in connection with the investigation and prosecution, she effectively has been
9 prohibited from pursuing her research as a marine biologist (which research has contributed
10 substantially to the marine resource and the knowledge base of the scientific community), she has been
11 isolated from her scientific colleagues through NOAA's actions, she has had to undergo the considerable
12 stress, anxiety and ignominy that accompany a federal investigation and criminal prosecution, and she
13 now has suffered a federal criminal conviction and she will be placed on federal probation.

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17 In light of all this, the defense respectfully requests that the Court impose a sentence of two years
18 probation with the five special conditions of probation set forth in the *Plea Agreement*, 300 hours of
19 community service, a fine of \$500, and a special assessment of \$25.¹ Such a sentence will be well
20 sufficient to comply with the purposes set forth in 18 U.S.C. § 3553(a) and, with all that Ms. Black has
21 suffered, it will be more than ample punishment.

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28 ¹ The defense believes that one year of probation would be sufficient for the purposes of 18
29 U.S.C. § 3553(a), but it is highly unlikely that Ms. Black will be able to complete the 300 hours of
30 community service in one year, so two years of probation is requested.

MEMORANDUM

I. Objections and Comments/Clarifications Re: The Presentence Report

A. Basic Legal Framework For Addressing Objections

As noted above, the defense is aware that this is a misdemeanor proceeding in which the sole two contested issues are the length of probation and the fine.² Defense counsel has been discussing with the Government possible ways to avoid protracted sentencing proceedings. Unfortunately, those mutual efforts have not produced a resolution. Contested sentencing proceedings therefore appear to be necessary including, potentially, an evidentiary hearing to address the most significant contested facts and conclusions in the PSR.

In undertaking such proceedings, Rule 32(i)(3)(B) directs that the district court “must – for any disputed portion of the presentence report or other controverted matter – rule on the dispute or determine that the ruling is unnecessary.” *See Carter*, 219 F.3d at 867 (if the Court chooses to rely on a disputed fact in imposing sentence, it must make an explicit factual finding that resolves the dispute or it must clearly state that the disputed fact was not taken into account in the sentencing determination). This principle, however, must be read in conjunction with the further principle explicated by the Ninth Circuit: that Rule 32 findings and determinations are necessary “because of the unfairness that would result to a defendant if prison or parole officials were to rely on false allegations or uncorrected reports.” *Carter*, 219 F.3d at 866; *accord United States v. Fernandez-Angulo*, 863 F.2d 1449, 1456 (9th Cir.

² The PSR additionally recommends that even more special conditions of probation be imposed, beyond the standard conditions and beyond the special conditions agreed to and specified by the parties in the *Plea Agreement*. Specifically, the PSR recommends that the voluntary whale watching guidelines set forth at p. 4, ¶ 14 of the PSR’s recommendations be imposed as additional conditions, which would make her subject to further criminal proceedings if she were accused of violating the guidelines. In light of the already-agreed special conditions, and under the doctrine of “inclusio unius est exclusio alterius” (i.e., the inclusion of one is the exclusion of another (Black’s Law Dictionary, 6th ed.)), the additional proposed special conditions should not be imposed.

1 1988) (modified on rehearing by *United States v. Fernandez-Angulo*, 897 F.2d 1514 (9th Cir. 1990) (en
2 banc)).

3 While hearsay evidence may be used in sentencing, *see* U.S.S.G. § 6A1.3(a), “a defendant
4 clearly has a due process right not to be sentenced on the basis of materially incorrect information,” and
5 the Ninth Circuit requires that “some minimal indicia of reliability accompany a hearsay statement.”
6 *United States v. Huckins*, 53 F.3d 276, 279 (9th Cir. 1995). And when hearsay statements of
7 codefendants are considered in resolving disputed matters at sentencing, there must be indicia of
8 reliability and/or there must be extrinsic evidence to corroborate the statements.³ *Id.* (district court
9 committed error in crediting a codefendant’s statements implicating the defendant because the
10 statements were made in the context of plea negotiations with the Government, in which the codefendant
11 may have been trying to curry favor for himself with law enforcement and/or the Government);
12 *Williamson v. United States*, 512 U.S. 594 (1994) (“the fact that a statement is self-inculpatory does
13 make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says
14 nothing at all about the collateral statement’s reliability”); *see also United States v. Mezas de Jesus*, 217
15 F.3d 638, 641-644 (9th Cir. 2000) (it is error to rely on contested hearsay statements of witnesses
16 contained in police reports or officers’ notes and incorporated into the presentence report). As explained
17 by the Circuit:
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22 Because of their inherent unreliability, police reports have generally been excluded
23 [at criminal trials] except to the extent to which they incorporate firsthand

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25 ³ While there are no formally-named codefendants, the PSR and the Government seek to
26 attribute to Ms. Black the acts undertaken by the crew of Jean-Michel Cousteau’s Ocean Futures Society
27 (“OFS”), by which the OFS crew seeks to blame Ms. Black for what they did. *See* PSR at ¶¶ 43, 45.
28 These attempts to blame Ms. Black are baseless and even mendacious, and in the context in which they
29 are raised, it is proper to view the crew’s statements with the skepticism applicable to a more traditional
30 “codefendant” who cooperates with the Government and seeks to lay blame at another’s feet, as the
crew apparently has done here.

1 observations of the officer. Fed. R. Evid. 803(8)(B) advisory committee's note.
 2 The rule's legislative history indicates that . . . the reason for this exclusion is that
 3 the observations by police officers at the scene of the crime or the apprehension of
 4 the defendant are not as reliable as observations by public officials in other cases
 because of the adversarial nature of the confrontation between police and the
 defendant in criminal cases.

5 *Id.* at 641 (citation and quotation marks omitted).

6 Doubts about disputed facts must be resolved in favor of the defendant. *Hardy*, 289 F.3d at 614
 7 (the rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions,
 8 but also to the penalties they impose") (citing *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1272 (9th Cir.
 9 2001) (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980))) (internal quotation marks omitted).

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 11 **B. Background Information Important To A Proper Evaluation Of The**
 12 **Statements And Conclusions Contained In The PSR**

13 In the introduction section of defense counsel's November 4, 2013 letter of objections to the
 14 draft PSR (which the Probation Office has provided to the Court), counsel addressed important
 15 overriding issues and concerns regarding the reliability of a number of persons who provided the
 16 Probation Office with information and conclusions that appear in the PSR. *See* pp. 1-4 of the letter of
 17 objections ("Nov. 4 objections letter"). In the Nov. 4 objections letter, counsel also provided
 18 observations made by and information obtained from others who have been involved in the
 19 investigation, which information conflicts with the Government's version of events (including NOAA's
 20 version) but which information was not considered or included in the PSR. Some of these persons are,
 21 themselves, long-time, well-respected NOAA scientists who effectively have been prohibited from
 22 voicing their observations and opinions on matters that are key to this prosecution and sentencing, even
 23 though their observations and opinions bear directly on the facts and conclusions contained in the PSR.

24 In the Nov. 4 objections letter, counsel also explicated important background information
 25 regarding the credibility of the lead Government agent in the case, SA Roy Torres, and his conduct in
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1 this case and previous cases. This is important because, *inter alia*, SA Torres was the conduit through
 2 which considerable information was filtered and provided to the Probation Office, which then was
 3 accepted and adopted into the PSR. The background information provided by the defense in this regard
 4 includes the letter dated July 15, 2013 from John Ford, Ph.D., Head, Cetacean Research Program &
 5 Adjunct Professor, Department of Zoology, University of British Columbia. *See* Attachment A. In that
 6 letter, Dr. Ford addresses SA Torres' report that flowed from his interview of Dr. Ford on February 21,
 7 2009:
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 10 During and immediately following the review of these videos⁴ [during SA Torres'
 11 interview of Dr. Ford], I provided verbal comments to Mr. Torres with the
 12 understanding that my comments were informal and did not constitute in any way
 13 a formal statement. I explicitly indicated to Mr. Torres that I did not wish to be
 14 involved in any way in this prosecution. [¶] I was not aware of the February 21,
 15 2009, memo until it was sent to me recently by a research colleague. This memo,
 16 according to Mr. Torres, is a "paraphrased synopsis of Ford's statements". **I have**
 17 **reviewed this memo and have serious concerns about how Mr. Torres has**
 18 **represented the opinions I expressed. Some of my comments are represented**
 19 **accurately but there are several inaccuracies or exaggerations in his**
 20 **descriptions of what I recall saying at the time. The memo also**
 21 **mischaracterizes some of the points I was seeking to make.** I have been told
 22 that Mr. Torres's memo has been submitted in connection with the sentencing
 23 hearing for Ms. Black, which I find particularly disturbing given that I was very
 24 clear that my informal comments were not to be used in this prosecution.

25 Letter of Dr. John Ford to U.S.P.O. dated July 15, 2013 (emphasis added) (Attachment A,
 26 NB2013Letters000022).⁵
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25 ⁴ The videos referenced here are those seized from Ms. Black upon the execution of a search
 26 warrant in 2006. These videos form the basis for important pieces of information contained in the PSR.

27 ⁵ This attachment is one of the letters of reference/support submitted with this *Sentencing*
 28 *Memorandum*. Those letters constitute Attachment and the pages have been Bates numbered
 29 collectively using the following convention: "NB2013Letters____." All specific references to those
 30 letters use this convention.

1 The introduction section of the Nov. 4 objections letter also includes information from other
 2 whale experts, such as Kenneth C. Balcomb III, Senior Scientist at the Center for Whale Research and
 3 one of the most respected orca researchers in the world. *See* Attachment A, NB2013Letters000014-
 4 000015. Mr. Balcomb recounts how he personally observed SA Torres's bias against Ms. Black and
 5 how SA Torres not only inappropriately harassed and "baited Nancy" but also actively muzzled NOAA
 6 and National Marine Fisheries Service ("NMFS") whale experts who disagree with the Government's
 7 and NOAA's actions and representations in connection with this case. Ms. Black's business partner,
 8 Richard Ternullo, corroborates Mr. Balcomb's account in his letter. *See* Attachment A, NB2013Letters
 9 000009-000010. Mr. Ternullo notes that the agent instructed Nancy's friends and colleagues at NOAA
 10 not to contact Nancy or share information with her. Mr. Ternullo also notes that the agent went so far as
 11 to humiliate Dr. Marilyn Dalheim (a co-researcher and colleague of Ms. Black's) with inappropriate and
 12 embarrassing questions, leaving her in tears, in connection with SA Torres's efforts to extract statements
 13 from her that are unfavorable to Ms. Black (which have made their way into the PSR). Mr. Ternullo
 14 also provides specific examples, based on his first-hand knowledge, of the agent's ignorance of whale
 15 behavior, whale watching, whale research, and various MMPA permit requirements, all of which are
 16 relevant to the prosecution of this case and this sentencing.

17 Additionally, NOAA has a history of improper conduct in investigating and prosecuting crime
 18 that is well documented. *See, e.g., Report and Recommendation of the Special Master Concerning*
 19 *NOAA Enforcement Action of Certain Designated Cases*, April 2011, available at
 20 <http://www.noaa.gov/lawenforcementupdates/specialmasterreport.pdf> (last visited 12/18/13). In the last
 21 14 years, the Office of the Inspector General ("OIG") has reprimanded NOAA seven times, and the
 22 2011 *Report and Recommendation* details 53 separate cases where misconduct had been alleged against
 23 NOAA in the way that it handled criminal investigations and prosecutions. *Id.*; *see also* Richard Gaines,

1 “Probe Cites Wrongs by NOAA Prosecutors,” Gloucester Times (Feb. 9, 2013) (discussing NOAA
 2 attorneys’ coercive conduct “with an intention to intimidate”), available at
 3 <http://www.gloucestertimes.com/local/x1525012733/Probe-cites-wrongs-by-NOAA-prosecutors/print>;
 4 Richard Gains, “Kerry, Brown Press NOAA for Fish Police Report,” Gloucester Times (July 31, 2012),
 5 available at [http://www.gloucestertimes.com/fishing/x614300915/Kerry-Brown-press-NOAA-for-fish-](http://www.gloucestertimes.com/fishing/x614300915/Kerry-Brown-press-NOAA-for-fish-police-report)
 6 [police-report](http://www.gloucestertimes.com/fishing/x614300915/Kerry-Brown-press-NOAA-for-fish-police-report).
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8 Further, much of the PSR is based on statements from disgruntled former employees and
 9 colleagues of Ms. Black (designated in the PSR by the initials DF, SG, PS, HT and others), some of
 10 which were made after Ms. Black fired them for cause or otherwise separated from them under
 11 acrimonious circumstances. These witnesses’ later statements also are often materially inconsistent with
 12 their earlier statements.
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14 In light of this background information relevant to the credibility of many of the sources of
 15 information that appears in the PSR, much of the information and many of the conclusions contained in
 16 the PSR are unreliable and lack credence.
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18 **C. Objections And Comments/Clarifications Re: The PSR**

19 As noted previously, defense counsel has sought to resolve the outstanding issues with the
 20 Government, but those discussions have been unfruitful. Counsel therefore poses the following
 21 objections to the PSR and conditionally requests an evidentiary hearing to address them.
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23 **1. Guidelines Calculations, To Which The Defense And The** 24 **Government Object Pursuant To The Rule 11(c)(1)(C) Plea** 25 **Agreement**

26 The *Plea Agreement* sets forth the proper Guidelines calculations. Those calculations are
 27 supported by the reliable evidence; the significant increases proposed in the PSR are not. The defense
 28 and the Government object to the PSR’s Guidelines calculations in ¶ 55 (proposed 2-level increase
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under § 2Q2.1(b)(1)(A)), ¶ 57 (proposed 2-level increase under § 3B1.3), ¶ 58 (proposed 3-level increase under § 3B1.1.1(b)), and ¶ 59 (proposed 2-level increase under § 3C1.1). The defense and the Government relatedly object to the paragraphs that flow from these higher proposed calculations, including ¶ 63 (Total Offense Level), ¶¶ 96-102, ¶ 104, and any sentencing recommendations from the Probation Office which flow from these higher proposed Guidelines calculations. The Guidelines calculations set forth in the *Plea Agreement* are accurate and appropriate and the Court should accept them, rather than necessitate an evidentiary hearing regarding them.

2. Objections To Specific Paragraphs In The PSR

The defense submits the following six objections to specific paragraphs in the PSR. While the Court will note that these objections are pared down considerably from those contained in the Nov. 4 objections letter, this paring down does not concede the accuracy or veracity of the paragraphs in the PSR that are not objected to here; the defense simply focuses here on the most pertinent issues. Many of the factual statements and conclusions in the PSR that are not objected to here are, indeed, contested and the sources for much of what appears in the PSR have questionable credibility and motives, as outlined above and in the introduction to the Nov. 4 objections letter. The abbreviated list of objections here addresses the paragraphs that are most important and/or most egregiously inaccurate.

a. Paragraph 28 (proposed addition of whale watching guidelines as special conditions of probation)

Paragraph 28 (and the related recommendation in the PSR to expand the list of special conditions of probation) concern the whale watching recommendations of the Wildlife Disturbance Working Group in 2003, which are recommended guidelines without legal effect. Ms. Black will continue to do her best to comply with these recommendations, but they should not be included as additional probationary conditions, particularly in light of the special probation conditions already specified and agreed to in the Rule 11(c)(1)(C) plea agreement.

b. Paragraph 34 (events involving the encounter with the “friendly” humpback whale)

Paragraph 34 concerns the sequence of events involving and following the “friendly” humpback whale incident in late 2005. The “facts” stated in the PSR are significantly different from the facts to which the parties stipulated in the *Plea Agreement* (at pp. 4:20-5:10). Paragraph 34 should be deleted and the following (reflecting the substance of pp. 4:20-5:10 of the *Plea Agreement*) should be substituted in its place:

In connection with the “friendly” whale incident of October 12, 2005, Black met with a Sanctuary Officer and a NOAA Investigative Agent at their offices in Monterey on or about October 24, 2005. The Sanctuary Officer was investigating the potential harassment of an endangered humpback whale that was reported to have occurred on October 12. The interaction with the humpback whale had been filmed by one of Black’s crewmembers with a camera that uses a Fuji Film mini DVM 60 video cassette. During a telephone call before the October 24 meeting, the Sanctuary Officer asked Black if she had any videotape of the humpback whale encounter. She told him that a crewmember had taped it, and he asked her to provide the videotape. She voluntarily agreed to provide the videotape during the October 24 meeting, but before the meeting, she took the original videotape, put the video footage on her computer, and edited it to remove several minutes of footage that included some footage of the humpback whale between two vessels that belonged to her whale watching business, extraneous footage, and sounds. She then put the edited footage on another Fuji Film mini DVM 60 video cassette and dated it “10/12/05.” When she met with the Sanctuary Officer on October 24, 2005, he asked her if she had the video recording of the October 12, 2005 encounter, and she produced the mini DVM video cassette dated 10/12/05 with the edited footage. She did not tell him that she had put edited footage on the cassette tape, even though she knew that she had. By not disclosing the editing of the video, she could have impeded or influenced NOAA’s investigation into the humpback whale incident.

c. Paragraph 39

The first sentence of paragraph 39 is just plain wrong, and it’s not necessary to the remainder of the paragraph. It states: “YH provided that she videotaped multiple episodes in the spring of 2005 wherein SG and Black (and others) secured whale blubber chunks from Orca kills in Monterey Bay.” While the incidents involving the floating blubber occurred in 2004, YH did not begin working with Ms.

1 Black until 2005, and Ms. Black was rarely on her inflatable in 2005, as she was attending to her ailing
 2 mother. The first sentence should be deleted.

3
 4 **d. Paragraph 42**

5 Paragraph 42 concerns an allegation that Ms. Black “interrupted an orca kill.” With all due
 6 respect, this paragraph, as drafted, presents a lack of understanding of whales’ behavior and actions,
 7 which would be explicated by whale experts at an evidentiary hearing, if necessary. Ms. Black’s
 8 presence did not interrupt the kill, nor did it prolong the suffering of the gray whale calf. And even if
 9 Ms. Black had tried to obstruct the so-called “escape” route of the gray whales (which she did not), they
 10 simply would swim under the boat with its shallow draft. Moreover, it is not uncommon for whales,
 11 when under attack, to swim toward a boat to seek shelter from the killer whales; the person in the boat
 12 cannot control the independent actions of wild whales and cannot be held responsible for their actions.
 13 This paragraph should be deleted.

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 16 **e. Paragraphs 43 & 45 (Ocean Futures Society’s attempt to**
 17 **falsely attribute to Ms. Black the responsibility for Ocean**
 18 **Futures Society’s own actions)**

19 Paragraphs 43 and 45 are the most inaccurate and egregious paragraphs in the PSR, for two
 20 reasons. First, the first three sentences in paragraph 43 mischaracterize Ms. Black’s actions; her actions
 21 are more accurately stated in the *Plea Agreement*’s mutually stipulated factual statement (regarding the
 22 insertion of the rope and the use of the pole cam). Allowing the characterization contained in the first
 23 three current sentences in paragraph 43 to remain in the PSR would be counterfactual and inaccurate.
 24 These sentences should be stricken.

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1 Second, the apparent efforts by the crew of Ocean Futures Society (“OFS”) to blame Ms. Black
 2 for their own misconduct is flatly false and even offensive.⁶ Ms. Black did not give “directives” to OFS.
 3 Moreover, she told them explicitly that they could not conduct their work under her permit and that they
 4 needed to obtain their own permit. This was expressly confirmed by OFS in the intra-office email sent
 5 on April 9, 2004 by Holly Lohuis (at the time a research assistant on the staff of OFS) to Cousteau and
 6 the OFS crew/personnel. That email states, in relevant part:

8 I just got off the phone with Nancy Black and confirmed the rough estimate of
 9 when we hope to be filming in the Monterey Bay area. ... She said YES we can
 10 use our own zodiac to film her boat watching whales. YES we can send our team
 11 out on her WW boat and film from the top deck. YES we can use a hydrophone if
 12 we get close to whales. **YES we need our own permit if we want to approach
 the whale.** (We [i.e. OFS] might have our own from mid-May but probably not
 earlier).

13 NBUS017339 (Attachment B) (capitalized emphasis in original; bold emphasis added).

14 This objection also extends to related paragraph 45 (which continues with OFS’s actions on
 15 April 29, 2004 when they struck the gray whale mother and ran over the gray whale calf’s carcass).
 16 These actions were admitted by OFS in the detailed factual statement contained in the civil *Complaint*
 17 *for Forfeiture* filed in United States v. The 25 Foot ... Vessel, Manfish, No. CV 13-2690 EJD (Doc. 1),
 18 resulting in the simple civil forfeiture of a boat (which Mr. Cousteau and his organizations easily could
 19 afford), with no criminal charges filed. Nothing in that factual statement implicates Ms. Black, and
 20 rightly so. OFS’s apparent attempt to blame Ms. Black in order to obtain leniency for themselves is
 21 false and offensive.
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 26 ⁶ The defense never received any reports about these purported allegations apparently made by
 27 OFS and its crew; the first time the defense learned of these claims was when the draft PSR was issued,
 28 and the defense still does not know the basis for these allegations. The defense was informed today
 29 (December 30) that there may be additional information pertinent to these allegations, and the defense
 respectfully reserves the right to address these issues further.

1 Paragraphs 43 and 45 should be deleted. If they are not, an evidentiary hearing would be
2 necessary.

3 **f. Paragraph 48 (bullet-point conclusions proposed by selected**
4 **personnel within NOAA)**

5 This bullet-point paragraph addresses the much-contested conclusions purported to be drawn by
6 a small, unspecified sampling of NOAA personnel (and/or others) regarding the nature and effect of Ms.
7 Black's conduct. This paragraph is factually inaccurate and the means by which this information was
8 presented to the Probation Office is unworthy of credence. Significant modifications should be made to
9 this paragraph, along the lines proposed in the Nov. 4 objections letter (there addressing draft ¶ 47,
10 which is now renumbered as ¶ 48), by which both the position of the Government and the position of the
11 defense are included, as specified below. Absent that balance and perspective, an evidentiary hearing
12 would be necessary.
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15 Paragraph 48 is based on the statements of a limited number of NOAA personnel which were
16 presented to the Probation Office. However, there is a significant number of renowned NOAA scientists
17 who disagree with those statements, and while they have voiced their disagreement internally to NOAA
18 and the Government, these scientists have been effectively muzzled. This would have been brought to
19 light by motions work that was anticipated by the defense, but that was unnecessary in light of the plea
20 agreement that was reached. These contested statements should not now be included in the PSR as fact,
21 for they are not.
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24 Paragraph 48 currently is inaccurate, incomplete and unbalanced, particularly given the
25 circumstances under which selected, limited information was provided to the Probation Office (and by
26 which the Probation Office was deprived of additional information and viewpoints). The modifications
27 proposed by the defense in the Nov. 4 objections letter (with minor clarifications set forth here) should
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be adopted in the interest of accuracy and fairness, as follows:

48. The cache of video clips were shown to selected whale research scientists and professionals in the industry. In essence, these NOAA NMFS personnel concluded that Black's conduct endangered the mammals:
- Causing marine mammals to lose their natural wariness of humans or boats, becoming conditioned to receiving handouts, and associating people with food. Associating people with food places marine mammals in the wild at increased risk for additional harm, including being injured or killed by: approaching vessels and being struck by them; taking fish from fishing lines and hooks, and swallowing or becoming entangled in fishing gear; and being shot at or having explosives thrown at them to prevent them from taking bait/catch from fishing lines. The defense contends that, as the most powerful predator in the ocean, killer whales are not particularly wary of boats; they are often curious even without any food being present. (The killer whales were at risk of associating people and boats with food if food not otherwise present is provided to them. However, in this case, the food (gray whale blubber) was already present. If the killer whales learned anything from these two experiences it is that Black's boat was a competitor for the blubber, rather than a provider of new food, but not an effective competitor that significantly impeded the killer whales.
 - Changing the animals' natural behaviors, including feeding and migration activities, and decreasing their willingness to forage for food on their own. These changed behaviors and associated harms are self-perpetuating because they may be passed on to their young and other members of their social groups, causing additional harm to future generations. (There was at least one young calf in one of the groups of whales that were fed. The prosecution contends that the risk of that young animal learning maladaptive behavior was high.) The defense contends there is no evidence that Black's behavior changed the behavior of the killer whales (including the calf), or affected their migration, their foraging for food on their own, or their feeding activities.
 - Placing marine mammals at serious health risks when items fed to the animals are contaminated (old or spoiled) food which can cause illness or death, or when they are fed inappropriate food or non-food items (e.g., human food or objects). The defense contends that none of these concerns apply in this case. The food involved was the natural prey of the killer whales, had been killed by the killer whales themselves, and was fresh.
 - In addition to the animal welfare concerns, there are significant human health and safety concerns. Marine mammals fed by people often become aggressive when seeking food, and have been known to bite or injure people when teased or expecting food handouts. (The prosecution contends that Black and her crew were at risk of injury or even death by having such close interactions with wild killer whales, and that if one of the people had fallen into the water, or if one of the whales had pulled them off the vessel, there was a potential for someone to have been severely hurt or to have drowned.) The defense contends that while

there was some risk to Black's crew, this risk was quite small. There is no record of a wild killer whale attacking humans. There is no indication that Black was teasing the killer whales or providing a "food handout." She was temporarily restraining the blubber from floating away from her inflatable, and as the videos clearly show, when the killer whales approached the blubber they had no difficulty whatsoever in pulling it free from the rope and swimming away.

II. The Determination Of An Appropriate Fine

A. Legal Framework

U.S.S.G. § 5E1.2 addresses the imposition of a fine for an individual defendant and provides principles that are clear and delimited. For an adjusted offense level of 6, the Fine Table in § 5E1.2(c)(3) specifies the minimum of the fine guideline range as \$500 and the maximum as \$5,000. Section 5E1.2(c)(2) cabins the imposition of a fine, stating, "Except as specified in [§ 5E1.2(c)](4) below, the maximum of the fine guideline range is the amount shown in column B of the table below," i.e., \$5,000 in the present case. No exception to these limits arises under § 5E1.2(c)(4) since the statute of conviction does not have "a maximum fine greater than \$250,000," nor does it authorize "a fine for each day of violation."

Under 18 U.S.C. § 3553(a)(6), in imposing sentence the Court is to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The Supreme Court has "emphasized that unwarranted disparities between offenders – and the concern that such disparities w[ill] result in imposing sentences 'greater than necessary' to achieve the objectives of sentencing – [is] ... an important factor for district courts to consider." *United States v. Trujillo*, 713 F.3d 1003, *17 (9th Cir. 2013) (citing *Kimbrough v. United States*, 552 U.S. 85, 91 (2007)); *see also United States v. Saeteurn*, 504 F.3d 1175, 1181 (9th Cir. 2007) ("Congress's primary goal in enacting 18 U.S.C. § 3553(a)(6) was to promote national uniformity in sentencing" (Citation omitted)).

B. Disparity/Proportionality Analysis

As noted previously, Ms. Black appears to be the first person to be criminally charged and convicted of “feeding” a marine mammal in violation of MMPA regulations.⁷ This fact alone distinguishes the punishment that she already has suffered vis-à-vis the many other MMPA violations that NOAA has enforced simply through administrative means via a citation and a moderate fine. And a review of NOAA’s MMPA enforcement policies and actions demonstrates that for violations comparable to Ms. Black’s, a civil assessment of a few thousand dollars is the norm.

1. Guidance Provided By NOAA’s Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions

NOAA’s *Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions* (2011) (“*NOAA Penalty Policy*” or “*Policy*”) provides guidance in determining the appropriate penalty/sanction. A copy of the *NOAA Penalty Policy* is appended to this *Sentencing Memorandum* as Attachment C and is available at http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf (last visited 12/17/13). As set forth in the *Policy*:

The purpose of this Policy is to ensure that: (1) civil administrative penalties and permit sanctions are assessed in accordance with the laws that NOAA enforces in a fair and consistent manner; (2) penalties and permit sanctions are appropriate for

⁷ The primary purpose of the MMPA regulation prohibiting feeding of marine mammals, 50 C.F.R. § 216.3, was to respond to the problem of *tour boats* feeding dolphins. See 56 Fed. Reg. 11,693. Although many commercial dolphin-watching businesses in Texas, Florida, and other Gulf states long have brought food to feed dolphins, the enforcement of the MMPA regulations prohibiting feeding against these companies is of very recent vintage, and the Marine Mammal Commission (“MMC”), the federal agency tasked with protecting marine mammals, has repeatedly criticized NMFS’s lack of enforcement of MMPA regulations prohibiting feeding against commercial habitual dolphin-feeding operations. See, e.g., Marine Mammal Commission—Annual Report to Congress 2002, at 76, available at <http://www.mmc.gov/species/pdf/ar2002bottlenosedolphin.pdf> (last visited July 18, 2013). (Conversely, the MMC has recognized that “[i]nvestigating foraging patterns and the ecological impact of predation by killer whales,” which Ms. Black’s research encompasses, is a “Pressing Conservation Issue.”) See Marine Mammal Commission, Annual Report to Congress 2003, at 26, available at <http://mmc.gov/reports/annual/pdf/2003annualreport.pdf> (last visited July 18, 2013).)

the gravity of the violation; (3) penalties and permit sanctions are sufficient to deter both individual violators and the regulated community as a whole from committing violations; (4) economic incentives for noncompliance are eliminated; and (5) compliance is expeditiously achieved and maintained to protect natural resources. Under this Policy, NOAA expects to improve consistency at a national level, provide greater predictability for the regulated community and the public, improve transparency in enforcement, and more effectively protect natural resources.

NOAA Penalty Policy at p. 1 of 56.

Somewhat similar to the U.S. Sentencing Guidelines, the *NOAA Penalty Policy* employs a penalty matrix system to determine the appropriate penalty, with the vertical access (Gravity Offense Level) delineated from Level I to Level IV, and the horizontal access (Level of Culpability) delineated from “A” (Unintentional) to “D” (Intentional). *See Policy* at pp. 25-31 of 56 (Appendix 1 to the *Policy*, containing the penalty matrixes for violations of various statutes). The Penalty Matrix specific to violations of the Marine Mammal Protection Act (“*MMPA Penalty Matrix*”) is set forth in the *Policy* at p. 29 of 56, and here:

<u>Penalty Matrix for the Marine Mammal Protection Act</u>				
Level of Culpability				
Gravity Offense Level	A Unintentional	B Negligent	C Reckless	D Intentional
I	Written warning- \$200	Written warning- \$500	Written warning- \$750	Written warning- \$1,000
II	Written warning- \$1,000	\$1,000-\$1,500	\$1,500-\$2,000	\$2,000-\$3,000
III	\$1,000-\$2,000	\$2,000-\$3,000	\$3,000-\$4,000	\$4,000-\$6,000
IV	\$2,000-\$3,000	\$3,000-\$5,000	\$5,000-\$8,000	\$8,000-statutory maximum

The procedures for applying the *Policy* and its matrixes are set forth in the *Policy* at pp. 3-14 of 56. To determine the Gravity Offense Level, one refers to the Schedules of Offenses contained in Appendix 3 of the *Policy*, which appears at pp. 32-56 of 56. The Marine Mammal Protection Act

Schedule of Offenses is set forth at p. 51 of 56 (“*MMPA Schedule*”). That schedule applies to Ms. Black’s violation of the MMPA. Under the *MMPA Schedule*, the most analogous violation (though it overstates Ms. Black’s actions) appears under the “Taking Violations,” specifying Level II for “harass[ing] a marine mammal, or attempt[ing] to do so.”⁸ Even if Ms. Black’s actions constitute a Level II violation, the *MMPA Penalty Matrix* specifies a fine range of \$1,500-\$2,000 if her Level of Culpability is deemed “reckless,” and a range of \$2,000-\$3,000 if her Level of Culpability is deemed “intentional,” and if her actions constitute a Level I violation, the *MMPA Penalty Matrix* specifies a fine range of “Written warning-\$750” for “reckless” culpability and “Written warning-\$1,000” if “intentional.” And while final determination of the applicable penalty under the *NOAA Penalty Policy* requires consideration of additional adjustment factors (such as a violator’s history of non-compliance, whether the conduct involved commercial or recreational activity, and the violator’s conduct after the violation; *see Policy* at p. 5 of 56, pp. 10-14 of 56), the adjustments apply only to increase or decrease the penalty “within the range of penalties and permit sanctions provided in the matrix.” *Id.* at p. 5 of 56 (“Base Penalty After Application of Adjustment Factors – The NOAA attorney may adjust the initial base penalty upward or downward *within the range of penalties* and permit sanctions provided in the

⁸ “Harassment” is a violation separate from “feeding” under the MMPA, and the Government and the defense agree that Ms. Black committed a misdemeanor violation of the “feeding” statute, not “harassment.” As made clear by Ninth Circuit authority addressing what constitutes “harassment,” actions much more egregious than Ms. Black’s actions must be present for “harassment” to have occurred. *See United States v. Hayashi*, 22 F.3d 859, 865 (9th Cir. 1993), *superseded by statute* (“only direct and serious disruptions of normal mammal behavior fall under the term ‘harassment’”); *Tepley v. NOAA*, 908 F.Supp. 708, 710 (N.D. Cal. 1995) (under *Hayashi*, the “standard for harassment under the MMPA . . . must refer to a direct, serious disruption of a [marine mammal’s] customary pursuits,” consistent with Congress’s “primary concern in enacting the MMPA . . . to prevent the danger of extinction, depletion of marine mammals, and other seriously intrusive acts.”) (citation and internal quotation marks omitted).

1 matrix to reflect the particular circumstances of a specific violation, creating the ‘base penalty.’”)
 2 (Emphasis added).

3 Thus, under the *NOAA Penalty Policy*, even in the worst case scenario by which the Gravity
 4 Offense Level is II and the Level of Culpability is “Intentional,” the fine range is \$2,000-\$3,000. More
 5 appropriately here, the application of Gravity Offense Level I and Level of Culpability “Intentional”
 6 yields a fine range of “Written warning-\$1,000.”

8 **2. Guidance Provided By The Dispositions In Comparable Cases** 9 **Involving Violations Under NOAA’s Jurisdiction**

10 Additional guidance in determining the appropriate fine is gleaned from numerous dispositions
 11 of violations set forth on NOAA’s Office of Law Enforcement (“NOAA OLE”) Web site. While these
 12 dispositions involved only a civil fine and no criminal prosecution, the information they provide is
 13 useful.

14 In addressing “feeding” cases, when NOAA has undertaken enforcement against commercial
 15 dolphin tour boat operators (who were the original impetus for – and target of – the “feeding”
 16 regulation), the very typical result is nothing more than the issuance of a Notice of Violation and
 17 Assessment of Civil Penalty (“NOVA”) and a small assessment of a few thousand dollars. *See, e.g.*,
 18 NOAA Office of General Counsel, Enforcement Actions: July 1, 2012, through December 31, 2012 at
 19 17, ¶ 17 (Feb. 2013), *available at* http://www.gc.noaa.gov/documents/2013/enforce_Feb_02112013.pdf
 20 (last visited July 17, 2013) (“SE1003031, Marine Mammal Protection Act \$5,000 NOVA settled for
 21 \$5,000, with \$1,000 suspended for eighteen months. Owner and operator were charged for feeding wild
 22 dolphins.”); NOAA Settlement Agreement, MMPA, Case No. SE0902854MM (Aquatic Adventures
 23 Management Group settles \$5,000 NOVA for violating MMPA regulations prohibiting feeding for
 24 \$4,000); NOVA, MMPA, issued to Ben Chancey and Eric Mannino, Case No. SE0903717MM (\$5,000
 25 NOVA issued for violation of MMPA regulations that prohibit feeding of marine mammals in the wild).

1 Dispositions involving actions other than dolphin feeding also are instructive. In 2006, NOAA
 2 resolved its case against Randall Davis, a researcher, for research projects he had undertaken in 2003-
 3 2004, studying the behavior patterns of Steller sea lions. As stated by NOAA in announcing the
 4 settlement:
 5

6 NOAA's Office of General Counsel for Fisheries in Alaska has reached
 7 settlement in a case against Randall Davis, a Steller sea lion researcher. Davis
 8 was charged with conducting research on Steller sea lions, which is an
 9 endangered species, in Resurrection Bay and Prince William Sound without a
 10 reauthorization to resume research, as was required in his permit. Other alleged
 11 violations included using unauthorized sedatives; capturing animals in an age
 group not authorized in his permit, failing to provide the names and qualifications
 of individuals who were anesthetizing Steller sea lions; and failing to follow
 protocols in marking the Steller sea lions.

12 NOAA OLE press release, *NOAA Reaches Settlement in Case Against Steller Seal [sic] Lion*
 13 *Researcher*, April 4, 2006, attached as Attachment D. For his activities in using unauthorized sedatives,
 14 capturing animals not authorized by his permit, failing to provide information to NOAA, and failing to
 15 follow protocols, Mr. Davis was assessed a civil fine of \$6,666.⁹
 16

17 In 2007, NOAA resolved its case against the captain of the tour vessel Awesome Orca and the
 18 vessel's owner, Orca Enterprises, Inc. NOAA stated the following in announcing the settlement:
 19

20 The Agency's notice charged the captain and vessel owner with harassment in
 21 August 2006, as the Juneau-based tour boat AWESOME ORCA was conducting a
 22 wildlife viewing cruise in Stephens Passage near North Pass in Southeast Alaska.
 23 During the tour, NOAA alleged that the captain maneuvered the vessel into the
 path of three oncoming whales, placing the vessel closer than 100 yards from the
 endangered humpback whales. Subsequently, one whale collided with the vessel
 causing one of the passengers to fall and suffer a head injury.
 24

25
 26 ⁹ Additional conditions barred Mr. Davis from being a researcher under any NOAA permit for
 27 the remaining months of 2006 (April-December), specified that for 2007 and 2008 NOAA would not
 28 issue or approve any permit where Mr. Davis was listed as the applicant or principal investigator, and
 29 that any permit holder and/or principal investigator with a permit listing Mr. Davis as a co-investigator
 or research assistant must provide direct, on-site supervision of Mr. Davis.

NOAA OLE press release, *Alaska Tour Boat Agrees To Pay \$7,000 For Alleged Harassment Of Endangered Humpback Whales*, April 2, 2007, attached as Attachment E. For maneuvering the vessel into the path of three oncoming whales, placing the vessel closer than 100 yards from the endangered humpback whales, and colliding with a whale causing a passenger to fall and suffer a head injury, this for-profit enterprise was assessed a civil fine of \$7,000.¹⁰

And in December 2012, a man was videotaped “riding” a sperm whale that subsequently died. Rather than filing criminal charges, NOAA simply issued the man a written warning. *See* Juan Ortega and Willard Sheperd, “NOAA Slaps Warning on Florida Man Who Rode Whale: The sperm whale died hours after a man took a ride on the giant mammal,” *NBC Bay Area*, Feb. 22, 2013, *available at* <http://www.nbcbayarea.com/news/weird/NATL-NOAA-Slaps-Warning-on-Florida-Man-Who-Rode-Whale-192396201.html> (last visited December 17, 2013).

E. Observations Regarding Deterrence

As a final note, while some might believe that a significant fine should be imposed on Ms. Black for purposes of deterrence, this would be misguided in light of what is known about deterrence. The whale-watching community and the community of researchers already have seen what Ms. Black has been through over the past seven-plus years, and they will see and know that she is on federal probation for her actions, all of which is quite sufficient. Moreover, while it long has been believed that harsher sentences are necessary and/or appropriate to provide deterrence, closer examination discloses that there is no evidence that this is so, and the historical evidence demonstrates that harsh sentences do not, in fact, promote deterrence. As observed by researchers Anthony N. Doob and Cheryi Marie Webster

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¹⁰ An additional \$2,000 civil fine was suspended for a period of three years on the condition that no similar violations occur during the suspension period.

1 upon surveying and reviewing the scientific and sociological literature addressing general deterrence:

2 Although it is tempting to extend the search for consistent relationships between
3 sentence severity and crime rates “just one last time” in the belief that general
4 deterrent effects may still be lurking at the end of the next regression equation,
5 one must recognize that *sentencing policies currently in place in many*
6 *jurisdictions are still based on the assumption that harsh sentences deter. There*
7 *is no plausible body of evidence that supports policies based on this premise. On*
8 *the contrary, standard social scientific norms governing the acceptance of the*
9 *null hypothesis justify the present (always rebuttable) conclusion that sentence*
10 *severity does not affect levels of crime.*

11 Doob and Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 Crime and Justice:
12 A Review of Research 143 (Michael Tonry ed., 2003) (emphasis added); *see also* Raymond Paternoster,
13 *How Much Do We Really Know About Criminal Deterrence?*, The Journal of Criminal Law and
14 Criminology (2010) (“[T]he evidence does not suggest that either imprisonment itself or the length of
15 imprisonment is effective in deterring crime for those who experience it.”), citing Doob and Webster,
16 *supra*.

17 CONCLUSION

18 Ms. Black already has been punished far more severely than numerous for-profit dolphin-feeding
19 operations and other violators whose actions were far more egregious than hers. She has paid out over
20 \$100,000 in legal fees, she has been prevented from applying for and obtaining research permits for
21 more than seven years, she has had her reputation in the scientific community severely tarnished, NOAA
22 OLE has instructed/intimidated her friends and colleagues to avoid all contact with her, for over seven
23 years she has been under the strain and anxiety of a federal criminal investigation and prosecution, and
24 she now has suffered a criminal conviction and she will be placed on federal probation, with the
25 additional requirement that she complete 300 hours of community service. It would be fundamentally
26 unfair and antithetical to the principles and policies underlying § 3553(a) and the Guidelines to punish
27 Ms. Black even more severely by assessing a significant additional fine.

1 In light of the above, Ms. Black and her counsel respectfully request that the Court impose a
2 sentence of two years probation with the five special conditions of probation set forth in the *Plea*
3 *Agreement* (and not the additional special conditions proposed in the PSR), 300 hours of community
4 service, a fine of \$500, and a special assessment of \$25.
5

6
7 Dated: December 30, 2013

Respectfully submitted,

8 Mark R. Vermeulen
9 Lawrence E. Biegel
10 Michael D. Pepson
11 Attorneys for Defendant
12 NANCY BLACK

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30 By: /S/
Mark R. Vermeulen

ATTACHMENT A

Letters of support/reference

(Letter of Dr. John Ford to U.S.P.O. dated July 15, 2013 is contained at Bates
NB2013Letters000022)



AMERICAN CETACEAN SOCIETY

July 30, 2013

To the Honorable Edward J. Davila
United States District Court Judge
In care of the Law Offices of Mark R. Vermeulen
755 Florida Street, #4
San Francisco, California 94110

Dear Judge Davila,

Established in 1967, the American Cetacean Society (ACS) is the world's oldest whale conservation organization. Its mission is to protect whales, dolphins and porpoises through public education, research grants and conservation actions. The American Cetacean Society is committed to incorporating sound scientific principles in its actions and policies. Its Scientific Advisory Board is made up of respected marine scientists to provide technical, independent advice. The American Cetacean Society has hosted 13 International Biennial Conferences, which provide a venue for the world's most preeminent marine biologists and policy makers to collaborate on the conservation of cetaceans. The scientific journal, *Whalewatcher*, is published by ACS twice a year and contains articles by the foremost whale researchers in the world. ACS participates in meetings of the International Whaling Commission and was instrumental in gaining the world-wide commercial ban on whale hunting.

This letter is respectfully submitted to acknowledge valuable contributions to cetacean science by Ms. Nancy Black and to request leniency in her sentencing. I have known Nancy since she was a graduate student at Moss Landing Marine Labs and was awarded a research grant by the Monterey Bay Chapter of the American Cetacean Society in the late 1980s. It is through Nancy Black's efforts that we learned about predation of gray whales by killer whales in Monterey Bay. Nancy has generously shared her scientific knowledge and field work with the American Cetacean Society and many other whale conservation organizations around the world. She has provided complimentary educational field trips to ACS members and students and has always demonstrated respect for laws protecting marine mammals. As a scientist as well as co-owner of a whale watching business, Nancy earned her credibility and extensive knowledge of

cetaceans in Monterey Bay through field observations and study.

Nancy Black's scientific contributions to our knowledge of orcas resulted in invitations to speak at the American Cetacean Society International Biennial Conference in Monterey, California in 2008 and at other international marine science conferences. In 2008 and 2010, scientists and researchers attending the ACS conference in Monterey converged at Ms. Black's vessel because of her knowledge of the Monterey Bay and its marine life.

Since Ms. Black's home and business were raided in 2008 by NOAA, she is no longer conducting essential orca research, resulting in a loss to the scientific community. It is known that the expert opinions of some of NOAA's own scientists were disregarded when prosecuting this case, resulting in further reduction of needed whale research.

I do not condone breaking the law for cetacean research, and knowing Nancy Black, she did not intentionally plan to break the law. Her violation should be taken in context. Unlike illegal dolphin feeding in Florida, Ms. Black was not feeding killer whales. Ms. Black has accumulated huge legal fees and her health has suffered from 5 years of this ongoing legal ordeal. An only child, she bore the burden of caring for two disabled parents, who both passed away during her lengthy trial.

It is unfortunate that so many resources have been expended to prosecute a respected marine biologist and small business owner. For the sake of justice, please do not continue to prosecute Nancy Black. Her punishment has already exceeded her 'crime'.

Respectfully submitted,



Diane Glim, President
American Cetacean Society
PO Box 1391
San Pedro, California 90733

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UK**

To the Honorable Edward J. Davila, United States District Court Judge
c/o Law Offices of Mark R. Vermeulen
755 Florida Street #4
San Francisco, CA 94110

1 August 2013

To the Honorable Edward J. Davila, United States District Court Judge

Re Nancy Black

I have known Nancy Black since the late 90s, when I first contacted her during my work as a wildlife filmmaker with the BBC Natural History Unit in Bristol, England. I worked as an Associate Producer on the series "The Blue Planet" and, after many long phone conversations with Nancy, travelled out to Monterey to try to film killer whale/orca behaviour with herself and Richard Ternullo. I spent two months working with her over two years so feel that I got to know her well.

Having worked as a wildlife filmmaker and photographer for over 20 years, I have met many people who work with animals and I was very impressed with Nancy from the start, due to her great respect for the wildlife of Monterey Bay. It was obviously important to ensure that we worked with people of repute and during the month we had filming together in 1997 and 1998 we became friends.

I distinctly remember occasions during our filming trip when she was concerned that some sight-seeing boats were getting too close to cetaceans and harassing them. I was impressed at how she had the welfare of the whales uppermost in her mind.

Nancy was an excellent help and advisor during our filming trips. She had a hunch that killer whales may be feeding on the tongues of the whales that they were killing. With her help and advice the BBC crew was able to use a pole camera to obtain underwater images to prove that this was indeed the case – the first time that this was ever filmed.

I want to be very clear that her motivation was not financial in any way.

Indeed, she turned down the offer of payment to help us and told me that was more than satisfied with being able to spend a lot of time at sea observing killer whale behaviour, (because the BBC chartered a boat which then enabled Nancy to come onboard and allowed her a lot of time at sea to focus on watching killer whales – far more than she would have had normally).

Nancy is, in my opinion, a very good-hearted person whose only motivation with regards to filming the orcas feeding on the free-floating blubber was to further people's knowledge of their behaviour. She is very generous and has donated many trips to benefit charity auctions and fundraisers for the American Cetacean Society. She is also a great animal lover and supports many animal charities.

Nancy has suffered enormously with the stress of this case, as well as having had to deal with the illness and subsequent death of her parents. She has spent a lot of time, stress and money as a result of the case and I do not think a fine would serve any purpose. Indeed, as I understand it, NOAA and DOJ may have spent well over a million dollars on the investigation and prosecution of Nancy Black. The defense will ask for a \$0 fine - which I think is appropriate. Nancy has already been punished too much for her naivete: she has spent over \$100,000 on legal fees alone, lost a contract to do killer whale tagging research, and lost additional revenue due to not being able to work full-time on her boats because of needing to care for her elderly parents (who both passed away).

I think Nancy would benefit most from a short period of probation so that she can put this situation behind her and get on doing what she does best – showing people the wonders of the natural world and helping educate people with her whale trips and research. These whale watch trips bring people from all over the world to Monterey Bay.

Nancy's research is incredibly important to her, and she takes it very seriously. I know that she would NEVER take any actions that would in any way endanger Orcas and other whales in connection with her research and whale watching and have spent many weeks with her, watching her behave in an exemplary way around cetaceans.

Finally, I was contacted by Roy Torres several years ago. I answered all his questions and offered to fly to the US to be a character witness for Nancy, but never heard back from him after I explained how I felt she'd behaved in an exemplary way when I was filming with her for the BBC.

Yours sincerely,

Sue Flood

Tel: +44 - 7786 997492.

2716 S. Denison Avenue
San Pedro, CA 90731
4 August 2013

To the Honorable Edward J. Davila, United States District Court Judge
Re: Sentencing Nancy Black

Your Honor:

I have known Nancy Black for over 25 years. I am a marine biologist who has studied cetaceans for over 33 years, and have worked extensively as marine biologist, naturalist, and whale researcher on boats in California, Massachusetts, Mexico, and Alaska. I have specialized in the identification of individual killer whales encountered off California since the early 1980's, and have been the Principle Investigator (Director/Coordinator) of the American Cetacean Society's Gray Whale Census and Behavior Project (based at Pt. Vicente) since 1984. I archive all killer whale sightings, and track their distribution and behavior as part of the California Killer Whale Project. Nancy and I are the two killer whale experts that specialize in identifying individual killer whales encountered in California. I have authored and coauthored numerous articles and conference poster presentations, primarily on killer whales; many are co-authored with Nancy (including the only photo-ID catalog of killer whales of California and Mexico). I met Nancy at a Marine Mammal Conference in 1987, when she was a graduate student at Moss Landing Marine Labs studying Pacific white-sided dolphin. Nancy had just encountered killer whales for the first time; I happened to sit next to her as she was looking at her slides, asked to look at her slides, and recognized those whales. We kept in touch regarding killer whale sightings; I became her friend, and later her research associate and collaborator as she shifted her research focus from Pacific white-sided dolphin to killer whales.

Nancy and I have shared hundreds of whalewatching trips, and have encountered killer whales on numerous occasions. Her killer whale sighting rate is higher than those of other companies due to her unique breadth of knowledge regarding the foraging behavior of killer whales, her longer trips (additionally lengthened in summer to allow more time to locate offshore humpback and blue whales), and her very experienced crew with acute spotting abilities. Nancy is one of the most conscientious boat operators that I have seen; she carefully approaches whales to ensure that she is not harassing them or cutting others off. Nancy is extremely knowledgeable about the marine life of Monterey Bay, generously sharing more details throughout her trips than any other boat operators. Her passengers often comment that they chose her company because of the extremely high quality of extended whale encounters and knowledge shared.

The themes of conservation, education, and research, and ecological awareness are constant threads in Nancy's whalewatch trip narrations. Whenever she spots balloons floating at sea, she plucks them out and explains to her passengers the damage that balloons (and plastic bags) can do to marine animals - especially to whales, dolphins, and sea turtles. At the World Whale Watch Conference, Monterey Bay Whale Watch was honored as a runner-up for the Responsible Whale Watch Award for 2012. To qualify for this award, a whale watching operator had to score five stars from five reviewers on the Planet Whale Ethical Review and Rating System using these criteria: safe approach to whales and dolphins, valuable learning experience, meeting passenger expectations, philosophy and approach that results in minimal impact on the marine environment, and doing their own research that supports conservation.

Nancy has authored or coauthored over thirty articles and conference poster presentations on killer whales and other cetaceans in Monterey Bay. A report coauthored by Nancy on gillnet mortalities of harbor porpoise - supporting a continued ban on gillnet use in Monterey Bay's shallow waters - led to a permanent nearshore gillnet closure in 2002 that helped this porpoise population rebound. She is a frequent collaborator with other researchers such as Cascadia Research Collective; she sends them photographs and sighting data that have contributed substantially to scientific knowledge of cetaceans - particularly of eastern North Pacific humpback whales and blue whales. One of Nancy's significant research contributions regarding killer whales: the analysis of her killer whale biopsy dart samples (collected under NMFS research permit) helped reveal that the Bigg's (transient) killer whale is the most pollutant contaminated mammal in the ocean - a startling discovery. Those biopsy samples, as well as analysis of sloughed whale skin and feces that she collected, have contributed to our understanding of killer whale population genetics.

Nancy was the first to document that killer whales frequently attack and kill gray whale calves in Monterey Bay during the spring northbound cow/calf migration. Killer whales feed on fresh gray whale kills underwater (since fresh carcasses do not float), out of sight for people filming at the surface. They rip off pieces of gray whale flesh and blubber (which does float), and then surface periodically to feed on those portions. Nancy temporarily restrained a piece of gray whale

calf blubber that was floating freely at the surface after a kill, so that she could film killer whales feeding underwater; she did this to further knowledge of Bigg's (transient) killer whale feeding behavior - a topic that she has focused on for over two decades. Killer whale predation produced that floating blubber; Nancy did not bring "chum" with her with the intention of enticing cetaceans over to her boat, as has been done with commercial "feed-the-dolphin" businesses in Florida that purposely focus on attracting dolphins to their boats - which was why the regulation against "feeding cetaceans" was developed. Other commercial businesses routinely perform this same procedure, chumming the water to attract sharks and bony fish. Nancy did not share her footage with the media to garner fame, sell it, or intend to profit financially from it; she would never knowingly do anything that might jeopardize her NMFS research permit.

Nancy Black is an extremely generous person. She donates hundreds of complementary whale-watching passes to schools and community groups annually, including the American Cetacean Society and animal rescue groups. These passes are valued at about \$14,000-16,000 per year, which is multiplied when auctioned as fund-raisers. She receives hundreds of appreciative acknowledgements for her past donations, as well as solicitations for future charity events. Nancy also invites researchers, interns, educators, and students (from Moss Landing and elsewhere) to come out on her boat free of charge to gain marine mammal field experience by using her vessel as a platform of opportunity. She has volunteered her time by giving whale talks to groups such as the American Cetacean Society, the Aquarium of the Pacific, and schools. She often helps friends who are financially strapped; she has shared her marine mammal conference motel room with friends who couldn't pay for their own rooms. Nancy has "adopted" a surrogate mom in the form of her late mother's elderly friend; she takes this friend to doctor appointments, dines and socializes with her regularly, and assists her financially.

Nancy is extremely concerned about animal welfare. She is especially generous with charities and conservation groups affiliated with protecting endangered wildlife like elephants and chimpanzees and cheetahs; she goes to the "Wildlife Conservation Network Expo" annually in San Francisco, donating substantial monies to a plethora of participating wildlife conservation groups. Her intense affection for all animals includes domestic ones - especially dogs. She has been bringing her own dogs out on her whalewatching trips since they were puppies; her very popular 14-year-old black Lab constant companion is known as "Captain Andy". She also welcomes other dogs on her trips, including those of her passengers; her company is one of very few with this "dog-friendly policy". Nancy is so intensely focused on her passions for whales (especially killer whales) and other animals that she often appears naïve in other respects.

Both of Nancy's elderly parents became critically ill over the past few years (and passed away). An only child, Nancy had to move them out of their home of over 60 years and into an assisted living home, and help care for them. She could never bring herself to tell her parents about her legal "nightmare". Nancy's demeanor changed markedly after armed agents and law enforcement officers raided her home, confiscated whale research materials from both home and business (including irreplaceable whale sighting data sheets that may never be returned), and charges were filed. She stopped working for well over a year, and worked very little after that, becoming a near-recluse due to the debilitating stress brought on by her mortification at the thought of encountering people who might "think that I am a horrible criminal". However, she had to still pay the company's bills and employee wages, as well as more than \$100,000 in legal defense fees accrued since 2006. Nancy had a contract to participate in a killer whale satellite-tagging project; when this investigation began, that contract was revoked - which was especially devastating to her, as tagging killer whales was her life's "most cherished dream". She has also lost touch with long-time friends and colleagues at NOAA, who were directed to cease all contact with her. I am a friend and collaborator with killer whale researchers around the world, including many NOAA researchers; several told me that they do not agree with NOAA's hyper-aggressive prosecution, and do not think that Nancy's behavior imposed great risks to the whales. However, they have been heavily pressured by NOAA to avoid speaking to the court (or anyone else) about this case; some fear they may lose their research permits (or even their jobs) were they to do so.

NOAA and DOJ may have spent more than a million dollars on investigating and prosecuting this case. Nancy has suffered enormously throughout this incredibly stressful ordeal, including the crippling loss of much of her personal and professional support system. She has been extensively punished - financially and personally - for her act of poor judgment. I feel that Nancy Black's fine should be waived, and that she should have a short probation period; her life has already been in suspension for seven years. Please consider these factors in her sentencing.

Sincerely,

Alisa Schulman-Janiger

Monterey Boat Charters Inc.

84 Fisherman's Wharf

Monterey, CA 93940

Phone: (831) 372-0599

Fax: (831) 372-0566



To the Honorable Edward J. Davila, United States District Court Judge

In care of:

Law offices of Mark R Vermeulen

&55 Florida Street #4

San Francisco, CA 94110

Your Honor,

I would like to comment on the sentencing of Nancy A. Black. I have known Nancy for more than 20 years. We have collaborated on many publications and presentations, mostly on North Pacific Killer Whales. We have aided numerous graduate students, researchers, and documentary filmmakers. Our efforts have increased hopefully, public awareness of the marine environment.

I have been witness to the legal problems she has faced for past eight years. It has been prison-like due to the zealous, and in my opinion, misguided, arbitrary, and uneducated interpretation NOAA Special Agent Roy Torres. She was isolated from close friends that NOAA, instructed not to contact them or share information. We both have many close friends and associates working for NOAA we knew from graduate school neither of us have spoken to for eight long years.

With the exception of one SWFC contract to produce a Killer Whale Catalog for California and Mexico, we have been self-funded. The information we have shared has cost NOAA nothing. Her permit was suspended, another bogus applicant has been awarded a permit similar to Nancy's and produced in the past eight years not one line of research. This person who was once part of our team, stole, hid, and never returned valuable research items hiding behind NOAA Special Agent Torres admonition not to speak to her.

During this period, Nancy has had the to weather the loss of her father and then her mother. She had shoulder the double burden of lawyer fees and assisted living arrangements for her parents. The stress and fear she still feels after the "Gestapo raid" NOAA Special Agent Torres led on her house makes her panic if someone drives near her house in the early morning. Since all this started I have suffered two bouts of cancer, kidney removal, two rounds of chemotherapy and radiation, and a near fatal infection. This I'm sure, also distressed Nancy.

NOAA Special Agent Torres has spent an undisclosed, but surely millions of taxpayer's dollars trying to discredit Nancy. NOAA Special Agent Torres also visited National Marine Mammal Laboratories to interview one of our dearest friends, Dr. Marilyn Dalheim. When he was finished humiliating her with questions about her sexual orientation (!) he left her in tears. Marilyn has a reputation of the highest standards of integrity I know. OLE has suffered many setbacks in recent years and has come under fire for many abuses. I think NOAA Special Agent Torres actions are consistent with the out of control mindset that characterizes OLE even today.

NOAA Special Agent Torres and, to some extent, NOAA Enforcement Officer Robert Yerena seem to interpret permit requirements/non-requirements from an uninformed point of view. Here are two examples: NOAA Enforcement Officer Robert Yerena once decided that Dr. Daniela Maldini could not piggy-back two research efforts together in order to save money. He went to her house and left a note on her door that she would be in violation if she did so. After a call to the Office of Protected Resources, they were cleared to proceed. Why did NOAA Enforcement Officer Robert Yerena not do this himself? Why leave an intimidating note on her door when a simple phone call could have sufficed? When NOAA Special Agent Torres interviewed me, he said that he was aware I keep sighting records and that constituted research without a permit. Any scientist would record what he saw and any other pertinent information. It is also good practice recommended by the International Whaling Commission to track long-term effects on marine mammals. NOAA Special Agent Torres then said I should retain a lawyer and would be investigating my note taking as research without a permit. He obviously does not know what responsible whale watching is all about. This entire episode has had a very chilling effect on the entire marine mammal research community because the threat of a NOAA officer's unilateral, uniformed, and poorly reasoned interpretation could lead to trouble. I think NOAA OLE personnel need a lot more training regarding their knowledge of the animals they are protecting. I seriously believe NOAA Special Agent Torres has not been forthcoming with accurate information of why he has so vigorously pursued this matter.

I think Nancy has suffered enough emotional trauma. A simple investigation and remediation was more in line with reality. In my humble opinion this should end and the laws that were designed to thwart gangsters and racketeers be applied thoughtfully in this case.

Thank you for your time

Respectfully

A handwritten signature in black ink, appearing to read "Richard L. Temple". The signature is written in a cursive, flowing style with a large initial "R".

707 Leahy Street Apt. 229
Redwood City, CA 94061
July 28, 2013

To the Honorable Edward J. Davila

Re: Sentencing for Nancy Black

I have known Nancy Black for 37 years, we went to San Carlos High School together and became great friends. From that point of our friendship I realized how loving and caring she was towards animals and everyone around her. She volunteered and worked at Marine World In Redwood City and that's when I saw her passion for all wildlife evolve.

She then graduated from high school and attended U.C. Davis, from there she knew she wanted to become a Marine Biologist and worked very hard. She has always been very serious and well centered in everything she does. This became her life focus, caring and protecting and trying to help animals in anyway possible.

She has always had pets from rescue shelters and if she couldn't care for them, her parents would take over.

I'm a mother and a caregiver to my parents, Nancy took great care of both parents as they fell ill. Her father survived Pearl Harbor and tried to make every years trip to Hawaii for the memorial, this last trip was his last and he never made it home, Nancy spent over a month in the hospital by her fathers side and had to come home alone devastated I picked her up from the airport, she could never tell her mother he had died because she suffered Alzheimer's disease and was in a nursing facility, she wanted to spare her the pain and instead carried it all to herself. She never told her parents about the accusations because they were both ill and didn't want them to worry. Year later her mother passed away, and I helped her plan a memorial for both of them. In the seven years, she was never allowed to grieve because of all the pressure and harassment. She was their caregivers, only child and felt very alone.

No one could ever imagine what she was put through all these years with the investigations etc. And has always been there for me and my family. That's who Nancy Black is a caring , loving human being who has been tortured in ways only a friend or a sister as I see her to me, has seen. She also has taken on caring for someone who was in the nursing facility with her parents who has no one.

She is very knowledgeable in what she does, and most important would never harm anyone or anything especially all wildlife and animals.

She has suffered enough please take this under consideration.

Sincerely,

Frances Corsinotti

Patricia Giobetti
726 N. Dartmouth Avenue
Clovis, CA 93611

August 6, 2013

Re: Sentencing for Nancy Black

To the Honorable Edward J. Davila, United States District Court Judge,

I wish to ask for a kind judgment for my friend Nancy Black. I hope you will consider all that she has been through since this case began. Please apply those years as time served and rule that there is no additional financial or time penalty needed.

I met Nancy 32 years ago at U.C. Davis. Nancy was my dorm roommate. We have been friends ever since. From the time we met, she has always wanted to work with animals. The person I know has an amazing heart and love for animals. She is not a person who would ever want to harm any animal or break any law meant to protect the animals. She has devoted her adult life to educating novices, like me, on beautiful ocean life. She is the first to stop to fish out balloons or plastic from the ocean to protect the animals from eating it. Her love for whales is amazing. When they have a whale sighting, you just have to listen to her over the intercom on her tours to know she is the biggest fan! The excitement in her voice is infectious! She dearly loves those animals and wants others to learn and appreciate them. She is a great ambassador for those animals and has championed their cause for almost 25 years now. She devotes both time and money to charities to support these animals.

I was so impressed years ago with the research work she showed me. They started to identify the whales along the Pacific Coast through photographs. She and some other researchers work to identify the whales and monitor their migration behaviors in order to learn more and share the knowledge with the broader world community. Unfortunately we cannot measure the impact this case has had on lost research Nancy would have provided if this investigation never happened.

Nancy is an only child. She was the caretaker to her 2 aging parents. This case impeded her time with her parents. She regrets she did not have more time with them as this case's time and financial needs restricted her. She will not get that time back as both have passed away in the last few years. I am certain to watch the stress their daughter was under was not easy for them.

Years ago when Nancy told me about this case, I was shocked! I figured someone would eventually realize it was all a mistake. After all, she devoted her life to help the whales. Each time we spoke I told her to keep positive! I told her that she is not guilty and someone will see the injustice. As the years went by, I could see the toll it was taking on her. To be honest, I am not certain I could do as well as she has done. When she told me she was going to settle, I asked her to reconsider. Yet, as we talked, I could see that she needed to have this over. My very strong friend was exhausted. The investigators had worn her down. So unfair! Yet, for her to settle was the only way to get this over.

Please do not help this case minimize the amazing contributions she has done and hopefully will do on behalf of her animal friends. The true injustice would be for this case to have a lasting impact on her ability to continue to contribute to the scientific research. Reinstate my belief there is justice in our legal system and consider what she has endured over the last 6+ years as payment in full. I hope you will help her with closure.

Sincerely,



Patricia Giobetti

July 2, 2013



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To the Honorable Edward J. Davila, United States District Court Judge:

I have known Nancy Black since about 1990, through our mutual interest in science, conservation, and responsible whalewatching. The latter has been a core effort by Cetacean Society International (CSI) since 1977. As vice-president from 1984 and president of CSI since 1994, I am responsible for our advocating for marine mammal science, conservation and education, facilitating research grants from CSI to qualified recipients, and representing CSI at various meetings and workshops. As such I have met and worked with a large number of marine mammal specialists, including Nancy Black. I am a past Director and current Advisor to the Center for Coastal Studies and have a strong working relationship with the Dolphin Fleet Whalewatch, both in Provincetown, MA.

Based on my comparative experiences, Nancy is an unusually knowledgeable, helpful and productive scientist and educator. I have experienced her Monterey Bay Whalewatch operation several times and, from experience with many whale watch operations on three continents, attest that she knew the habitat and animals so well that she provided the public with a superior educational experience while never approaching any threshold of harm or harassment; she always showed respect for both the animals and the habitat.

Over the many years I have known Nancy she has been exceptionally cooperative and helpful, an opinion shared by everyone I know that knows her, particularly other researchers, educators and organizations. She has assisted many professionals who wanted to study or document Monterey Bay and especially the orcas that use that habitat. Her love of her work is at the core of her life's purpose

To put it simply, from my decades of experience, there are very few in this highly competitive field of science who equal her focus to help others and act so as never to harm or harass marine mammals.

Since she was charged I can attest that Nancy has suffered inhumane emotional and financial distress. There is no question in my mind that she has already suffered more than enough punishment. Justice will be served by absolving her from any fine or period of probation, but if any are levied, I am certain that she will adhere to the requirements with absolute fidelity.

I am concerned as well with the implications of this matter negatively affecting every level of worker across all aspects of marine mammal research and conservation by US citizens. My astonishment at the charges brought against Nancy Black, and the manner in which the investigation was conducted, is echoed universally by everyone in this country that is trying to improve the conservation and knowledge of marine life, and education and concern of the public. I know of several colleagues who depend upon permits to conduct their professional work who are concerned that they, while not guilty of any violation, might be accused and find their careers and work in jeopardy because of unjustified accusations.

Respectfully,

A handwritten signature in black ink, appearing to read "W. Rossiter", written over a horizontal line.

William W. Rossiter
President



355 Smuggler's Cove Road
Friday Harbor, WA 98250

phone (360) 378 5835
fax (360) 378 5954

orcasurv@rockisland.com

CENTER FOR WHALE RESEARCH, INC.

A 501(c)(3) non profit organization

18 July 2013

To the Honorable Edward J. Davila, United States District Court Judge
In care of
Law Offices of Mark R. Vermeulen
755 Florida Street #4
San Francisco, CA 94110

Dear Judge Davilla,

In the matter of sentencing for Nancy Black I would like to make the following comments: I have known Nancy for more than twenty years as a colleague in killer whale research, and as a friend for almost ten years. She is one of those rare individuals who can recognize individual whales by sight and memory, and she is THE acknowledged expert on killer whales inhabiting the central California coastal ecosystem. Her personal foibles aside, it is safe to say that literally nothing of scientific value would be known of the killer whales of Monterey Bay if it were not for Nancy's years of dedication and sharing of her information with colleagues.

I had heard of Nancy's troubles with NMFS Enforcement, and I have witnessed her debilitating anxiety over the official actions taken against her, concurrent with the deteriorating health of her parents. I have felt compassion for her, but it was not until I helped support a joint NMFS/BBC research project in Monterey Bay a couple of years ago that I witnessed her persecution. I was astonished to hear that agent Roy Torres invited my NMFS collaborators to his office to show them the evidence against Nancy and instruct them to not have any communications with her during the course of our research project. I had heard of "official" muzzling of other NMFS researchers, but I did not expect this intimidation to extend to friends and research colleagues, much less tangentially to me. On the water in Monterey Bay, I was further astonished to see that agent Torres was aboard a large California Fish and Game vessel shadowing Nancy's whale-watch vessel near Monterey Canyon (like a highway patrolman selecting a particular person to cite), and he baited Nancy on the VHF radio by asking her if she was then involved in research or whale-watching, though it was clear that she was on her commercial whale-watch vessel. I do not know how often such shadowing happened,

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but I do know that such behavior was not appropriate. There were other whale-watch vessels in the vicinity that agent Torres did not question or shadow.

A NMFS colleague who has told me that (s)he is not allowed to make any comment in the case forwarded me a memo prepared by agent Torres concerning a conversation he had with "experts" at Six Flags amusement park in Vallejo. The "expert" responses to Torres leading questions reflect zero knowledge of wild free-ranging killer whale natural behavior, and a self-serving mindset that pervades the captive whale display industry – that these animals are dangerous to humans in the big scary ocean. The Torres memo is analogous to seeking expert opinion on mouse biology by interviewing actors at Disneyland. I have been informed of other outrageous investigative antics and manipulations of testimony by Torres, but in absence of my direct knowledge of such events I leave them to your honor's questioning.

I conduct my research under permit from the National Marine Fisheries Service, and I work under contract to that agency. I have felt pressures applied to stand with the federal family in matters of controversy, though I clearly speak on my own at times (see FACA report on a mass stranding of beaked whales in the Bahamas). I do understand the need for authority in matters of law and governance; but, I consider abuse of such authority to be a greater risk to our nation than terrorism by external entities or individuals. Nancy has suffered terribly from a relentless enforcement action lasting many years, and in my view she deserves remedy not sentencing.

Thank you for receiving my comments in this matter.

Sincerely,



Kenneth C. Balcomb, III
Senior Scientist CWR

19 July 2013

The Right Honorable Edward J. Davila
US District Court



Re: Ms. Nancy Black

Dear Judge Davila:

Few of us in California have a history in the arena of marine mammal science and conservation reaching back several decades. Nancy Black and I are in that group. I've known Nancy since she was a student and I was an Assistant Professor. Some of us, including Nancy, straddle the interface between science and the public. This reflects a dedication to the notion that science in the service of conservation is most effective when communicated to the public in ways they easily understand. This involves taking people out to see whales in a natural environment and delivering the stories via documentaries and publications to those who cannot make the excursions into the wild, yet form public opinion on conservation and other environmental issues.

In these trials and tribulations Nancy has been through, one thing stands out — no marine mammals were harmed by her actions. I believe that is the underlying spirit of the MMPA.

As a founding board member and co-investigator with the Alaska Whale Foundation, I split my whale work between Alaska and California. When a producer seeks to film whales in Alaska, NMFS asks us to work directly with the filmmakers to ensure they operate under strict guidelines and do not negatively impact the whales. In the past I've worked with BBC, ABC-TV, Discover, NHK (Japan), and others. For ten years we worked with National Geographic Remote Imaging (Cittercam) putting cameras on the backs of whales — an activity that was much more invasive than anything Nancy did using a bit of floating blubber to draw an orca near. My point is that Nancy did nothing that negatively impacted a whale or dolphin in any way.

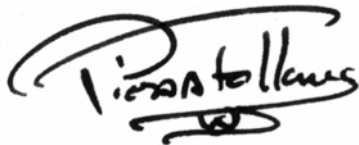
As an expert witness in Federal Court on matters involving whales, I have also seen first hand the astonishing doggedness of government attorneys behind an MMPA/ESA indictment who abandon all sense of justice. When it becomes clear a case has little merit, they sometimes insist on taking things way beyond reason, apparently to avoid the embarrassment of losing the case on any level. This attitude negatively and unnecessarily impacts the defendants in many ways. Nancy's

predicament is similar in the tenacity of her accusers, the over-reaching of the prosecutors, and their misguided resolve to hurt a well-meaning citizen as much as they can. Nancy has been hurt and damaged enough already by them. It should stop now.

Further, I am one of the two permitted Large Whales in Distress Responders (whale disentanglers) in California. Nancy, her whale watching program, and her naturalists and captains have been totally supportive and actively involved in our efforts to save entangled whales in the Monterey Bay area. I would hope that no penalty or probation or other negative imposition is put upon Nancy due to the unwarranted charges. She is a very important player in the conservation of marine mammals in the area beyond her research and commercial operation. We want that involvement to continue as long as she wants to participate.

Thank you for considering my observations and opinions.

Sincerely,

A handwritten signature in black ink, reading "Pieter A. Folkens". The signature is stylized with a large, sweeping initial "P" and a horizontal line underlining the name.

Pieter A. Folkens
Team Leader, California W.E.T. (Whale Entanglement Team)
Co-founding Director, Alaska Whale Foundation
Creative Director, A Higher Porpoise Design Group

1807 Martin Luther King Jr Way #D
Berkeley, CA 94709
July 18, 2013

To the Honorable Edward J Davila

Re: Sentencing for Nancy Black

I have known Ms. Black fairly well for more than 25 years since she was a graduate student at Moss Landing Marine Labs studying Pacific white-sided dolphins. I am a retired state attorney after spent 25 years litigating energy issues at the Public Utilities Commission, including numerous enforcement cases. I am also a wildlife biology researcher (M.Sc., U.C. Berkeley), and an expert on North Pacific right whales and international legal issues regarding whale management. I have published numerous articles on right whale biology in scientific journals, several co-authored with NOAA scientists. My 200 page law review on international management of whales won an award as the "Technical Publication of the Year" from The Wildlife Society (professional wildlife biologists association). I am a charter member of the Society for Marine Mammalogy. I have served as an official member of the U.S. delegation to the North Pacific Fur Seal Commission, and as a peer reviewer for many science journals, and most recently at NOAA's request for its Draft Recovery Plan for the North Pacific Right Whale.

I have been on hundreds of whale-watching and whale research cruises from Alaska to South Africa, and more than a hundred whale watching and orca research cruises with Ms. Black. During all my cruises with Ms. Black, I have seen her be very careful not to do anything that might harm or harass any whale, orca or other marine mammal. Her whale-watching trips see more whales than competitors simply because they are longer trips, she and her crew are excellent spotters, and she has hard-earned understanding of cetacean distribution in Monterey Bay. Ms. Black has always been very generous in sharing her knowledge with me, and with the passengers on her whale-watching cruises, about whale biology. Her knowledge regarding whales is amazingly detailed, comprehensive, observant, and scientifically accurate.

Ms. Black's passion for whales, killer whales in particular, and animals in general, is so intense and consuming that she has little time for other subjects. Most of the remainder of her time during the whole period of this investigation has been consumed being the caregiver for both her father and mother, both of whom died during the course of this investigation and prosecution. On other subjects, Ms. Black is often very naïve. For example, she was unaware that both of California's senators were women. Ms. Black is not a sophisticated hustler scheming to prevent federal agents from protecting whales. NOAA Enforcement mistook her easy embarrassment and naiveté for cunning, and then its pit bull tactics launched this unnecessary and wasteful tragedy.

To the Honorable Edward J Davila

Page 2

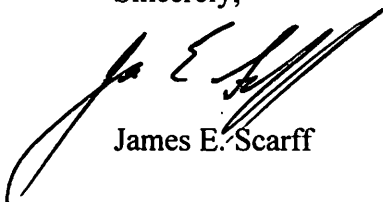
The vast majority of the scientific research Ms. Black has conducted, she has financed personally rather than seeking government funding. The key to successful long-term studies of uncommon species like orcas that are unpredictable in occurrence is to spend a lot of time on the ocean. Ms. Black has spent that time and recorded all her observations in detail. Information she has freely shared with NOAA scientists and valuable data NOAA could never otherwise been able to afford to obtain. Many of those records have been seized by the Department of Justice who now refuses to return them to her. I understand her attorneys are providing you with her lengthy list of scientific publications.

As a lawyer, I am appalled at the way that NOAA and DOJ have pursued this case. Since 2005, NOAA agents and DOJ attorneys seem to have done everything possible to harass Ms. Black, spending what I estimate is at least a million dollars of taxpayer money to investigate and prosecute this tiny, silly case. (In contrast, NOAA and DOJ have brought no criminal or even civil action against any person associated with Jean-Michel Cousteau's Ocean Futures Society for exactly the same actions done in his case for profit not science on the same day in Monterey Bay.) Even in the cases of commercial dolphin watch operations in the Gulf of Mexico that were bringing food on cruises to feed the dolphins for tourists, in 2012 NOAA only sought minor civil assessments against them.

A very strong legal argument can be made that what Ms. Black did was not "feeding" as that term should be interpreted under the Marine Mammal Protection Act. As NOAA scientists have told NOAA's Office of Law Enforcement and DOJ, and as the regulatory record makes clear, that regulation was created to shut down commercial feed-the-dolphin programs in Florida, not block scientific research on orca feeding. Glaring features of the prosecution in this case all along has been NOAA's and the Department of Justice's unwillingness to rely on NOAA's own expert scientists' evaluation of the case or to let them inform the court about the value of Ms. Black's science. It is well known within the scientific community that a number of senior NOAA whale experts did not agree with the basis for this prosecution, and that these dissenting opinions were actively suppressed by NOAA and DOJ.

I have seen up close the toll this case has taken on Ms. Black personally and on other scientists associated with this case. I have also heard dozens of top whale scientists complain about the enormous "chilling" effect that NOAA/DOJ's actions have taken on their willingness to contact and cooperate with each other whale researchers, if, as here, NOAA demands all copies of such communications and threatens to use them against the scientists. Nancy has been working to save whales and orcas for decades. The court should act to support that work, not punish it.

Sincerely,

A handwritten signature in black ink, appearing to read "James E. Scarff", with a long, sweeping underline that extends to the left.

James E. Scarff

Thomas A. Jefferson, Ph.D.
Clymene Enterprises
13037 Yerba Valley Way
Lakeside, CA 92040
1 (858) 945-4240 (tel.)
Sclymene@aol.com (email)

19 July 2013

The Honorable Edward J. Davila, United States District Court Judge

Subject: Sentencing of Nancy Black

Your Honor,

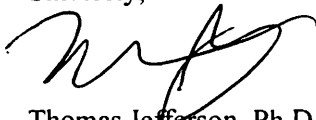
I am a marine mammal biologist who has been studying these animals for 30 years. I am the author or co-author of over 110 scientific papers and several books on these animals, and am also affiliated with NOAA Fisheries, although I speak today as a private citizen. As the Director of Clymene Enterprises, I have known Nancy Black for 27 years, and have worked closely with her in the past (we were fellow graduate students at Moss Landing Marine Labs from 1986-1989).

I know Nancy to be a caring and passionate person who loves animals and devotes her life to learning about these animals and helping to make sure they are properly protected. I understand that the incident that she is charged with was an example of poor judgement on her part, but I strongly believe that her motivations were to help people learn about these fascinating animals, and were not motivated by a desire for money or fame (I don't think Nancy cares much about either).

Based on my knowledge of the case, I believe that Nancy has suffered enough, and I do not believe that any further fines or probation are justified. Nancy has been through a very difficult time with this case, and I don't see the "punishment fitting the crime".

I have always known Nancy to be a productive and law-abiding person and member of the community, and I know that she would never do anything intentionally to harm killer whales or other marine mammals. It seems that these rumors were started by her competitors in the whale-watching business of Monterey Bay. It seems to me that Nancy has been over-zealeously pursued during the course of this case, and it would be best for all parties for it simply to end it with no fines or probation. Feel free to contact me for more information.

Sincerely,



Thomas Jefferson, Ph.D.
Marine Mammal Biologist



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July 16, 2013

The Honorable Edward J. Davila
United States District Court Judge

I am writing in regards to the sentencing hearing for Nancy Black, to provide some comments on my experience from knowing Nancy for the last 25 years. I first met Nancy in 1989, and have followed her research with Pacific white-sided dolphins and killer whales closely since then. Nancy's work has significantly contributed to our understanding of killer whale behavior and ecology off the California coast and throughout the eastern North Pacific. Nancy has authored or co-authored a number of studies published in peer-reviewed scientific journals and presented her work at numerous international scientific conferences, attesting to her scientific credibility and dedication to marine mammal science and conservation. Nancy and I have previously collaborated on a study examining world-wide genetic diversity of killer whales, published in the Proceedings of the Royal Society of London in 2002. I have also worked with Nancy on killer whale research cruises run by the National Marine Mammal Laboratory in Alaska, joined her on one of her field projects in California, and discussed numerous possible collaborative research projects that we might undertake together off California. Nancy has also freely contributed photographs and information on sightings of killer whales and other species to numerous other researchers, all in the interest of increasing knowledge and protection for these species.

From working and interacting with Nancy over the years I think her motivation for working with marine mammals has always been to help understand and protect endangered and threatened species and their environment, and I have never thought she has been motivated by personal gain. I do not think Nancy would ever deliberately take any actions that would endanger killer whales or other marine mammal; in fact I think the opposite is true, her behavior and interactions with killer whales and other marine mammals reflect the respect she has for these animals.

If there is any additional information I can provide, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'RW Baird' with a stylized flourish at the end.

Robin W. Baird, Ph.D.
Research Biologist
rwbaird@cascadiaresearch.org



Fisheries and Oceans
Canada

Pêches et Océans
Canada

Science

Sciences

Pacific Biological Station
3190 Hammond Bay Road
Nanaimo, B.C. V9T 6N7

July 15, 2013

Insa Bel'Ochi
U.S. Probation Office
280 S. First St. - Suite 106
San Jose, CA 95113

Dear Ms. Bel'Ochi:

I write regarding a memo written by NOAA Special Agent Roy Torres dated February 21, 2009, describing a meeting with me that took place at the Pacific Biological Station on February 19, 2009. This meeting was arranged at the request of Mr. Torres, who was seeking science advice on potential effects on killer whales of alleged activities undertaken by Ms. Nancy Black. Mr. Torres showed me various video recordings and asked for my opinion on the likelihood of whale disturbance having taken place and various other related topics.

During and immediately following the review of these videos, I provided verbal comments to Mr. Torres with the understanding that my comments were informal and did not constitute in any way a formal statement. I explicitly indicated to Mr. Torres that I did not wish to be involved in any way in this prosecution.

I was not aware of the February 21, 2009, memo until it was sent to me recently by a research colleague. This memo, according to Mr. Torres, is a "paraphrased synopsis of Ford's statements". I have reviewed this memo and have serious concerns about how Mr. Torres has represented the opinions I expressed. Some of my comments are represented accurately but there are several inaccuracies or exaggerations in his descriptions of what I recall saying at the time. The memo also mischaracterizes some of the points I was seeking to make. I have been told that Mr. Torres's memo has been submitted in connection with the sentencing hearing for Ms. Black, which I find particularly disturbing given that I was very clear that my informal comments were not to be used in this prosecution.

Sincerely,

John K.B. Ford, PhD
Head, Cetacean Research Program &
Adjunct Professor, Department of Zoology, University of British Columbia
Email: ford@zoology.ubc.ca

To the Honorable Edward J. Davila,
United States District Court Judge.

Your Honor,

I am writing this letter in support of Nancy Black. I am a zoologist specializing in studying animal behavior. In the late 1990s, when I was a new immigrant at the early stages of my career, Nancy invited me to participate free of charge for over a year in her whalewatching trips so that I could observe rarely seen behavior of marine mammals. She didn't benefit from my presence onboard in any way, but for me it was a unique chance to obtain valuable experience and skills, as well as desperately needed practice in professional English. I will never forget this act of kindness.

Since that time, I have conducted zoological studies on all continents, and have witnessed the work of countless marine mammal researchers and whale watching operators. Most of them usually follow the rules; some don't. Tour operators, in particular, are often under tremendous pressure to get closer to the animals than the boats of their competitors. Of all those people, few, if any, have been as meticulous in following the rules, and as obsessively concerned with minimizing disturbance to the animals, as Nancy and her team.

It was with a sense of disbelief and outrage that I learned about the legal case brought against Nancy on a minuscule technicality by a bunch of bureaucrats who most likely have never been in the open ocean in a small boat, particularly in an area as inhospitable as the waters off California, with their heavy swell, dangerous fog, and ice-cold wind.

I was born outside the US, and came here as a political refugee. I admire this great country, and particularly its system of protecting the rights of its citizens. I have been living here now for sixteen years, and in all that time my belief in America has never been challenged as severely as by the ridiculous case against Nancy Black. For absolutely no logical reason, an insane amount

of taxpayers' money has been wasted on a vicious attack against an honest, dedicated, hard-working scientist. If not for the support of her fellow naturalists who had no doubt about her innocence, Nancy's livelihood and her life's work would be completely destroyed. She has suffered through years of unbelievable stress, maddening uncertainty, crippling financial losses – and all that because some of her competitors are corrupting a government agency into a weapon of personal assault. It reminds me of staged political trials that my country of origin is so infamous for.

The damage cannot be undone, but I am respectfully asking you to exercise wisdom and common sense by protecting Nancy from being subjected to even more undeserved losses. My understanding is that you have broad discretion in determining the amount of fine to be levied and the length of probation. As a field zoologist with more than 25 years of professional experience, I am strongly convinced that any fine other than zero would be unfair and undeserved and I urge you to impose the briefest period of probation permissible.

Thank you for your time and consideration.

Vladimir Dinets, Ph.D

Research Associate, Louisiana State University;

Research Assistant Professor, University of Tennessee, Knoxville.

RNR Building, LSU, Baton Rouge, Louisiana 70803

(404)414-6539, dinets@gmail.com

Adrian Manise

8 Main St, Seaton, Rutland, LE15 9HU

United Kingdom

22/7/2013

To the Honorable Edward J. Davila, United States District Court Judge

Dear Judge Davilla,

In the matter of the sentencing of Nancy Black may I please offer the following comments:

I have been fortunate to have been a friend of Nancy's for many years. I was first introduced to Nancy by mutual friends in 1998. Nancy is primarily responsible for kindling my long held admiration and passion for cetacean conservation and the marine environment. I am not a professional in this area, but can comment as an enthused member of the public.

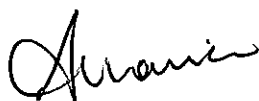
Perhaps more important than the kindling and nurturing of my own interest, I represent an example of a truly huge number of people from all over the world who have been fortunate enough to have been enlightened and enthralled by the research and world class wildlife documentary films enabled by Nancy and Richard, and their understanding of the behavior of the wonderful creatures they take film crews and wildlife enthusiasts to see every day. Were it not for some of Nancy's research work over the years, we would not have the understanding we do today of these stunning creatures. We are all used to seeing amazing footage on BBC documentaries, softly reinforced by Sir David Attenborough's inimitable presentations, but none of that would be possible without people like Nancy and their devotion to their work. Work which rolls quickly by unnoticed when the credits roll at the end of the show.

I first learned about this case when it appeared in the U.K. newspapers (<http://www.dailymail.co.uk/news/article-2083331/Marine-biologist-Nancy-Black-arrested-charges-abused-whales-feeding-them.html>). Stories in the British press made us all question the American government's priorities in respect of whale conservation and science. All those I heard from were similarly stunned to learn of the proceedings. The more we delved, the more ridiculous it seemed. The sheer amount of public money and resources which must have been allocated to this over the years makes NOAA, and the US more generally, look shameful to a wider audience. At best ridiculous.

Here in Europe we are continually shocked to hear of the growing anti-science tendencies which have been growing in the US over recent years, and this simply worsens the wider image of the US as being increasingly anti science, and increasingly distant from reason. I don't mean to suggest that the action taken against Nancy was an orchestrated conspiracy against science, but I think sometimes the US could do with a quiet and critical friend to let you know how you come across sometimes – and this is one of them.

Personally, I am shocked by the way Nancy has been treated. I hope you can find some scope for compassion in your deliberations. Thank you for receiving my comments as a lay person.

Adrian Manise



Kelly Newman
3245 Virginia Street Apt 1
Miami, FLA 33133

To: the Honorable Edward J. Davila, United States District Court Judge
July 8, 2013

Dear Judge Davila,

I met Nancy Black in 1989. At the time I was taking classes at Moss Landing Marine Lab, where she was finishing up her Master's Thesis on Pacific white-sided dolphins in Monterey Bay. She worked on a species that few had attempted to study. I was impressed with how much time she spent in the field. Then, around from 2000-2001, I worked with her on Elderhostel Programs in Monterey Bay for the Oceanic Society. It was a wonderful program where we took out laypeople in her boat to help with Nancy's long-term research project on Whales and Dolphins of Monterey Bay. Nancy's immense knowledge of marine biology was obvious. Yet she never put on airs, and was always humble. She made non-scientists feel comfortable.

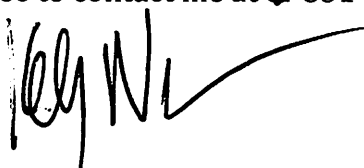
In 2010 Nancy and I collaborated again, on a killer whale passive acoustics study in Monterey Bay. This also had not been done previously. She has always been very professional and helpful, and is an important member of the killer whale research community. She pioneered much of the orca research in Monterey Bay and her continued presence is needed out there.

Even though she has been dealing with this court case and when her parents passed away- she has maintained her dedication to conservation and education. She has also probably worked harder than anyone on Monterey Bay. The fact that such a highly trained biologist has a whale watching business is highly unusual and has helped everyone in that area, including the whales in Monterey Bay as well as her competitors.

She is a very non greedy person, and clearly cares deeply about orcas and marine life. She would never, ever harass or hurt any animal intentionally. I hope that you are very lenient with her probation period and her fine. This whole ordeal has cost her a lot of money and immeasurable costs to her health. She has paid the price in every way- professionally, financially, health-wise and emotionally for what I consider to be an exaggerated charge based on an account by an unreliable person. Excessive fines could jeopardize her business and research, and Monterey Bay and the whales would suffer if it were to lose her presence. Please be consider her positive attributes when deciding her fate. If you have any questions, feel free to contact me at 831-821-0361.

Sincerely,

Kelly Newman



10 August 2013

Insa Bel'Ochi
United States Probation Office
280 South First Street Suite 106
San Jose, California 95113

Re: Support for Nancy Black

Dear Ms. Bel'Ochi:

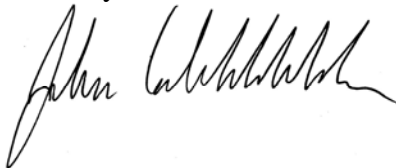
I wanted to state my strong support for Nancy Black and the important research she has been conducting over the years and request leniency in her sentencing. While I have been very troubled by many aspects of the case against her, I do appreciate that there were mistakes she made and mostly want to focus on why I think leniency is appropriate here. I have been conducting research on whales off the US West Coast for over 25 years and Cascadia's work on humpback and blue whales forms the primary basis for the abundance estimates and trends for these species that NOAA uses in the Stock Assessment Reports.

Leniency is appropriate here for the following reasons:

1. I think while some of the actions Nancy conducted may not have been appropriate I do not think they did any harm to the animals and should be considered fairly minor violations.
2. I am convinced from long-term familiarity with Nancy's work that she her intentions were not bad. She has shown a long-term commitment to helping whales and has volunteered her time for many endeavors on whales.
3. Her work especially on killer whales has been important and credible and represented a major contribution to science and conservation of this species.
4. She has worked to provide valuable data to other research efforts including our own on humpback and blue whales.

While I think her prosecution has been a major miscarriage, where a simple reprimand or notification would have been appropriate, I ask that at least more harm not be done with a major sentence against her.

Sincerely,



John Calambokidis
Research Biologist and Founder of Cascadia Research
Adjunct Faculty, Evergreen State College

September 4, 2013

To The Honorable Edward J. Davila,
United States District Court Judge

Dear Judge Davila,

I have known Nancy Black for over 20 years, as a fellow scientist involved in marine mammal research and conservation. I have seen Nancy grow from a graduate student into a confident and capable researcher. She is a hard working marine scientist with a well-deserved reputation as being the resident expert on Killer whales in the Monterey Bay area.

In 2001 as Director of Research for the Oceanic Society, I chartered Nancy's boat and she served as Captain for a week of cruises commencing 5 days after the attacks on New York and Washington D.C.. She dealt with the terrible stress of those days invisibly. Her quiet demeanor and professionalism as the skipper of the vessel, ambassador for the marine environment and dedicated conservationist enabled us to focus on the behavior of animals we encountered. She deserved all the credit for the success of those cruises.

Nancy runs a commercial whale watch operation. She doesn't profit from her research by garnering fame or money. Her whale watch business enables her to be out with the animals, and study their natural behavior.

Spend just a few minutes with Nancy and her abiding interest in and love of marine mammals and their oceanic habitat is obvious. She blossoms when she talks about them and there is depth in her knowledge. She clearly enjoys sharing this with others. When a sighting occurs at sea, she casually educates those around her by clearly describing what she's seeing and providing context to further her audience's understanding. There is no affect of lecturing; it is more a casual conversation about the animals she has devoted her life to understanding.

Nancy is unusual in many ways. Most marine mammal researchers are employed by research organizations, but she has found a different way to get out on the water every day, to be where the animals are. Nancy is naturally shy and unlike many scientists, she doesn't blow her own horn, proclaiming her expertise. Instead, she allows her scientific credibility to be defined by the researchers who have chosen to work with her and the quality of their joint publications.

Nancy is generous. She willingly shares her data with other scientists and makes it readily available to the general public. Any person with web access can go to her site (montereybaywhalewatch.com) and obtain a list of all sightings of marine mammals for every Monterey Bay Whale Watch cruise since 1997. It is an invaluable resource allowing teachers and students of all ages to delve into real sighting data describing the presence of animals in our local marine environment. Nancy's generosity is also seen in

her providing complementary passage on her cruises to local and visiting scientists and conservation groups like Wildlife Conservation Network.

Nancy is an only child and she took care of her parents as they slipped away due to age and Alzheimer's.

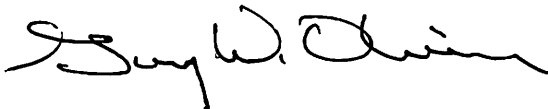
I cannot speak to Nancy's motive for moving the blubber that the killer whales had ripped from the gray whale. I am certain that she would never do anything, which she felt would endanger any of the animals she studies. This is also clear from the work she has chosen to do; it is descriptive, not highly intrusive.

The MMPA amendment forbidding feeding marine mammals was based on a report to Congress (http://www.nmfs.noaa.gov/pr/pdfs/education/dolphin_feeding.pdf). Events similar to this case were never part of the discussion. I have operated under MMPA scientific permits since 1973 and prior to this prosecution; I would not have considered what Nancy did to be 'feeding' them and thus a violation

Nancy has already paid a heavy price as a result of this investigation. I have seen and been concerned about changes in her mental and physical behavior: she has been badly beaten. I hope she will recover.

I know Nancy as a law-abiding citizen and a well-informed marine scientist often interviewed on the news. I'm glad she's a member of the greater Monterey Bay community, she enriches it. Community service and a short period of probation seem sufficient punishment.

Sincerely,

A handwritten signature in black ink, appearing to read "Guy W. Oliver". The signature is fluid and cursive, with the first name "Guy" being the most prominent.

Guy W. Oliver, Ph.D.

233 Northrop Place
Santa Cruz, CA 95060
831-458-4121
831-419-7239 cell
guywoliver@gmail.com

P.O. Box 4611
Dalton, GA 30719
August 20, 2013

The Honorable Edward J. Davila, United States District Court Judge
c/o Mark R. Vermeulen, Attorney at Law
755 Florida Street #4
San Francisco, CA 94110-4833

Dear Judge Davila:

I have known Nancy Black since August of 2000, when I participated in a whale study week in Monterey. This program was sponsored by the Oceanic Society and was hosted by Monterey Bay Whale Watch with Nancy as the marine biologist. This week was a wonderful opportunity to learn about marine mammals and to participate in the onboard duties and records keeping of a marine biologist. Since that time I have returned to Monterey to go whale watching nine times. I value Nancy's friendship and her knowledge as a marine biologist.

In my experience with Nancy, she has always exhibited the utmost professionalism and integrity as a marine biologist. I believe that it is the love of the pursuit of science which motivates Nancy, as well as other marine biologists which I have known. The personal and professional satisfaction of a job well done takes precedence over desire for fame and fortune.

I have been on many whale watch trips to many destinations and can ascertain that Nancy's Monterey Bay Whale Watch is a model for the way these trips should operate. In all of the trips which I have made with Monterey Bay Whale Watch, the laws governing marine mammal protection have been fully complied with.

As you consider the disposition of Nancy's case, I ask that you please consider her professional character and conduct, as well as her value to society and science as you make your decision.

Sincerely yours,



Martin Smith

To the Honorable Edward J. Davila,
United States District Court Judge,

September 5, 2013

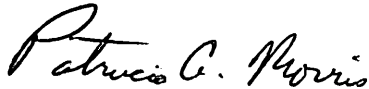
I do not know Nancy Black very well. My acquaintance with her is only from going out on her whale watching cruises a few times and seeing her casually at biannual marine mammal conferences. In these circumstances, I was always impressed that she cared deeply about the animals she studied and was dedicated to understanding their behavior and communicating her observations, insights and appreciation to the public and other scientists. My understanding of the Marine Mammal Protection Act is that the intent is to protect marine mammals while allowing for limited and monitored amounts of harassment for scientific research, as well as non-intrusive opportunities for the public to view these animals in educational settings. My experiences on Nancy's whale watching cruises have provided excellent opportunities to view many of the cetaceans of Monterey Bay while learning about their behavior. The boat was always operated in a manner that showed respect for the animals we were observing, while Nancy provided excellent yet unobtrusive narration. At conferences Nancy has always been collegial, sharing her expertise with other scientists and students, in a clear and interesting manner. As a local resident, I have seen Nancy on the local news several times, explaining unusual cetacean sightings or events in Monterey Bay in a coherent manner for the benefit of all our local residents.

I do not have any first-hand experience of the circumstances surrounding the charges against Nancy but I know that they have engendered controversy and that a settlement is being reached by plea agreement. I have read descriptions of the event (that Nancy tied already floating pieces of blubber from a dead gray whale killed by *Orcinus orca* to her boat in hopes that she could observe continued feeding more closely) and understand why she would not have thought that that constituted 'feeding'. The killer whales had already procured the 'food' themselves. I do not believe that Nancy did anything that posed a danger to any marine mammal. While behavioral scientists might argue about the validity of observations under these circumstances being completely 'normal', causing small alterations in an animal's behavior is generally allowed under the terms of a marine mammal research permit, which Nancy had.

I attended one of Nancy's minor hearings in San Jose. The woman I saw at that hearing was very different from the one I had known previously. The proceedings were basic and brief. When the hearing concluded, Nancy's lawyer met with her, and the people who had come to support her, in the courthouse hall to explain the proceedings. I have no legal expertise, but I already had a fairly complete understanding of what had occurred. Nancy, who I know is an intelligent woman, appeared to have grasped almost nothing during the proceedings. She was exhausted and apparently completely lost.

I know that Nancy's finances as well as her emotional well-being have been destroyed in the last few years. In my opinion, she has already paid many times over for her offenses in money, time and distress. I urge you to impose the minimal sentence available under the agreement.

Sincerely,

A handwritten signature in cursive script that reads "Patricia A. Morris". The signature is written in black ink and is positioned above the printed name.

Patricia A. Morris

Santa Cruz, California

ATTACHMENT B

Ocean Futures Society intra-office email sent on April 9, 2004 by Holly Lohuis (at the time a research assistant on the staff of OFS) to Cousteau and the OFS crew/personnel), confirming that Ms. Black informed them that **“YES we [OFS] need our own permit if we want to approach the whale.”**

----- Forwarded Message

From: Holly Lohuis <hlohuis@oceanfutures.org>

Date: Fri, 09 Apr 2004 12:15:27 -0800

To: Pam Stacey <pamstacey@aol.com>, Richard Murphy
<RMurphy000@aol.com>, Don

Santee <dsantee@oceanfutures.org>, Jean-Michel Cousteau
<nanandjmc@aol.com>,

Barbara Lapiana <blapiana@oceanfutures.org>, Nani Chang
<nchang@oceanfutures.org>

Conversation: Latest from Nancy Black-Monterey Bay

Subject: Latest from Nancy Black-Monterey Bay

Hello team,

I just got off the phone with Nancy Black and confirmed the rough estimate of when we hope to be filming in the Monterey Bay area. The dates Pam and I came up with are: April 28th (depending on how our shoot goes with Wayne Perryman at Piedras Blanca) through the first week in May, possible May 9th so we can have two weekends to film Nancy's whale watching boat full of tourist.

She said YES we can use our own zodiac to film her boat watching whales. YES we can send our team out on her WW boat and film from the top deck. YES we can use a hydrophone if we get close to whales. YES we need our own permit if we want to approach the whales. (We might have our own from NMFS by mid-May but probably not earlier).

Nancy witnessed an orca attack off of Pt. Lobos last weekend but the mother and calf escaped by sneaking between the rocks. Otherwise, Pt. Lobos and a few other spots inside the bay tend to be the hotspot for potential orca attacks. She will keep us posted.

As of May 1st, Nancy's whale watching company switches trips from Gray whales to Blues and Humpbacks. But of course, they will take advantage of any whales to watch on all their trips. They just do not focus as much on the gray whale mothers and calves because they tend to snorkel (exhale their breathe before their blowhole reaches the surface, to escape possible attacks by orcas). As of May 1st her trips for the blues and humpbacks are longer, 4-5 hours.

Nancy can best be reached on her cell phone at: (831) 901-3839

Cheers,
Holly

----- End of Forwarded Message

OFS000121

NBUS017339

ATTACHMENT C

NOAA's *Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions* (2011)

Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions
NOAA Office of the General Counsel – Enforcement and Litigation

I. Statement of Scope and Purpose

This Policy provides guidance for the assessment of civil administrative penalties and permit sanctions under the statutes and regulations enforced by NOAA.

The purpose of this Policy is to ensure that: (1) civil administrative penalties and permit sanctions are assessed in accordance with the laws that NOAA enforces in a fair and consistent manner; (2) penalties and permit sanctions are appropriate for the gravity of the violation; (3) penalties and permit sanctions are sufficient to deter both individual violators and the regulated community as a whole from committing violations; (4) economic incentives for noncompliance are eliminated; and (5) compliance is expeditiously achieved and maintained to protect natural resources. Under this Policy, NOAA expects to improve consistency at a national level, provide greater predictability for the regulated community and the public, improve transparency in enforcement, and more effectively protect natural resources.

This Policy supersedes all previous guidance regarding assessment of penalties or permit sanctions and all previous penalty and permit sanction schedules issued by the NOAA Office of the General Counsel.¹

To assist in the interpretation of this Policy, attached to this Policy are three Appendixes: (1) Appendix 1 is a preliminary penalty assessment worksheet; (2) Appendix 2 consists of seven penalty matrixes, one for each of the seven statutes most commonly enforced by NOAA; and (3) Appendix 3 consists of seven offense level schedules, corresponding to each of the seven matrixes listed in Appendix 2. A more detailed explanation for the use of the Appendixes is described herein.

This Policy provides guidance for the NOAA Office of the General Counsel, but does not, nor is it intended to, create a right or benefit, substantive or procedural, enforceable at law or in equity, in any person or company. The basis for penalties calculated under this Policy, however, will be included in charging documents filed by the Agency. Further, although this Policy provides guidance regarding the assessment of proposed penalties and permit sanctions, NOAA retains discretion to assess the full range of penalties authorized by statute in any particular case.

This Policy will apply to all civil administrative enforcement cases charged on or after its issuance on March 16, 2011. In transitioning to this new Policy, the NOAA General Counsel's Office will monitor penalty assessments closely; any penalty or permit sanction under this Policy that is substantially higher or lower than under the prior penalty schedules will be reviewed before the penalty is put into a charging decision.

¹ This penalty policy does not address, and is not meant to affect, NOAA's summary settlement schedules or related delegations of authority.

II. Statutory Background and Enforcement Framework

A. NOAA Authorities

NOAA has authority and responsibility under more than 30 federal statutes to protect living marine resources, including marine areas and species, and manage sustainable fisheries. A large proportion of NOAA's enforcement cases are brought under seven statutes – the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the National Marine Sanctuaries Act, the Endangered Species Act, the Marine Mammal Protection Act, the Lacey Act, the Northern Pacific Halibut Act, and the Antarctic Marine Living Resources Convention Act.

B. Role of NOAA Office of Law Enforcement and Federal and State Partners

Officers and agents in the NOAA Office of Law Enforcement, the U.S. Coast Guard, Customs and Border Protection, Immigration and Customs Enforcement, U.S. Fish and Wildlife Service, and State officers authorized under Cooperative Enforcement Agreements, monitor compliance and investigate potential violations of the statutes and regulations enforced by NOAA. In general, when an investigating agent identifies a statutory or regulatory violation he or she may pursue one of several available options, depending on the nature and seriousness of the violation.

Where a violation is less significant or is merely technical, having little to no impact on marine resources, the agent may provide a verbal or written warning or issue a "Fix-It Ticket," which provides the alleged violator with an opportunity to correct the violation within a certain amount of time and waives all penalties if the alleged violator takes the appropriate curative action.

For certain less significant violations, the agent may issue a "summary settlement" notice, under authority delegated to the agent by the NOAA Office of General Counsel. Under the terms of a summary settlement, an alleged violator receives a document explaining the alleged violation and the alleged violator may resolve the matter expeditiously by paying a reduced penalty. The determination of appropriate summary settlement penalties is guided by summary settlement schedules developed by the Office of General Counsel, with input from the NOAA Office of Law Enforcement and, often, the relevant program office. *See* <http://www.gc.noaa.gov/enforce-office3.html>.

Where an agent determines that an alleged violation is significant, or where an alleged violator has one or more prior violations, or does not pay a proposed summary settlement amount, the agent may refer the case to the NOAA General Counsel's Office for Enforcement and Litigation (GCEL) for further civil action or, often working with GCEL attorneys, to a U.S. Attorney's office for criminal prosecution. U.S. Coast Guard officers, state officers operating under Cooperative Enforcement Agreements, and agents from the U.S. Fish and Wildlife Service or Customs and Border Protection, investigate cases, and where appropriate, submit proposed cases to OLE to determine the proper action to take.

C. Role of the NOAA Attorney

A NOAA attorney assigned to a case, in consultation with the investigating agent, evaluates whether evidence in the case demonstrates a violation of a NOAA statute or regulation, and determines whether to recommend charging the alleged violator or declining the case. All charging or declination recommendations by NOAA attorneys are made to the NOAA General Counsel or Deputy General Counsel for final approval. If the NOAA attorney determines that it is appropriate to recommend filing charges, the attorney then has a number of remedial options. For less significant cases, the attorney may recommend a Written Warning; this action is appropriate where the alleged activity has a limited impact on natural resources, the alleged violator demonstrates a high degree of cooperation, the alleged violator takes corrective action that substantially mitigates or eliminates the impact of the violation, or a substantial amount of time has passed from the date of the violation. For more significant violations, the NOAA attorney may recommend charges under NOAA's civil administrative process (*see* 15 C.F.R. Part 904), through issuance of a Notice of Violation and Assessment of a penalty (NOVA), Notice of Permit Sanction (NOPS), Notice of Intent to Deny Permit (NIDP), or some combination thereof. Alternatively, the NOAA attorney may recommend that there is a violation of a criminal provision that is sufficiently significant to warrant referral to a U.S. Attorney's office for criminal prosecution.

III. Summary of the Penalty Policy

A. Approach

Any penalty policy must start with the statutory and regulatory requirements for establishing appropriate penalties. While there is significant variation in the maximum penalties and sanctions authorized under the statutes most commonly enforced by NOAA, the factors used to determine an appropriate penalty or permit sanction under these statutes are similar: the nature, circumstances, extent and gravity of the alleged violation; the alleged violator's degree of culpability; the alleged violator's history of prior offenses; and the alleged violator's ability to pay the penalty. *See* 15 C.F.R. § 904.108(a).² This Policy utilizes these principles to create a system for determining appropriate penalties.

² The most common statutes enforced by NOAA are the Magnuson-Stevens Act (16 U.S.C. § 1801, *et. seq.*); the National Marine Sanctuaries Act (16 U.S.C. § 1431, *et. seq.*); the Endangered Species Act (16 U.S.C. § 1531, *et. seq.*); the Marine Mammal Protection Act (16 U.S.C. § 1361, *et. seq.*), the Lacey Act (16 U.S.C. § 3371, *et. seq.*), the Northern Pacific Halibut Act (16 U.S.C. § 773, *et seq.*), and the Antarctic Marine Living Resources Conservation Act (16 U.S.C. § 2431, *et seq.*). The current maximum statutory penalties permitted by the seven statutes most commonly enforced by NOAA are as follows:

Magnuson-Stevens Act – \$140,000 per violation
 National Marine Sanctuaries Act – \$140,000 per violation
 Endangered Species Act – \$32,500 per violation (knowing violations - endangered species)
 Marine Mammal Protection Act – \$11,000 per violation
 Lacey Act – \$11,000 per violation
 (footnote continued on next page)

Under this Policy, penalties and permit sanctions are based on two criteria: (1) A “base penalty” calculated by adding (a) an initial base penalty amount and permit sanction reflective of the gravity of the violation and the culpability of the violator and (b) adjustments to the initial base penalty and permit sanction 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. Described as an equation:

Base Penalty [(Initial Base Penalty based on the Gravity of the Offense and Culpability) + (Upward/Downward Adjustment for Specific Circumstances)] + [Proceeds of Unlawful Activity and Any Additional Economic Benefit] = [Penalty Assessment and Permit Sanctions]

We note that this Policy is a departure from NOAA’s prior practice of developing detailed penalty schedules by region and by specific types of violations with broad ranges for both penalty and permit sanctions. This Policy uses a simplified approach of having one penalty and permit sanction matrix for each major statute that NOAA enforces with narrower penalty and permit sanction ranges to be applied nationally. This approach assures that NOAA attorneys are provided with greater guidance in recommending penalties, and should assure fairness and consistency of approach across NOAA statutes, across fisheries, and across the country.

B. Criteria for Determining Penalty and Permit Sanction

Initial Base Penalty and Permit Sanction – two factors are considered in determining the initial base penalty and permit sanction amount (collectively, the “initial base penalty”): (1) the gravity of the prohibited act that was committed; and (2) the alleged violator’s degree of culpability, based on an assessment of the alleged violator’s mental culpability in committing the violation. These two factors constitute the seriousness of the violation.³

As detailed more fully below, the initial base penalty is determined by first finding the charged violation on the attached schedules, which list the most common violations that NOAA charges. The schedules are found at Appendix 3. The schedules assign a particular “offense level” to

Northern Pacific Halibut Act – \$200,000 per violation

Antarctic Marine Living Resources Conservation Act – \$11,000 per violation

Notably, at least once every four years, the Department of Commerce adjusts the maximum civil monetary penalties authorized by statute for inflation, pursuant to the Federal Civil Penalties Inflation Act (Pub. L. 101-410) as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104-134). *See* 73 Fed. Reg. 75321 (Dec. 11, 2008).

³ Notably, NOAA regulations require that NOAA consider these factors when determining the proper penalty to assess. *See* 15 CFR § 904.108(a) (“Factors to be taken into account in assessing a penalty . . . may include the . . . gravity of the alleged violation [and] the respondent's degree of culpability . . .”). *See also* 16 U.S.C. § 1858, Section 308 (“In determining the amount of [the] penalty, the Secretary shall take into account the . . . gravity of the prohibited acts committed [and] . . . with respect to the violator, the degree of culpability . . .”).

each violation.⁴ This offense level corresponds to the vertical axis of the attached penalty matrixes, which were developed for each of the seven major statutes that NOAA enforces. The matrixes are found at Appendix 2. The proper penalty range is determined by using the offense level and the alleged violator's degree of culpability, to find a penalty box within the appropriate matrix. The initial base penalty is the midpoint of the penalty range within that box.

Base Penalty After Application of Adjustment Factors – The NOAA attorney may adjust the initial base penalty upward or downward within the range of penalties and permit sanctions provided in the matrix to reflect the particular circumstances of a specific violation, creating the “base penalty.” The following factors are considered in making this adjustment:

- a. The alleged violator's history of non-compliance (i.e., whether there have been any prior violations);
- b. Whether the alleged violator's conduct involves commercial or recreational activity;
- c. The conduct of the alleged violator after the violation – whether the violator self-reports, makes a good faith effort to come into compliance promptly, or cooperates with the investigation or, alternatively, whether there is an attempt to avoid detection, interfere with an investigation, lie, or participate in other obstructive activity;

Proceeds of the Unlawful Activity and Any Additional Economic Benefit – Finally, once the initial base penalty and adjustments are determined, an additional amount is added to the base penalty to collect any proceeds from unlawful activity gained by the violator through his or her illicit conduct, along with any additional economic benefit received. This additional amount is meant to prevent an alleged violator from profiting from his or her unlawful activity, remove any actual economic benefit to the alleged violator, keep the alleged violator from gaining an unfair advantage over lawful actors, and prevent unlawful activity from continuing as a “cost of doing business.” Absent extraordinary circumstances, the NOAA attorney will add to the base penalty an amount equal to the fair market value derived from noncompliance, along with any additional economic benefit gained through the violator's misconduct.⁵

⁴ Where a violation is not listed in the schedules, or where the violation is of a statute for which no schedule has been developed, the attorney determines the offense level by using the offense level of a similar listed violation. If no similar violation can be identified, the attorney chooses an appropriate offense level by assessing the gravity of the violation based on criteria described in this Policy.

⁵ Capturing the proceeds of unlawful activity and a violator's economic benefit is a well-accepted approach reflected in both NOAA regulations and case law. See 15 C.F.R. § 904.108(b) (“A civil penalty may be increased . . . for commercial violators, to make a civil penalty more than a cost of doing business. . . .”); *In re Pesca Azetca, S.A. de C.V. (F/V AZETCA I)*, 2009 WL 3721029 (NOAA 2009), subsequently affirmed by the Administrator, 2010 WL 1676739 (a sanction amount should be large enough to alter the economic calculus that might lead Respondents and other participants in the fishery to simply account for any possible sanction as the cost of doing business); *In the Matter of Christine Swanson*, 2005 WL 776152 (NOAA 2005) (“Respondents' unlawful behavior here must invoke a civil penalty which is more than merely the cost of doing business. It must be sufficient to deter this activity in the

IV. Establishing the Base Penalty Matrixes and Schedules

A. Matrixes and Schedules

As noted above, to guide a NOAA attorney's recommendation of a base penalty, NOAA has developed a penalty matrix using the two factors that constitute seriousness of the violation for each of the seven statutes that NOAA most commonly enforces: the gravity of the violation and the degree of culpability. The matrixes are set forth in Appendix 2. In addition, NOAA has developed corresponding schedules that provide guidance in determining the gravity of the violation (the gravity-of-offense level) for the most common violations. These schedules are set forth in Appendix 3.

For each matrix, two factors – the gravity of the violation and the degree of culpability – form the two axes on the matrix. The vertical “gravity-of-offense” axis is split into four or six different “offense levels,” depending on the applicable statute, with increasing penalties as the gravity of a violation becomes more significant. The horizontal “degree of culpability” axis is split into four levels of increasing mental culpability, depending on whether the violation was the result of unintentional activity (accident or mistake), negligence, recklessness, or an intentional act (*see* Appendix 2).

B. Penalty Ranges

In determining the appropriate penalty range for each box in the matrixes, NOAA examined the maximum available penalties under the particular statute, and interpreted the relevant statutes as calling for graduated penalties from the most serious violation, warranting the maximum penalty, down to the least serious charged violation, warranting a significantly lower penalty. This graduated scheme provides for a fair base penalty assessment taking into account the seriousness of the violation, as envisioned by the statutes.

C. Permit Sanctions

With respect to permit sanctions, where applicable, the statutes that NOAA enforces generally provide broad authority to suspend or revoke permits. While permit sanctions may be an important tool in deterring future violations, we are mindful that vessel or dealer permit sanctions may result in negative financial impacts to parties beyond the alleged violator(s) (e.g., crew, processors/dealers, and commercial markets). Given the impact that permit sanctions may have, permit sanctions are generally appropriate only in cases involving violations that are moderate to major in terms of their gravity. In the context of the Magnuson Act, the penalty matrixes provide for an incremental gradation of permit sanctions ranging from 5-20 days, 20-60 days, 60-180 days, and 180 days to one year.

future and put these operators and owners on notice that severe penalties will be forthcoming if this activity is continued”). Other regulatory agencies, such as the Environmental Protection Agency, also capture violators’ economic benefit in their penalty assessments.

In some cases, permit sanctions may also be appropriate where the alleged violator has a history of prior violations that are similar to the violation charged, or where the assessed penalty does not adequately account for the proceeds of the unlawful activity or any additional economic benefit derived from noncompliance because of the statutory cap. Permit sanctions in these circumstances may be sought only with the specific prior approval of the NOAA General Counsel or Deputy General Counsel.

Permit revocation is also appropriate in extraordinary cases. *See* 16 U.S.C. § 1858(g)(i). Revocation may be appropriate, for example, where a permit is obtained by fraud or false information, or where a monetary penalty and permit suspension do not adequately reflect the serious nature of the violation. Permit revocation may be sought only with specific prior approval of the NOAA General Counsel or Deputy General Counsel.

V. Determining the Initial Base Penalty Using the Matrix

In determining an initial base penalty, the NOAA attorney first determines an appropriate gravity-of-offense level, using the listed schedules of common violations as a guide (Appendix 3). Where a violation is not listed in the schedules, the attorney determines the offense level by using the offense level of a similar listed violation. If no similar violation can be identified, the attorney will determine an appropriate offense level by assessing the gravity of the violation, using the factors listed below. Once an offense level is established, the attorney will then determine the alleged violator's degree of culpability, following the criteria set forth below. The initial base penalty will be the midpoint of the penalty range in the appropriate matrix box determined using this method. Where the matrix box includes a permit sanction range, there is a presumption that the appropriate permit sanction will also be the midpoint of the permit sanction range in the matrix box. However, the economic impact of a permit sanction on a violator may be considered in determining the proper sanction within the range, taking into account the fishery involved and the time of year or fishing season to which the sanction applies. Moreover, it may be appropriate to tie the length of a permit sanction to the duration of the alleged violation, especially where the violation provides an unfair advantage, such as in fisheries involving time and area limits.

A. Gravity of the Violation

There are four or six gravity-of-offense levels assigned to each vertical axis of the matrixes, depending on the applicable statute. More particularly, there are four offense levels assigned to the Marine Mammal Protection Act, Endangered Species Act, Lacey Act, and Antarctic Marine Living Resources Convention Act, and there are six offense levels assigned to the Magnuson-Stevens Act, National Marine Sanctuaries Act, and Halibut Act (*See* Appendix 2). The matrixes with six offense levels reflect the higher monetary penalties provided for in the applicable statutes, and the need for additional offense level classes to narrow the potential penalty ranges available for a particular violation.

The offense levels reflect a continuum of increasing gravity, taking into consideration the nature, circumstances, and extent of a violation, with offense level I representing the least significant

charged offenses, and offense level VI the most significant. The attached schedules assign the most common violations to a corresponding offense level. In determining the appropriate offense level to assign to each violation, a number of factors were considered, including:

- a. The nature and status of the resource at issue in the violation (e.g., whether the fishery is currently overfished, overfishing is continuing, or the stock is particularly vulnerable because of its slow reproduction rate; whether the violation affects measures designed to protect essential fish habitat, endangered/threatened species, or resources within a national marine sanctuary);
- b. The extent of harm done to the resource or to the regulatory scheme or program;
- c. The potential harm to the resource or to the regulatory scheme or program;
- d. Whether the violation involves fishing in closed areas, fishing in excess of quotas, fishing without a required permit, or fishing with unauthorized gear;
- e. Whether the violation provides a significant competitive advantage over those operating legally;
- f. The nature of the regulatory program (e.g., limited versus open access fishery); and
- g. Whether the violation is difficult to detect without an on-scene enforcement presence or other compliance mechanisms such as Vessel Monitoring Systems (VMS) or an observer (e.g., unlawful discards, high-grading of catch, use or deployment of fish aggregating devices, gear conflicts, or failure to use seabird or turtle bycatch mitigation devices).

In making a determination of an initial base penalty, NOAA attorneys will examine the attached schedules and ascertain the proper offense level for a particular violation. To determine the proper offense level where a violation is not listed, NOAA attorneys will either determine the offense level by using the offense level of an analogous violation, or independently determine the level by considering the above listed factors.

B. Degree of Culpability

The second axis of the penalty matrixes focuses on the degree of mental culpability of the alleged violator when participating in the unlawful activity for which the penalty is being imposed. This axis reflects the importance that NOAA places on the alleged violator's degree of culpability prior to and at the time of violation. There are four levels of culpability reflected in the matrixes: intentional, recklessness, negligence, and unintentional acts (including accident, mistake, and strict liability).

An intentional violation generally exists when a violation is committed deliberately, voluntarily or willfully, i.e., the alleged violator intends to commit the act that constitutes the violation. A person intends a result when he or she both foresees the result that will arise if certain actions are

taken and desires the result to occur. Intent may be particularly demonstrated by violations committed as part of a pattern, course of conduct, common scheme or conspiracy, or where a violator has been charged in the past with a similar violation, even if not fully adjudicated.

Recklessness is a conscious disregard of a substantial risk of violating conservation measures that involves a gross deviation from the standard of conduct a law-abiding person would observe in a similar situation. Recklessness occurs where someone does not intend a certain result, but nonetheless foresees the possibility that his or her actions will have that result and consciously takes that risk. Recklessness may also occur where someone does not care about the consequences of his or her actions. Recklessness involves a lesser degree of fault than intentional wrongdoing but a greater degree of fault than negligence.

Negligence is the failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances. Negligence denotes a lack of diligence, a disregard of the consequences likely to result from one's actions, or carelessness. Negligence may arise where someone exercises as much care as he or she is capable of, yet still falls below the level of competence expected of him or her in the situation. The failure to know of applicable laws/regulations or to recognize when a violation has occurred may itself be evidence of negligence.

Finally, an unintentional act is one that is inadvertent, unplanned, and the result of an accident or mistake. An unintentional act is one not aimed at or desired. This culpability level reflects the strict liability nature of regulatory violations, and the fact that the statutes NOAA enforces are designed to protect marine resources even where a violation is unintended.

In assessing whether an alleged violator's activity constitutes intentional, reckless, negligent, or unintentional behavior, a NOAA attorney will consider the following factors:

- a. Whether the alleged violator took reasonable precautions against the events constituting the violation;
- b. How much control the alleged violator had over the events constituting the violation;
- c. Whether the alleged violator knew or should have known of the potential harm associated with the conduct;
- d. Other similar factors as appropriate.

VI. Base Penalty Following Application of Adjustment Factors

As set forth in Section V above, the gravity of the violation and the degree of culpability are considered in determining the initial base penalty. Once an initial base penalty is established, several adjustments are applied to reflect legitimate differences between similar violations. Adjustment factors include an alleged violator's history of noncompliance, whether the alleged violator's conduct involves commercial or recreational activity, and the conduct of the alleged violator after the violation occurs.

Starting from the midpoint of the appropriate matrix box, a NOAA attorney will use the adjustment factors to move up or down the penalty range within a box, or to a different penalty box altogether. These factors may increase, decrease, or have no effect on the base penalty and permit sanction to be assessed. Application of the adjustment factors is cumulative, i.e., more than one factor may apply in a case. In applying the adjustment factors, the NOAA attorney will use the information about the alleged violator and violation available at the time of assessment.

In extraordinary circumstances, the initial base penalty may be adjusted above (or below) the high (or low) end of the base penalty range that would otherwise apply using the guidance described below, but only with specific prior approval of the NOAA General Counsel or Deputy General Counsel.

A. History of Non-Compliance

An alleged violator's previous violation of natural resource protection laws is evidence of an intentional disregard for NOAA's statutes or regulations or a reckless or negligent attitude toward compliance with them. Subsequent violations also may be evidence that the prior enforcement response was insufficient to deter future violations. Accordingly, prior violations are a basis to adjust a penalty upward. Factors the NOAA attorney will consider in applying this adjustment include, *inter alia*, the following:

- a. The similarity of the prior violation, i.e., whether past and present violations involve the same or similar acts, the same statutes or regulations, or the same resources;
- b. How recently the prior violation occurred;
- c. The number of prior violations; and
- d. An alleged violator's efforts to correct any prior violation(s).

All prior violations will be considered, with adjustments upward as follows: (1) for each prior violation that is similar to the newly charged violation, and has been subject to final administrative adjudication within the past five years (including summary settlement, administrative settlement, final judgment, or consent decree), the NOAA attorney will move the initial base penalty an entire box to the right in the matrix, with a maximum increase of three

penalty boxes (note: where it is not possible to move to the right in the penalty matrix, the NOAA attorney will select the box below the previously determined penalty box); (2) for priors that have been subject to a final adjudication but are not similar to the newly alleged violation, or that are similar to the newly alleged violation but were subject to a final administrative adjudication more than five years prior to the present violation, the NOAA attorney will increase the penalty within the range of the initial base penalty box determined in Section V above.⁶ In determining the amount of the upward adjustment, age of the violation may be taken into account.

Any violation involving the use of a vessel will be considered as a prior violation against that vessel unless controlling ownership changes. A violation by a master or crewmember on a vessel will be considered as a prior violation for any subsequent violation they commit on the same or a different vessel. Where a master or crewmember has a prior violation and commits a later violation on a different vessel with a different owner, the prior violation will be imputed to the new owner unless the new owner exercised due diligence regarding prior violations of the master or crewmember. If two or more vessels are owned by the same person or company, then a violation by one vessel will be an imputed prior for the other vessel or vessels. If two or more vessels are owned by separate corporations, but the same person or company controls these corporations, then a violation by one vessel will be an imputed prior for the other vessel or vessels.

B. Commercial versus Recreational Activity

Where a violation arises from non-commercial activity, the status of the alleged violator – a recreational fisherman, for example – may be a mitigating factor justifying a downward adjustment in the initial base penalty, including a movement left, or up, in the matrix, to a lower penalty range. This adjustment is appropriate because an individual recreational violator is likely to have a lesser impact on the natural resource or regulatory program, typically participates in regulated activities less infrequently than a commercial operator, and by definition has no commercial purpose for his or her activity and therefore does not obtain the same degree of economic gain as a violation committed by a commercial enterprise.

Manifestly, an adjustment for recreational activity is not always appropriate. For example, in the case of a violation involving a vessel grounding in a national marine sanctuary, the operator of a recreational vessel may be just as culpable as the operator of a commercial vessel. Similarly, an intentional take of a protected species by a recreational actor may not warrant a downward adjustment. Nor would a recreational fisherman selling unlawfully caught fish receive a lighter penalty, as this activity would be commercial. Ultimately, a recreational actor will not receive an automatic downward adjustment; rather, consideration of this factor may lower the penalties of a recreational actor in the appropriate case.

⁶ This policy differs from past practice, where only prior violations from the previous five years were considered in assessing a penalty for a new violation. The NOAA attorney may take this change of policy into account when assessing an alleged violator's history of non-compliance under this Policy.

C. Activity After Violation – Good Faith Efforts to Comply: Cooperation/Noncooperation

The NOAA attorney may also move above or below the midpoint of a penalty range by taking into account the good or bad faith activities of the alleged violator after a violation occurs. Good faith factors, which may mitigate a penalty, include self-reporting, providing helpful information to investigators, and cooperating with investigators in any on-going investigation. Alternatively, actions taken in bad faith that may result in an increased penalty include any attempt on the part of the alleged violator to avoid detection (e.g., concealment or flight); or any evidence that the alleged violator interfered with the investigation by destroying evidence, intimidating or threatening agents or witnesses, lying, or similar activity. No downward adjustment will be made if the good faith efforts to comply primarily consist of coming into compliance.

NOAA strongly encourages self-reporting of violations because it indicates a violator's willingness to accept responsibility and provides for greater efficiency in administering NOAA's enforcement program, particularly where a violation is difficult to detect. Accordingly, where an alleged violator self-reports a violation, NOAA will consider such action a mitigating factor justifying a downward adjustment in the initial base penalty. Depending on the context and degree of the self-report, as well as the gravity of the violation, NOAA may move to the lower end of the penalty range within a box or move to a lower penalty box altogether. NOAA will not adjust a penalty downward for self-reporting where discovery of the violation is inevitable.

VII. Proceeds of Unlawful Activity and Any Additional Economic Benefit

In assessing a penalty, this Policy takes into account the value of proceeds gained from unlawful activity and any additional economic benefit of noncompliance to an alleged violator. The value of proceeds from the unlawful activity and any additional economic benefit to an alleged violator are factored in to prevent violators from profiting from illicit behavior and engaging in improper behavior because the sanctions imposed are merely a "cost of doing business" (i.e., because the economic benefit of their unlawful activity exceeds the cost of a potential penalty).⁷ Taking these factors into account also levels the playing field for the regulated community, so violators do not gain economic or strategic benefits over their law-abiding competitors. Absent extraordinary circumstances, the value of the proceeds from the unlawful activity and any additional economic benefit to the violator will be calculated and added to the base penalty.

The NOAA attorney will examine the following types of proceeds from unlawful activity and any additional economic benefit from noncompliance when calculating an appropriate amount to include in any penalty assessment:

- a. Gross Ex-vessel value of fish, fish product, or other product illegally caught
- b. Gross revenues of charter fishing vessel or whale watching vessel that violated regulatory restrictions

⁷ See footnote 5.

- c. Economic advantage from delayed costs (delay in purchase of required equipment, e.g., turtle excluding devices or vessel monitoring systems)
- d. Economic advantage from avoided costs (fuel saved by transiting through, not around, a protected area; costs of an observer on fishing trips; costs of infrastructure improvements, e.g., fish ladders and screens to protect ESA-listed species)

In some cases, there may be more than one type of proceeds from unlawful activity or additional economic benefit to the alleged violator. In such cases, the NOAA attorney will consider each category of proceeds from unlawful activity or additional economic benefit to calculate a combined total. Factors that are to be considered in making this assessment are described below.

A. Gross Value of Fish, Fish Product, or Other Product Illegally Caught, or Revenues Received

In cases where fish or other product is caught in violation of the statutory or regulatory requirements, the proceeds from unlawful activity will be assessed based on the gross ex-vessel value of the fish or other product. Where the actual value of the fish is known, that is the amount that will be used; when it is not known, the attorney will make a reasonable estimate of the value based on available information. Where a charter fishing vessel or whale watching vessel is involved, proceeds from the unlawful activity will include the gross revenues from the trip that gave rise to the violation.

If the illegal catch or product was seized and forfeited by NOAA, or if the alleged violator voluntarily abandoned the illegal catch or product, the proceeds from the unlawful activity was likely already recouped from the alleged violator and the proceeds for the penalty assessment will typically be zero.

B. Delayed Costs

Delayed costs are expenditures that have been deferred by the alleged violator and result in a failure to comply with the regulatory program. The alleged violator eventually will have to spend the money in order to achieve compliance, but during the period of non-compliance the violator has gained an economic benefit over his or her competitors who have paid to comply. The economic benefit for delayed costs consists of the amount of interest on the unspent money that reasonably could have been earned by the alleged violator during noncompliance.

C. Avoided Costs

Avoided costs are expenditures that are not made by the alleged violator, leading to a failure to comply with the law. These costs will never be incurred. Examples of avoided costs include, *inter alia*:

- a. Cost savings for operation and maintenance of equipment that the alleged violator failed to install;

- b. Failure to properly operate and maintain existing equipment (e.g., fish ladders and screens for the protection of ESA-listed species);
- c. Failure to employ sufficient number of adequately trained staff; and
- d. Failure to establish or follow precautionary methods required by rules or permits.

For avoided costs, the economic benefit equals the cost of complying with the requirement from the time that compliance was required until the date the violator comes into compliance.

VIII. Ability to Pay

The goal of NOAA's enforcement program is to secure compliance with the laws that protect natural resources, not to put alleged violators out of business. Thus, NOAA will consider at the appropriate stage the ability of the alleged violator to pay a penalty as described below. The NOAA attorney will generally not consider an alleged violator's ability to pay in making a recommendation regarding issuance of a NOVA because he or she will not have relevant information available before the NOVA with proposed penalty is issued.⁸ Once a NOVA is issued, the burden to demonstrate inability to pay rests with the alleged violator. *See* 15 C.F.R. § 904.108(c)-(e) (describing process for demonstrating inability to pay). The alleged violator must provide requested information that is verifiable, accurate, and complete to enable consideration of this factor in adjusting the proposed penalty.

When an alleged violator cannot afford the penalty prescribed by this policy, or payment of all or a portion of the penalty will preclude the alleged violator from achieving compliance or from carrying out remedial measures more important than the deterrence effect of the penalty, the NOAA attorney may consider, *inter alia*, the following options:

- a. An installment payment plan with interest;
- b. A reduction of the penalty amount in exchange for a comparable increase in the permit sanction component;
- c. A suspended penalty subject to specified conditions; and
- d. Straight penalty reductions.

The amount of any downward adjustment of the penalty for inability to pay is dependent on the individual financial facts of the case.

⁸ Unlike most statutes NOAA enforces, the Lacey Act requires consideration of ability to pay at the time of charging. *See* 16 U.S.C. § 3373(a)(6); *see also* 15 C.F.R. § 904.108(g)-(h) (describing process for consideration of ability to pay at the charging stage).

IX. Application of the Penalty Policy and Periodic Review⁹

Use of Preliminary Worksheet with Rationale for Assessed Penalty – In preparing a recommendation to charge an alleged violation through issuance of a NOVA, NOPS, or both, the NOAA attorney will complete the Preliminary Worksheet attached as Appendix 1 to establish a recommended penalty and permit sanction for each alleged violation. Each section of the worksheet corresponds to a section of the Policy as summarized in Sections V through VII above. The Preliminary Worksheet is a privileged document exempt from release, reflecting attorney-work product involving intra-agency deliberations related to enforcement that may include attorney-client communications, and is therefore not available to respondents; however, the basis of the penalty will be included in charging documents.

Multiple Violations – In certain situations, several violations may have been committed. An assessment will be undertaken for each violation charged.

Penalty Assessment Against Vessel Owner and Operator – Absent extraordinary circumstances, the penalty will be assessed jointly and severally against all appropriate actors (e.g., the vessel owner and operator).

Application to Violations of Other NOAA Statutes – As noted above, this Policy supersedes all previous guidance regarding assessment of penalties or permit sanctions and all previous penalty and permit sanction schedules issued by the NOAA Office of the General Counsel. This Policy, and the attached matrixes and schedules, address the seven major statutes that NOAA enforces. While NOAA develops base penalty matrixes for other statutes NOAA enforces, the NOAA attorney will use the closest one by analogy, i.e., the matrix developed for MSA violations will be used to develop a recommended penalty under other fishery laws with comparable statutory penalties.

Further, although all previous penalty and permit schedules are superseded by this Policy, they may still be used as an historical reference point to be considered in application of this Policy. In transitioning to this new Policy for assessing penalties and permit sanctions, the NOAA General Counsel's Office will monitor the situation closely, and any penalty or permit sanction under this Policy that is substantially higher or lower than under the prior penalty schedules will be reviewed before the penalty is put into a charging decision.

Periodic Review – The NOAA General Counsel's Office will review this Policy shortly after one year from its final effective date and consider revisions or modifications as appropriate to ensure that it continues to serve the stated purposes of the Policy.

⁹ This Policy does not address issues related to charging decisions, such as the appropriate "unit of prosecution" (e.g., whether an unpermitted fishing trip is one violation, or multiple violations for each fishing day). Instead, by separate policy, NOAA will provide guidance for making charging decisions under the statutes NOAA enforces.

APPLICATION OF POLICY – SPECIFIC EXAMPLES

EXAMPLE 1 – MAGNUSON-STEVENSON ACT

Description of Violation

Commercial fishing vessel, Vessel A, owned and operated by Captain X, lands 5,000 pounds of redbait groundfish, which is 2,000 pounds (approximately 67%) in excess of the applicable 3,000 pound trip limit. The trip limit had been in effect for several months as of the date of the violation. The violation occurs during a routine landing, which is monitored by a NOAA enforcement agent. The excess fish is voluntarily abandoned by Captain X. When interviewed by the NOAA agent, the captain says that the overage is due to a mistake by an inexperienced crewmember who was unaware of the 3,000 pound limit. At the time of the violation, Vessel A is participating in the groundfish fishery as a federally permitted, limited entry fishing vessel. Limited entry vessels qualify for a higher trip limit for redbait groundfish than do open access vessels. Redbait groundfish are not considered an overfished species. No other violations are found in connection with the overage. Captain X has one prior violation for an overage of groundfish, which occurred two years prior to the present violation.

The following is a discussion of the methodology used to calculate the amount of the proposed civil monetary penalty for the violation, under the penalty policy.

Initial Base Penalty

Offense Level: Level II. The Magnuson-Stevens Act schedule provides for an offense level of II for most fishing overages between 50% and 100%.

Degree of Culpability: Level B. Although the Captain indicated that the violation was unintentional, the Captain's knowledge of the 3000 lb limit and the size of the overage implies negligence in overseeing the vessel's crewmembers, particularly those who were inexperienced.

Initial Base Penalty: The penalty range is II B, \$4,000 to \$6,000, with a midpoint of \$5,000.

Adjustment Factors

History of Compliance: Captain X had one similar violation within the previous two years; this increases the penalty range to II C, \$6,000 - \$10,000, with a midpoint of \$8,000, which represents an upward adjustment of \$3,000 over the initial base penalty.

Commercial vs. Recreational Activity: the violation occurred in the commercial, limited entry groundfish fishery. The fact that Vessel A was participating in a limited entry fishery was considered in determining the initial base penalty. The limited entry fishery

management program is by definition applicable only to commercial fishing vessels; therefore no further adjustment is warranted.

Activity After Violation/Cooperation: Although Captain X voluntarily abandoned the excess fish, there was no cooperation with authorities in this case to a degree warranting a downward adjustment of the penalty.

Base Penalty After Application of Adjustment Factors: Increase initial base penalty to \$8,000 (\$5,000 + \$3,000 = \$8,000)

Proceeds of the Unlawful Activity and Any Additional Economic Benefit

N/A; Captain X voluntarily abandoned the excess fish.

Total Penalty (I. + II. + III.): \$8,000

EXAMPLE 2 – MAGNUSON-STEVENS ACT

Description of Violation

Commercial fishing vessel, Vessel A, owned and operated by Captain X, lands 830 pounds of Atlantic sea scallops that are sold for \$6 per pound, for a total of \$5,229. Because the vessel was issued a valid Limited Access General Category permit, it is limited to landing 400 pounds of scallops. Captain X completes a vessel trip report stating that only 400 pounds of scallops were landed, and submits this report to the National Marine Fisheries Service. The dealer to whom the scallops are sold (Dealer Y) reports to NMFS that it has purchased only 400 pounds of scallops. When interviewed by the investigating agent, Dealer Y denies purchasing the illegal scallops. When the investigating agent interviews Captain X, Captain X admits landing excess scallops and selling them to Dealer Y for cash. Captain X also admits submitting a false trip report. Further, he acknowledges that he has worked out an agreement with Dealer Y to report only 400 pounds. Captain X's admissions lead to the retrieval of Dealer Y's record that reveals the excess 430 pounds of scallops were purchased with cash for \$2,580 (430 lbs. x \$6 per lb.). Neither Vessel A nor Captain X have any prior history of violations. Based on this example, Vessel A and Captain X fished for, caught, possessed, landed, and sold scallops in excess of the 400 pound landing limit and submitted and maintained a false vessel trip report.

The following is a discussion of the methodology used to calculate the amount of the proposed civil monetary penalties for the violations against Vessel A/Captain X under the penalty policy.

Initial Base Penalty

Count 1: Possession of excess scallops

Offense Level: Level II. The Magnuson-Stevens Act schedule provides for an offense level of II for overages of General Category area scallops over 50% of the permissible catch.

Degree of Culpability: Level D. The evidence indicates the violation was intentional.

Initial Base Penalty: The penalty range is II D, \$10,000 - \$20,000, with a midpoint of \$15,000.

Count 2: False Trip Report

Offense Level: Level III. The Magnuson-Stevens Act schedule provides for an offense level of III for filing a false report that is material. Accurate reporting is a vital part of the Atlantic sea scallop fishery management program (*See, e.g. In re Atlantic Spray Corp.*, 1996 WL 1352603 (NOAA)), and Captain X conspired with Dealer Y to hide the scallop overage, causing a potentially significant harm to the regulatory program.

Degree of Culpability: Level D. The evidence indicates the violation was intentional.

Initial Base Penalty: The penalty range is III D, \$20,000 - \$40,000, with a midpoint of \$30,000.

Adjustment Factors

History of Compliance: Captain X has no prior enforcement history.

Commercial vs. Recreational Activity: the violation occurred in the commercial, limited entry General Category scallop fishery. The fact that Vessel A was participating in a limited entry fishery was considered in determining the initial base penalty. The limited entry fishery management program is by definition applicable only to commercial fishing vessels; therefore no further adjustment is warranted.

Activity After Violation/Cooperation: Captain X admitted the illegal landing and false reporting without making any further false oral statements and was cooperative. His admission and cooperation assisted the investigating agent's retrieval of evidence and uncovered the dealer's full role in the transaction. This significant degree of cooperation supports a downward adjustment of \$10,000 to the low end of the penalty range for the false reporting count.

Base Penalty After Application of Adjustment Factors: Count 1: No decrease/increase. Count 2: Decrease initial base penalty to \$20,000 (\$30,000-\$10,000=\$20,000).

Proceeds of the Unlawful Activity and Any Additional Economic Benefit

\$2,580, which is added to the penalty for possessing excess scallops.

Total Penalty (I. + II. + III.): Count 1: \$17,580; Count 2: \$20,000; total: \$37, 580.

EXAMPLE 3 – MAGNUSON-STEVENSON ACT**Description of Violation**

A foreign-flagged longline fishing vessel owned by Company Z and operated by Captain Y was documented, by a U.S. Coast Guard (USCG) air patrol, fishing inside the U.S. Exclusive Economic Zone (EEZ). USCG witnesses photographed and videotaped the vessel actively engaged in fishing in U.S. waters. In addition, USCG personnel prepared written statements documenting the fishing activities that they witnessed. USCG records provide the specific latitude and longitude inside the U.S. EEZ where the foreign fishing vessel was located. The vessel never came into a U.S. port and was never boarded by USCG or NOAA. Numerous violations by foreign –flagged fishing vessels have occurred in this area, which is extremely remote with little to no nearby enforcement assets. Patrols in this area are rare and expensive; accordingly, violations of this type often go undetected in this area.

The following is a discussion of the methodology used to calculate the amount of the proposed civil monetary penalty for the violation, under the penalty policy.

Initial Base Penalty

Offense Level: Level VI. The Magnuson-Stevens Act schedule provides for an offense level of VI for this violation because the gravity of the offense is significant. Many tuna stocks in the Pacific are subject to overfishing. In addition, foreign fishing vessels may not fish inside the U.S. EEZ without a permit, which the vessel did not have. Such violations harm U.S. fishers, because a foreign vessel is appropriating U.S. fishery resources. Moreover, this type of violation is difficult to detect. Overall, the violation had substantial adverse effect on the statutory and regulatory scheme.

Degree of Culpability: Level D. The evidence indicates the violation was intentional. The foreign fishing vessel was more than 20 nautical miles inside the U.S. EEZ.

Initial Base Penalty: The penalty range is VI D, \$100,000-\$140,000, with a midpoint of \$120,000.

Adjustment Factors

History of Compliance: Neither Company Z or Captain Y have any prior violations.

Commercial vs. Recreational Activity: The violation was by a commercial longline vessel, a factor already accounted for in the initial base penalty assessment.

Activity After Violation/Cooperation: There was no interaction with Company Z or Captain Y after the violation.

Base Penalty After Application of Adjustment Factors: No decrease/increase.

Proceeds of the Unlawful Activity and Any Additional Economic Benefit

There was no opportunity to board the vessel, so economic benefit is unclear and no additional penalty is assessed.

Total Penalty (I. + II. + III.): \$120,000

EXAMPLE 4 – NATIONAL MARINE SANCTUARIES ACT

Description of Violation

Recreational vessel A, owned and operated by Captain X, grounds in a seagrass habitat in the Florida Keys National Marine Sanctuary. When interviewed by law enforcement officers, Captain X advises that he had lost his bearings. An assessment of the grounding reveals that over 80 square yards of habitat is impacted, including prop scars and a blowhole.

The following is a discussion of the methodology used to calculate the amount of the proposed civil monetary penalty for the violation, under the penalty policy.

Initial Base Penalty

Offense Level: Level III. The National Marine Sanctuaries Act schedule provides for an offense level range of III where, as here, the gravity of the offense is moderate.

Degree of Culpability: Level B. The evidence indicates that although the grounding is unintentional, Captain X attempted to power off, thus creating a blowhole, which is negligent.

Initial Base Penalty: The penalty range is III B, \$4,000 - \$8,000, with a midpoint of \$6,000.

Adjustment Factors

History of Compliance: Captain X does not have any previous violations.

Commercial vs. Recreational Activity: Although there could be a distinction between commercial and recreational activity for grounding cases, in this example, the penalty would be the same.

Activity After Violation/Cooperation: The evidence does not indicate that Captain X was unusually cooperative or uncooperative.

Base Penalty After Application of Adjustment Factors: No decrease/increase

Proceeds of the Unlawful Activity and Any Additional Economic Benefit

N/A.

Total Penalty (I. + II. + III.): \$6,000

EXAMPLE 5 – MARINE MAMMAL PROTECTION ACT

Description of Violation

Upon arrival at a known haul-out for marine mammals, a state game warden is contacted by a civilian witness who states that she has just observed and photographed a man taking photos of elephant seals. The witness states that, at first, the man was just shooting photos of elephant seals at close proximity with little or no interaction with the animals. After a few minutes however, the man began to toss rocks onto one large bull elephant seal while attempting to take photographs of the animal's reaction. The man then began to pelt the animal's torso with rocks while taking photos. Finally, the man hit the animal on the tail with a large stick, which elicited an aggressive response (charge) from the animal. The man took one final photograph of the animal and then retreated quickly up the beach with the animal in close pursuit for several yards.

With the assistance of the witness, the warden is able to identify the man in a nearby parking lot and interview him. Initially, the man denies any wrongdoing and refuses to give his name or any other information. When the warden explains that his earlier actions had been photographed and that his camera would be seized as evidence of a violation of the MMPA, the photographer becomes very agitated and yells at the warden, stating that he did not hurt the elephant seals and that he just wanted to get a good photograph. Upon further questioning, the photographer states that he wants to be a professional wildlife photographer, that he loves marine mammals and wouldn't do anything to hurt them. No investigation of the health of the elephant seal is conducted.

The following is a discussion of the methodology used to calculate the amount of the proposed civil monetary penalty for the violation, under the penalty policy.

Initial Base Penalty

Offense Level: Level II. The Marine Mammal Protection Act schedule provides for an offense level of II for harassing a marine mammal, and an offense level of III for harming one. Because of the use of rocks and a stick to strike the animal, there is a moderate potential for harm to this particular elephant seal. Although there may have been actual harm to the animal because it is struck, there is no evidence on the record to support such a finding, accordingly the actions rise to the level of “harassment,” a level II offense.

Intent Level: Level D. The evidence indicates that the photographer intentionally harassed the animal.

Initial Base Penalty: The penalty range is II D, \$2,000-\$3,000, with a midpoint of \$2,500.

Adjustment Factors

History of Compliance: The Photographer has no prior violations.

Commercial vs. Recreational Activity: Although there is some indication of a commercial motivation for the violation, in that the alleged violator wants to become a professional photographer, there are no facts to support that this violation was conducted for specific commercial activity.

Activity After Violation/Cooperation: The alleged violator was uncooperative, and initially made an uncharged false statement to the investigating officer. These facts support an upward adjustment to the high end of the penalty range (\$3,000).

Base Penalty After Application of Adjustment Factors: Increase initial base penalty to \$3,000 ($\$2,500 + \$500 = \$3,000$).

Proceeds of the Unlawful Activity and Any Additional Economic Benefit

N/A

Total Penalty (I. + II. + III.): \$3,000

EXAMPLE 6 – ENDANGERED SPECIES ACT**Description of Violation**

A Maui resident (Mr. X) was documented approaching an endangered Humpback whale. Regulations under the Endangered Species Act and the National Marine Sanctuaries Act

prohibit approaching endangered Humpback whales within 100 yards in the waters around Hawaii. In this case, two sanctuary outreach and education volunteers spotted Mr. X and his child approaching Humpback whales just offshore. According to eyewitnesses, Mr. X and his child approached to within less than 10 feet. The witnesses provided statements and photographs to enforcement. Mr. X was well aware of the regulations establishing the prohibition on approaching Humpback whales.

The following is a discussion of the methodology used to calculate the amount of the proposed civil monetary penalty for the violation, under the penalty policy.

Initial Base Penalty

Offense Level: Level I. The Endangered Species Act schedule provides for an offense level of I for violation of a distance restriction by a non-commercial violator.

Intent Level: Level D. According to eyewitnesses, Mr. X deliberately and directly approached Humpback whales, violating the prohibition against approaching endangered species. The evidence indicates the violation was willful.

Initial Base Penalty: The penalty range is I D, Written Warning to \$2,000, with a midpoint of \$1,000

Adjustment Factors

History of Compliance: Mr. X has no prior violations.

Commercial vs. Recreational Activity: There are no facts to support that this violation was conducted for a specific commercial activity – the activities in question appeared to be recreational. However, because the recreational nature of the activity was already considered in determining the initial base penalty, no downward adjustment is warranted.

Activity After Violation/Cooperation: Although Mr. X refused to speak to the investigating officer, the refusal to speak, standing alone, is not a degree of lack of cooperation that creates a basis for an upward adjustment of the penalty.

Base Penalty After Application of Adjustment Factors: No decrease/increase.

Proceeds of the Unlawful Activity and Any Additional Economic Benefit

N/A

Total Penalty (I. + II. + III.): \$1,000

APPENDIX 1Preliminary Worksheet – Recommended Assessment of Penalty and Permit Sanction

Name of Alleged Violator(s) _____

Description of Violation _____

Case Number/Count _____

I. Base PenaltyInitial Base Penalty

A. Offense Level (I through VI): _____

B. Culpability (A through D) _____

C. Matrix Penalty _____

Adjustment Factors

D. History Of Compliance _____

E. Commercial vs. Recreational Activity _____

F. Activity After Violation/Cooperation _____

Total Base Penalty: _____**II. Proceeds of the Unlawful Activity and Additional Economic Benefit**

A. Proceeds of Unlawful Activity _____

B. Additional Economic Benefit _____

Total Economic Benefit: _____**III. Total Penalty (I + II)** _____**IV. TOTAL PENALTY(from all worksheets)** _____

Attorney: _____

Date: _____

APPENDIX 2**Penalty Matrix for the Magnuson-Stevens Act**

	Level of Culpability			
Gravity Offense Level	A	B	C	D
	Unintentional	Negligent	Reckless	Intentional
I	Written warning- \$2,000	Written warning- \$4,000	\$2,000-\$6,000	\$6,000-\$8,000
II	\$2,000-\$5,000	\$4,000-\$6,000	\$6,000-\$10,000	\$10,000-\$20,000
III	\$5,000-\$10,000	\$10,000-\$15,000	\$15,000-\$20,000	\$20,000-\$40,000 and permit sanction of 5-20 days for a second violation*
IV	\$10,000-\$15,000	\$15,000-\$25,000	\$20,000-\$40,000 and permit sanction of 10- 20 days*	\$40,000-\$60,000 and permit sanction of 20- 60 days*
V	\$15,000-\$25,000	\$25,000-\$40,000 and permit sanction of 10- 20 days*	\$40,000- \$60,000 and permit sanction of 20- 60 days*	\$60,000- \$100,000 and permit sanction of 60- 180 days*
VI	\$25,000-\$40,000 and permit sanction of 5-20 days for a second violation*	\$40,000-\$60,000 and permit sanction of 20- 60 days*	\$60,000- \$100,000 and permit sanction of 60- 180 days*	\$100,000- statutory maximum and permit sanction of 180 days to 1 year *

*Under catch share or similar programs, where permits allow for a certain amount of fishing quota per year (instead of fishing days per year), permit sanctions will be assigned as a percentage of the quota, at a rate of 0.27% for each day of permit sanction time listed in the matrixes (100% divided by 365 days per year is approximately 0.27% per day).

Penalty Matrix for the National Marine Sanctuaries Act

	Level of Culpability			
Gravity Offense Level	A Unintentional	B Negligent	C Reckless	D Intentional
I	Written warning- \$1,000	Written warning- \$2,000	\$1,000 - \$3,000	\$2,000 - \$4,000
II	\$1,000 - \$3,000	\$2,000 - \$4,000	\$3,000-\$6,000	\$4,000-\$8,000
III	\$3,000 - \$6,000	\$4,000-\$8,000	\$6,000-\$12,000	\$8,000-\$16,000
IV	\$4,000-\$8,000	\$6,000-\$12,000	\$8,000-\$16,000	\$16,000-\$32,000
V	\$6,000-\$12,000	\$8,000-\$16,000	\$16,000-\$32,000	\$32,000-\$70,000
VI	\$12,000-\$24,000	\$24,000-\$48,000	\$48,000-\$96,000	\$96,000-statutory maximum

Penalty Matrix for the Lacey Act

	Level of Culpability			
Gravity Offense Level	A Unintentional	B Negligent	C Reckless	D Intentional
I Marking Offenses (not including false- labeling)	Written warning to statutory maximum			
Offenses other than Marking Offenses* ⁺	N/A – Statute requires negligence	Written warning- \$500	Written warning- \$750	Written warning- \$1000
II	N/A – Statute requires negligence	Written warning - \$1,500	\$1,500-\$2,000	\$2,000-\$3,000
III	N/A – Statute requires negligence	\$1,000-\$3,000	\$3,000-\$4,000	\$4,000-\$6,000
IV	N/A – Statute requires negligence	\$2,000-\$5,000	\$5,000-\$8,000	\$8,000-statutory maximum

Notes:

* “False- Labeling” offenses require a culpability level of intentional.

⁺ If the violation involves fish or wildlife with a fair market value of less than \$350 and involves only the transportation, acquisition, or receipt of fish or wildlife taken or possessed in violation of any law, treaty, or regulation of the United States, any Indian tribal law, any foreign law, or any law or regulation of any State, the penalty assessed shall not exceed the maximum provided for violation of said law, treaty, regulation, or the statutory maximum under the Lacey Act, whichever is less. *See* 16 U.S.C. § 3373(a)(1)

Penalty Matrix for the Endangered Species Act

	Level of Culpability			
Gravity Offense Level	A	B	C	D
	Strict-Liability ¹⁰	Negligent	Reckless	Intentional
I Endangered	Written warning- statutory maximum*	Written warning- \$1000	Written warning- \$1500	Written warning- \$2000
Threatened		Written warning- \$500	Written warning- \$750	Written warning- \$1000
II Endangered	Written warning- statutory maximum*	\$2,500-\$3,500	\$3,500-\$6,000	\$6,000-\$11,500
Threatened		\$1,000-\$1,500	\$1,500-\$2,500	\$2,500-\$4,500
III Endangered	Written warning- statutory maximum*	\$6,000-\$11,500	\$11,500-\$17,000	\$17,000-\$23,000
Threatened		\$2,500-\$4,500	\$4,500-\$7,000	\$7,000-\$9,000
IV Endangered	Written warning- statutory maximum*	\$11,500-\$17,000	\$17,000-\$23,000	\$23,000- statutory maximum
Threatened		\$4,500-\$7,000	\$7,000-\$9,000	\$9,000-statutory maximum

* Currently \$650 for unknowingly committing a violation.

¹⁰ The Endangered Species Act establishes a lower statutory maximum penalty for strict-liability offenses.

Penalty Matrix for the Marine Mammal Protection Act

	Level of Culpability			
Gravity Offense Level	A	B	C	D
	Unintentional	Negligent	Reckless	Intentional
I	Written warning- \$200	Written warning- \$500	Written warning- \$750	Written warning- \$1000
II	Written warning- \$1,000	\$1,000-\$1,500	\$1,500-\$2,000	\$2,000-\$3,000
III	\$1,000-\$2,000	\$2,000-\$3,000	\$3,000-\$4,000	\$4,000-\$6,000
IV	\$2,000-\$3,000	\$3,000-\$5,000	\$5,000-\$8,000	\$8,000-statutory maximum

Penalty Matrix for the Northern Pacific Halibut Act of 1982

	Level of Culpability			
Gravity Offense Level	A Unintentional	B Negligent	C Reckless	D Intentional
I	Written warning-\$2,000	Written warning-\$4,000	\$2,000-\$6,000	\$6,000-\$8,000
II	\$2,000-\$5,000	\$4,000-\$6,000	\$6,000-\$10,000	\$10,000-20,000
III	\$5,000-\$10,000	\$10,000-\$15,000	\$15,000-\$20,000	\$20,000-\$40,000 and permit sanction of 5-20 days for a second violation*
IV	\$10,000-\$15,000	\$15,000-\$25,000	\$20,000-\$40,000 and permit sanction of 10-20 days for a second violation*	\$40,000-\$60,000 and permit sanction of 20-60 days*
V	\$15,000-\$25,000	\$25,000-\$40,000 and permit sanction of 10-20 days for a second violation*	\$40,000-\$65,000 and permit sanction of 20-60 days*	\$65,000-\$120,000 and permit sanction of 60-180 days*
VI	\$25,000-\$40,000 and permit sanction of 5-20 days for a second violation*	\$40,000-\$65,000 and permit sanction of 20-60 days*	\$65,000-\$120,000 and permit sanction of 60- 180 days*	\$120,000- statutory maximum and permit sanction of up to one year *

*Under catch share or similar programs, where permits allow for a certain amount of catch per year (instead of fishing days per year), permit sanctions will be assigned as a percentage of the quota, at a rate of 0.27% for each day of permit sanction time listed in the matrixes (100% divided by 365 days per year is approximately 0.27% per day).

Penalty Matrix for the Antarctic Marine Living Resources Convention Act

	Level of Culpability			
Gravity Offense Level	A Unintentional	B Negligent	C Reckless	D Intentional
I	\$1,000-\$4,000	\$3,000-\$6,000	\$5,000-\$8,000	\$7,000-statutory maximum
II	\$6,000-\$8,000	\$7,000-\$9,000	\$8,000-\$10,000	\$9,000-statutory maximum
III	\$8,000-\$10,000	\$9,000-statutory maximum	statutory maximum	statutory maximum
IV	statutory maximum	statutory maximum	statutory maximum	statutory maximum

APPENDIX 3
Offense Level Guidance
Magnuson-Stevens Act Schedule

VIOLATION	LEVEL
VIOLATIONS REGARDING GEAR	
Failing to affix vessel markings; Failing to comply with gear tag or marking requirements if not deployed or if deployed without gear limits; Failing to properly deploy seabird avoidance gear.	I
Violating area specific gear requirements; ¹¹ Having non-complying gear onboard or failing to have required gear onboard; Failing to have seabird avoidance gear on board; Failing to comply with gear tag or marking requirements if deployed with gear limits.	II
Violating area specific gear requirements; ¹² Fishing with non-compliant gear; Falsifying vessel markings.	III
Dumping gear.	IV

¹¹ Violating area specific gear requirements may be either a level II offense or a level III offense, depending on: (1) the nature of the area; (2) how far into the area the vessel traveled; (3) how long the vessel was in the area; (4) the nature of the gear restriction; and (5) the type of gear used.

¹² See footnote 11.

VIOLATIONS REGARDING THE FACILITATION OF ENFORCEMENT, SCIENTIFIC MONITORS, OR OBSERVERS	
<p>Failing to provide information, notification, accommodations, access, or reasonable assistance to either a NFMS-approved observer or a sea sampler conducting his or her duties aboard a vessel;¹³</p> <p>Submitting inaccurate or false data, statements, or reports;¹⁴</p> <p>Discarding, releasing, or transferring fish before bringing it aboard or making it available to an observer for sampling;</p> <p>Providing inaccurate information to an authorized officer, if accurate information is subsequently provided voluntarily in a timely manner.</p>	I
<p>Failing to provide information, notification, accommodations, access, or reasonable assistance to either a NFMS-approved observer or a sea sampler conducting his or her duties aboard a vessel;¹⁵</p> <p>Failing to maintain required observer or sea sampler coverage;</p> <p>Failing to maintain or obtain approval of sampling area;</p> <p>Submitting inaccurate or false data, statements, or reports;¹⁶</p> <p>Discarding, releasing, or transferring fish before bringing it aboard or making it available to an observer for sampling;¹⁷</p> <p>Providing false statements to an authorized officer;</p>	II

¹³ Failing to provide information, notification, accommodations, access, or reasonable assistance to either a NFMS-approved observer or a sea sampler conducting his or her duties aboard a vessel may be either a level I offense or a level II offense, depending on: (1) the gravity of the violation and (2) the type of information involved.

¹⁴ Submitting inaccurate data, statements, or reports may be a level I, II, or III offense. It is an offense level I where the adverse impact on the statutory or regulatory program is insignificant and there is no economic gain from the violation. It is an offense level II where the adverse impact on the statutory or regulatory program is minor or there is some economic gain from the violation. It is an offense level III where the adverse impact on the statutory or regulatory program is significant, or there is a significant economic gain from the violation.

¹⁵ See footnote 13.

¹⁶ See footnote 14.

¹⁷ This offense level only applies where a catch share or ITQ/IFQ system is involved.

Opposing, impeding, or interfering with any NMFS-approved observer or authorized officer.	
<p>Failing to maintain or operate flow scale or other scales to obtain accurate weights;</p> <p>Failing to comply with flow scale or other scale testing and certification requirements;</p> <p>Submitting inaccurate or false data, statements, or reports;¹⁸</p> <p>Harassing or intimidating any NMFS-approved observer or authorized officer;¹⁹</p> <p>Refusing to carry an observer or fishing without an observer.</p>	III
Refusal to allow a boarding/entry by an authorized officer or inspector to area of custody, or inspection.	IV
Assaulting, resisting, threatening, or coercing any NMFS-approved observer or authorized officer.	V
VIOLATIONS REGARDING PERMITS, REPORTING, DOCUMENTATION, AND PERMIT REQUIREMENTS	
<p>No vessel/operator permit onboard;</p> <p>Fishing without a general/open access permit or no vessel permit issued;</p> <p>Fishing for, receiving, processing, or possessing limited entry or catch share species without holding a valid permit if the permit is expired but renewable;</p> <p>Failing to report changes in permit information;</p>	I

¹⁸ See footnote 14.

¹⁹ Note that section 309 of the Magnuson-Stevens Fishery Conservation and Management Act (186 U.S.C. § 1859) makes these violations criminal offenses. Major violations will be considered appropriate for criminal referral.

<p>Purchasing, possessing, or receiving catch without a dealer or registered buyer permit, provided the transaction is reported consistent with requirements of dealer permit;</p> <p>Providing inaccurate information in connection with application, declaration, record, or report if the information is immaterial;</p> <p>Failing to comply in a timely fashion with log report, reporting, record retention, inspection, or other requirements, including failing to submit affidavits or other required forms in a non-quota fishery;²⁰</p> <p>Failing to provide legible logbooks or other reports;</p> <p>Failing to comply with VMS/days at sea reporting.²¹</p>	
<p>Purchasing, possessing, or receiving from an unpermitted vessel;</p> <p>Failing to comply in a timely fashion with log report, reporting, record retention, inspection, or other requirements, including failure to submit affidavits or other required forms in a quota fishery;²²</p> <p>Failure to provide accurate logbooks or other reports;</p> <p>Failing to comply with VMS/days at sea reporting.²³</p>	II
<p>Fishing for, receiving, processing, or possessing limited entry or catch share species without holding a valid permit if ineligible for a permit;</p> <p>Altering, erasing, or mutilating a permit or application;</p>	III

²⁰ Failing to comply in a timely fashion with log report, reporting, record retention, inspection, or other requirements, including failing to submit affidavits or other required forms in a non-quota fishery, may be either a level I or level II offense. It is an offense level I where the adverse impact on the statutory or regulatory program is insignificant and there is no economic gain from the violation. It is an offense level II where the adverse impact on the statutory or regulatory program is minor or there is some economic gain from the violation.

²¹ Failing to comply with VMS/days at sea reporting may be either a level I or level II offense. It is an offense level II where there is an adverse impact on the statutory or regulatory program such as where the DAS violation is related to landing an overage.

²² See footnote 20.

²³ See footnote 21.

<p>Providing false information in connection with application, declaration, record, or report if the information is material;</p> <p>Having a non-operational VMS unit onboard.</p>	
<p>Fishing for, taking, or retaining particularly vulnerable, depleted, or overfished species without a required permit;</p> <p>Tampering with, damaging, destroying, altering, or in any way distorting, rendering useless, inoperative, ineffective, or inaccurate the VMS or VMS unit;</p> <p>Failing to carry a VMS unit onboard;</p> <p>Failing to have approved operational VMS unit onboard.</p>	IV
<p>Failing to minimize catch of prohibited species.</p>	V
<p>VIOLATIONS REGARDING TIME, AREA, EFFORT, OR SECTOR RESTRICTIONS</p>	
<p>Fishing with excess crew.</p>	I
<p>Entering a closed area or transiting a closed area with gear not properly stowed;</p> <p>Failure to comply with permit restrictions or IFQ transfer requirements.</p>	II
<p>Fishing in a closed area or during a closed season;</p> <p>U.S. vessel fishing illegally in EEZ.</p>	III
<p>Foreign fishing vessel fishing in U.S. waters without a permit or transiting U.S. waters with fishing gear not properly stowed.</p>	VI

VIOLATIONS REGARDING SIZE/CONDITION/QUANTITY OF FISH OR LANDING/POSSESSION REQUIREMENTS	
<p>Fishing for, receiving, trading, landing, or possessing fish in excess of what is allowed by regulation, permit, notice, or other means, where the overage exceeds the catch limit by up to and including 50% or has a fair market value of \$500 or less;</p> <p>Taking, receiving, trading, or possessing more general category scallops than allowed by regulation, permit, notice, or other means, up to 50% overage;</p> <p>Taking, receiving, trading, or possessing more limited access area scallops than allowed by regulation, permit, notice, or other means, between 3% and 5% overage;</p> <p>Catching undersized or oversized fish/lobster;</p> <p>Possession of prohibited species.</p>	I
<p>Fishing for, receiving, trading, landing or possessing fish in excess of what is allowed by regulation, permit, notice, or other means, where the overage exceeds the catch limit by more than 50% and has a fair market value of between \$500 and \$2,000, or where the overage exceeds the catch limit by between 50% and 100% and has a fair market value of more than \$2,000;</p> <p>Taking, receiving, trading, or possessing more general category scallops than allowed by regulation, permit, notice, or other means, over 50% overage;</p> <p>Taking, receiving, trading, or possessing more limited access area scallops than allowed by regulation, permit, notice, or other means, up to 50% overage;</p> <p>Illegally discarding fish or violating fish retention requirement.</p>	II
<p>Fishing for, receiving, trading, landing or possessing fish in excess of what is allowed by regulation, permit, notice, or other means, where the overage exceeds the catch limit by 100% or more and has a fair market value of \$500 or more;</p> <p>Taking, receiving, trading, or possessing more limited access area scallops than allowed by regulation, permit, notice, or other means, by more than a 5% overage.</p>	III

Violating food safety regulations.	VI
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VIOLATIONS REGARDING TRANSFER, PURCHASE, TRADE, SALE (AND ATTEMPTS)	
Purchasing, receiving, transferring, trading, or selling more fish than allowed by regulation, permit, notice, or other means; illegal transfer from vessel at sea.	II
Purchasing, receiving, transferring, trading, or selling otherwise unlawfully landed fish; ²⁴	
Purchasing, receiving, transferring, trading, or selling otherwise unlawfully landed fish. ²⁵	III
Damaging or stealing gear or fish.	IV
VIOLATIONS OF ACTS IMPLEMENTING INTERNATIONAL AGREEMENTS Western and Central Pacific Tunas Convention Act and Atlantic Tunas Convention Act	
Failing to release tuna which will not be retained immediately and with a minimum of injury; Removing tail tag before permitted; Failing to report taking of a tagged tuna.	I
Fishing in excess of catch limits (Anglers & General); Selling, offering for sale, or transferring any recreationally caught Atlantic bluefin tuna; Fishing within 100 yards of corkline of purse seiner fishing for bluefin tuna;	II

²⁴ Purchasing, receiving, transferring, trading, or selling otherwise unlawfully landed fish may be either a level II or a level III offense. It is a level III offense where there is an adverse impact on the statutory or regulatory program, such as where the violation is related to receiving an overage.

²⁵ See footnote 24.

<p>Failing to request a purse seine vessel, net, or fish inspection;</p> <p>Failing to maintain reports, submit reports in a timely manner, or submitting inaccurate reports (Dealer);</p> <p>Failing to report taking of commercial-sized bluefin tuna (Dealer);</p> <p>Failing to tag a tuna;</p> <p>Retaining tuna caught under tag and release program;</p> <p>Fishing for or retaining undersized tuna;</p> <p>Landing tuna in other than prescribed forms;</p> <p>Fishing for, catching, possessing, retaining, or landing Atlantic highly migratory species (HMS) without the appropriate permit;</p> <p>Failing to properly mark a container holding tuna for export.</p>	
<p>Purchasing, transferring, or receiving tuna for a commercial purpose without a license or from a vessel without the appropriate permit;</p> <p>Transferring, purchasing, or receiving Atlantic bluefin tuna from any person or vessel without a valid dealer permit;</p> <p>Selling, offering for sale, or transferring any Atlantic bluefin tuna to any person other than a permitted dealer;</p> <p>Failing to comply with sea turtle mitigation gear and handling requirements by international agreement.</p>	III
<p>Fishing in excess of quota, allocation, or incidental catch limits;</p> <p>Purchasing or transporting with a buy boat any tuna that is captured incidentally by longlines;</p> <p>Purchasing, receiving, transferring, selling, offering for sale, importing, exporting, or having custody, possession, or control of tuna which are known to be, or should have been known to be, taken in violation.</p>	IV

<p>Using a fishing vessel equipped with purse seine gear to fish in a closed area;</p> <p>Setting a purse seine around, near or in association with a Fish Aggregating Device (FAD) or deploying or servicing a FAD during a FAD closure or prohibited period;</p> <p>Using a fishing vessel to fish in the Pacific Ocean using longline gear inside and outside the Convention Area on the same fishing trip when prohibited;</p> <p>Fishing during closure.</p>	<p>V</p>
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National Marine Sanctuaries Act Schedule

VIOLATION	LEVEL
GENERAL VIOLATIONS	
SEABED / LAKEBOTTOM ACTIVITIES	
Minor alteration of seabed or lake bottom that is easily fixed; Collection with minor impact to the sanctuary.	I
Anchoring in a prohibited manner or area; Mineral or hydrocarbon exploration, development, or production with minor impact to the sanctuary; Alteration or destruction of seabed or lake bottom, including dredging, drilling, coring, and construction with minor impact to the sanctuary.	II
Mineral or hydrocarbon exploration, development, or production with moderate impact to the sanctuary; Alteration or destruction of seabed or lake bottom, including dredging, drilling, coring, and construction, with moderate impact to the sanctuary; Collection with moderate impact to the sanctuary.	III
Mineral or hydrocarbon exploration, development, or production with major impact to the sanctuary; Alteration or destruction of seabed or lake bottom, including dredging, drilling, coring, and construction, with major impact to the sanctuary; Collection with major impact to the sanctuary.	V

FISHING	
<p>Possessing prohibited gear;</p> <p>Using prohibited gear such as pole spears, air rifles, bows and arrows, slings, Hawaiian slings, rubber powered arbaletes, pneumatic and spring-loaded guns, or similar devices known as spearguns;</p> <p>Fishing in prohibited areas such as Special Use Areas.</p>	I
<p>Using prohibited gear such as bottom longlines, traps, and nets;</p> <p>Fishing in prohibited areas such as a Wildlife Management Area.</p>	II
Fishing in prohibited areas such as an Ecological Reserves.	III
Trawling.	IV
EXPLOSIVES	
Possessing explosives, electrical charges, poisons, or similar destructive devices.	I
Using explosives, electrical charges, poisons, or similar destructive devices.	III
Using explosives, electrical charge, poisons, or similar destructive devices with major impact on sanctuary resources.	VI
VESSEL / AIRCRAFT	
<p>Motorized personal watercraft operations in prohibited areas;</p> <p>Aircraft disturbance of marine mammals or seabirds, including low overflight;</p> <p>Use of moorings in a prohibited manner.</p>	I
Operate vessel or aircraft in prohibited areas or in a prohibited manner (including groundings) that results in minor impact to the sanctuary.	II

Operate vessel or aircraft in prohibited areas or in a prohibited manner (including groundings) that results in moderate impact to the sanctuary, or in Area to be Avoided.	III
Operate vessel or aircraft in prohibited areas, or in a prohibited manner (including groundings) that results in major impact to the sanctuary.	V
HISTORICAL / CULTURAL	
Disturbing, damaging, destroying, moving, removing, salvaging, recovering, injuring, altering, or possessing historical or cultural resources (or attempting the same) that results in minor impact to the sanctuary; Use of grappling hooks, suction, conveyors, dredging, wrecking, or anchoring devices that results in minor impact to the sanctuary.	I
Disturbing, damaging, destroying, moving, removing, salvaging, recovering, injuring, altering, or possessing historical or cultural resources (or attempting same) that results in moderate impact to the sanctuary; Use of grappling hooks, suction, conveyors, dredging, wrecking, or anchoring devices that results in moderate impact to the sanctuary.	III
Disturbing, damaging, destroying, moving, removing, salvaging, recovering, injuring, altering, or possessing historical or cultural resources (or attempting same) that results in major impact to the sanctuary; Use of grappling hooks, suction, conveyors, dredging, wrecking, or anchoring devices that results in major impact to the sanctuary.	V
DISCHARGES & DEPOSITS	
Discharging or depositing, from within sanctuary boundaries, minor amounts of any non-exempt material or other matter (e.g., hydrocarbons or hazardous substances, fuel, oil, oily bilge waste; unprocessed, non-hazardous trash or raw material, or entangling material) that results in minor impact to the sanctuary; Discharging or depositing, from beyond sanctuary boundaries, any non-exempt material or matter that subsequently enters and injures a Sanctuary resource and results in minor impact to the sanctuary.	I

<p>Discharge or deposit, from within sanctuary boundaries, any non-exempt material or other matter (e.g., hydrocarbons or hazardous substances, fuel, oil, oily bilge waste; unprocessed, non-hazardous trash or raw material, or entangling material) that results in moderate impact to the sanctuary;</p> <p>Discharge or deposit, from beyond sanctuary boundaries, any non-exempt material or matter that subsequently enters and injures a Sanctuary resource and results in moderate impact to the sanctuary;</p> <p>Deposit of wrecks / desertion or abandonment of vessel.</p>	III
<p>Discharge or deposit, from within sanctuary boundaries, any non-exempt material or other matter (e.g. hydrocarbons or hazardous substances, fuel, oil, oily bilge waste, unprocessed, non-hazardous trash or raw material, or entangling material) that results in major impact to sanctuary;</p> <p>Discharge or deposit, from beyond sanctuary boundaries, any non-exempt material or matter that subsequently enters and injures a Sanctuary resource and results in moderate impact to the sanctuary.</p>	V
LIVING MARINE RESOURCES	
Attracting fish.	I
Injuring, moving, removing, taking, possessing, harvesting, landing, damaging, disturbing, or possessing (or attempting the same) living marine specimens (e.g., sharks, rayscoral, live rock, tropical fish, invertebrates, algae, marine plants, etc.) with minor impact to the sanctuary.	II
Injuring, moving, removing, taking, possessing, harvesting, landing, damaging, disturbing, or possessing (or attempting the same) living marine specimens (e.g., sharks, rayscoral, live rock, tropical fish, invertebrates, algae, marine plants, etc.) with moderate impact to the sanctuary.	III
Injuring, moving, removing, taking, possessing, harvesting, landing, damaging, disturbing, or possessing (or attempting the same) living marine specimens (e.g., sharks, rayscoral, live rock, tropical fish, invertebrates, algae, marine plants, etc.) with major impact to the sanctuary.	V

MISCELLANEOUS	
Defacing, damaging, or removing any signage, boundary markers, stakes, mooring buoys, boundary buoys, trap buoys, scientific equipment, navigation aids, notices, or placecards that does not result in damage to a sanctuary resource; Violating a sanctuary permit condition or term.	I
Breaking, taking, cutting, removing, damaging, or possessing any bottom formation with minor impact to the sanctuary; Defacing, damaging, or removing any signage, boundary markers, stakes, mooring buoys, boundary buoys, trap buoys, scientific equipment, navigation aids, notices, or placecards that results in damage to a sanctuary resource.	II
Breaking, taking, cutting, removing, damaging, or possessing any bottom formation with moderate impact to the sanctuary.	III
Releasing or introducing non-native species.	IV
Breaking, taking, cutting, removing, damaging, or possessing any bottom formation with major impact to the sanctuary.	V

Lacey Act Schedule

VIOLATION	LEVEL
MARKING VIOLATIONS	
Importing, exporting, or transporting in interstate commerce any container of fish (including shellfish) which has not been marked in accordance with applicable regulations and/or laws.	I
OTHER THAN MARKING VIOLATIONS	
<p>The following offenses when the amount of wildlife in question is a small quantity or the effect on the resource or the conservation scheme is relatively small:</p> <p>False labeling offenses;</p> <p>Attempting to or import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law;</p> <p>Within the special maritime and territorial jurisdiction of the United States, attempt to or possess any fish or wildlife taken, possessed, transported, or sold in violation of any foreign or Indian tribal law.</p>	III

<p>The following offenses when the amount of wildlife in question is a large quantity or the effect on the resource or the conservation scheme is relatively severe:</p> <p>False labeling offenses;</p> <p>Attempting to or import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law;</p> <p>Within the special maritime and territorial jurisdiction of the United States, attempt to or possess any fish or wildlife taken, possessed, transported, or sold in violation of any foreign or Indian tribal law.</p>	<p>IV</p>
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Endangered Species Act Schedule

VIOLATION	LEVEL
TAKING VIOLATIONS	
Collecting parts (Endangered or Threatened).	I
Harassment (Endangered or Threatened), or attempt to do so; Stellar Sea Lion violations including approaching designated rookery or haulout in buffer area or on land.	II
Wounding, injuring, hunting, or capturing an Endangered or Threatened Species, or attempt to do so; Stellar Sea Lion violations including fishing within a designated rookery or haul-out buffer area, or discharging a firearm within 100 yards of a sea lion.	III
Killing an Endangered or Threatened Species, or attempt to do so.	IV
TRANSPORTATION AND TRANSACTIONS VIOLATIONS	
Import/Export for personal use (Endangered or Threatened); Possess, deliver, carry, transport, sell or ship illegally taken threatened or endangered species in interstate or foreign commerce for personal use; Trade in violation of CITES for personal use.	II
Import/Export for commercial use (Endangered or Threatened); Possess, deliver, carry, transport, sell or ship illegally taken threatened or endangered species in interstate or foreign commerce for commercial use; Trade in violation of CITES for commercial use.	III

VIOLATIONS RELATED TO ENFORCEMENT, MONITORING, AND OBSERVERS	
Observer interference; Interference with a lawful investigation or inspection.	IV
OTHER VIOLATIONS (ENDANGERED OR THREATENED SPECIES)	
Violating distance restrictions for watchable wildlife (non-commercial); Failure to maintain records as required by federal regulation or permit.	I
Violating certificate of exemption regulations; Violating distance restrictions for watchable wildlife (commercial); Failure to allow inspection of records as required by federal regulation or permit.	II
Violating the conditions of a permit issued for research or propagation; Failing to comply with the terms and conditions of an incidental take permit; Dumping fish or other matter (including nets or other gear).	III
Refusing to allow a boarding, entry to an area of custody, or inspection; Interfering with an investigation; Violations of speed restrictions by vessels greater than or equal to 65ft (19.8m) in overall length. ²⁶	IV

²⁶ This offense is also listed under the Marine Mammal Protection Act (MMPA), but should be charged using the Endangered Species Act penalty schedule absent exceptional circumstances warranting charging under the MMPA.

VIOLATIONS RELATED TO TURTLE EXCLUDER DEVICES (TEDS)	
<p>Discrepancies unlikely to kill any turtles encountered, including but not limited to:</p> <ul style="list-style-type: none"> • TED angles between 56-57 degrees. 	I
<p>Discrepancies likely to kill some turtles encountered, including but not limited to:</p> <ul style="list-style-type: none"> • TED angles between 58-60 degrees; • Bar spacing off by up to 3”; • Holes/gaps in TED netting; • Double-Cover TED overlap between 16-17” (stretched). 	II
<p>Discrepancies likely to kill most turtles encountered, including but not limited to:</p> <ul style="list-style-type: none"> • TED angles between 61-70 degrees; • Double-Cover TED overlap between 18-19” (stretched). 	III
<p>Discrepancies likely to kill all turtles encountered, including but not limited to:</p> <ul style="list-style-type: none"> • No TEDs; • TEDs sewn shut; • TED angles above 70 degrees; • No floats on bottom-shooter TED; • Double cover TED overlap of 20” or above (stretched). 	IV

Marine Mammal Protection Act Schedule of Offenses

VIOLATION	LEVEL
TAKING VIOLATIONS	
Harass or Collect Parts of a Marine Mammal, or attempt to do so.	II
Harm, Hunt, or Capture of a Marine Mammal, or attempt to do so.	III
Killing of a Marine Mammal, or attempt to do so.	IV
TRANSPORTATION AND TRANSACTION VIOLATIONS	
Import, export, transport, sell, possess, purchase; Violations related to illegal importation, purchasing, possession, landing, transport, or sale of tuna, and violations related to record keeping, reporting, or FCO requirements.	III
COMMERCIAL FISHERIES VIOLATIONS	
Failure to register (i.e., fishing without authorization); Failure to display annual sticker/decal, fail to carry certificate on board, or failure to file annual report; Failure to report taking of a marine mammal.	II
Assaulting an observer, failure to take observer or impeding, intimidating, impairing, or interfering with an observer or observations; Providing false information; Commercial whaling.	IV

VIOLATIONS RELATED TO LABELING STANDARDS	
Federal Trade Commission; Violations related to tracking fishing operations; False statement/endorsement on a tuna tracking form; Violations related to canning operations (other than record keeping/reporting).	IV
VIOLATIONS RELATED TO ENFORCEMENT, MONITORING, AND OBSERVERS	
Observer interference; Interference with a lawful investigation or inspection.	IV
OTHER VIOLATIONS	
Violations related to unauthorized/non-permitted fishing, fishing methods, or fishing gear; Violations related to notification requirements; Permit violations; violations related to labeling standards.	III
Violations of native agent regulations or permit conditions; Violations of speed restrictions by vessels greater than or equal to 65 ft (19.8 m) in overall length; ²⁷ Exceeding DML or intentionally deploying net on dolphins after DML has been reached; Pinger violations not covered on Summary Settlement or Fix-It schedules.	IV

²⁷ This offense is also listed under the Endangered Species Act penalty schedule and should be charged under that penalty schedule absent exceptional circumstances warranting charging under the Marine Mammal Protection Act schedule.

Northern Pacific Halibut Act Schedule of Offenses

VIOLATION	LEVEL
VIOLATIONS REGARDING GEAR	
Failure to have setline gear or skate marker buoys properly marked; Failure to properly deploy seabird avoidance gear.	I
Failure to have aboard required seabird avoidance gear; Using automatic hook stripper to release halibut.	II
VIOLATIONS REGARDING THE FACILITATION OF ENFORCEMENT, SCIENTIFIC MONITORS, OR OBSERVERS	
Disfigurement of halibut that prevents minimum size or catch limit determination.	I
No Prior Notice of Landing submitted prior to offload.	II
Failure to permit inspection of hold/vessel by authorized officer upon request.	III

VIOLATIONS REGARDING PERMITS, REPORTING, DOCUMENTATION, AND PERMIT REQUIREMENTS	
<p>Submitting Prior Notice of Landing outside of time limit specified for submission;</p> <p>Making inaccurate entries in a halibut fishing log, other logbook or report;</p> <p>Failure to have license on board;</p> <p>Failure to update fishing log within time specified.</p>	I
<p>Material errors in log of halibut fishing operations, Landing Report, or record of purchases or receipts of halibut;</p> <p>No Prior Notice of Landing submitted prior to offload;</p> <p>Subsistence fishing for halibut without having been issued a Subsistence Halibut Registration Card;</p> <p>Subsistence fishing for halibut without having been issued and without the requisite qualifications to receive a Subsistence Halibut Registration Card.</p>	II
VIOLATIONS REGARDING EXCEEDING A QUOTA, HARVESTING, AND SELLING HALIBUT	
<p>Exceeding remaining available IFQ quota by more than 100%;</p> <p>Commercial fishing for halibut without obtaining an IFQ permit;</p> <p>Deliveries of IFQ catch to other than a registered IFQ buyer and/or sale of IFQ halibut by other than an registered IFQ buyer.</p>	III

VIOLATIONS REGARDING SIZE/CONDITION/QUANTITY OF FISH OR LANDING/POSSESSION REQUIREMENTS	
<p>Taking or possessing halibut under minimum size or over maximum size;</p> <p>Exceeding the daily sport bag limit or possession limit;</p> <p>Mutilating halibut.</p>	I
<p>Commercially harvesting undersized halibut – less than 10 undersized halibut ;</p> <p>Possession of subsistence-caught and/ or sport caught halibut on a vessel with commercial caught halibut onboard;</p> <p>Exceeding the daily personal limit of 20 subsistence halibut/person/day by more than 5 halibut.</p>	II

Antarctic Marine Living Resources Convention Act Schedule

VIOLATION	LEVEL
HARVESTING VIOLATIONS	
Harvesting Antarctic Marine Living Resources (AMLR) contrary to permit, area, catch limit or gear requirements, regulations or binding conservation measures.	III
TRAFFICKING VIOLATIONS	
Submitting an application for preapproval less than 15 working days before the date of the first receipt, importation, or re-export.	II
<p>Importing or exporting AMLRs taken by vessel with no harvesting permit, without a dealer permit or preapproval, unaccompanied by a complete and validated Dissostichus Catch Document (DCD), or contrary to the provisions of any permit;</p> <p>Shipping, transporting, selling, purchasing, importing, exporting, or having custody, control or possession of AMLRs harvested in violation of any binding conservation measure;</p> <p>Receiving AMLRs from a vessel without a Harvesting or Dealer Permit.</p>	III
MONITORING AND ENFORCEMENT VIOLATIONS	
<p>Refusing to permit a boarding by, or provide assistance to, a CCAMLR inspector;</p> <p>Assaulting, resisting, opposing, impeding, intimidating or interfering with a CCAMLR inspector;</p> <p>Resisting arrest or interfering with arrest of another;</p> <p>Providing false or inaccurate information;</p> <p>Frustrating timely identification of harvesting vessel or gear.</p>	IV

ATTACHMENT D

NOAA OLE press release, *NOAA Reaches Settlement in Case Against Steller Seal [sic]*
Lion Researcher, April 4, 2006

Department of Commerce
National Oceanic and Atmospheric Administration
NOAA Fisheries Service
- Office for Law Enforcement
FOR IMMEDIATE RELEASE
Apr. 4, 2006
CONTACT:

Mark Oswell
(301) 427-2300

NOAA REACHES SETTLEMENT IN CASE AGAINST STELLER SEAL LION RESEARCHER

NOAA's Office of General Counsel for Fisheries in Alaska has reached settlement in a case against Randall Davis, a Steller sea lion researcher from Texas A&M University. Davis was charged with conducting research on Steller sea lions, which is an endangered species, in Resurrection Bay and Prince William Sound without a reauthorization to resume research, as was required in his permit. Other alleged violations included using unauthorized sedatives; capturing animals in an age group not authorized in his permit, failing to provide the names and qualifications of individuals who were anesthetizing Steller sea lions; and failing to follow protocols in marking the Steller sea lions.

Davis paid \$6,666 as part of the settlement. He also agreed that he may not act as a principal investigator, co-investigator or research assistant under any permit issued by NOAA through 2006. NOAA will not issue or approve any permit that names Davis as an applicant, principal investigator, co-investigator or research assistant through December 31, 2006.

Davis further agreed that, for a period of two years beginning on January 1, 2007, NOAA will not issue or approve any permit where Davis is listed as the applicant or principal investigator. During that same time, any permit holder and/or principal investigator with a permit listing Davis as a co-investigator or research assistant will provide direct, on-site supervision of Davis.

In 2003 and 2004 Davis was working on research projects in Prince William Sound, studying the behavior patterns of Steller sea lions. The violations were originally reported to special **agents from NOAA Fisheries Service's Office for Law Enforcement in Anchorage.** Violations of the Endangered Species Act and the Marine Mammal Protect Act or any other marine resource violation can be reported to the NOAA Fisheries Service Office of Law **Enforcement's 24-hour hotline** at 800-853-1964.

NOAA Fisheries Service is dedicated to protecting and preserving our nation's living marine resources and their habitats through scientific research, management and enforcement. NOAA Fisheries Service provides effective stewardship of these resources for the benefit of the nation, supporting coastal communities that depend upon them, and helping to provide safe and healthy seafood to consumers and recreational opportunities for the American public.

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On the Web:

NOAA Fisheries in Alaska: alaskafisheries.noaa.gov

NOAA's Alaska Fisheries Science Center: www.afsc.noaa.gov

NOAA Fisheries Service: www.nmfs.noaa.gov

NOAA: www.noaa.gov

ATTACHMENT E

NOAA OLE press release, *Alaska Tour Boat Agrees To Pay \$7,000 For Alleged Harassment Of Endangered Humpback Whales*, April 2, 2007

Contact: Mark Oswell FOR IMMEDIATE RELEASE (301) 427-2300 07-HQ006

Apr. 2, 2007

ALASKA TOUR BOAT AGREES TO PAY \$7,000 FOR ALLEGED HARASSMENT OF ENDANGERED HUMPBACK WHALES

On January 2, 2007, the National Oceanic and Atmospheric Administration charged the captain of the tour vessel AWESOME ORCA and Orca Enterprises, Inc., the vessel's owner, with a \$9,000 Notice of Violation and Assessment for an alleged violation of the Endangered Species Act.

In a compromise settlement Orca Enterprises, Inc. agreed to pay \$7,000 of the civil penalty with the remaining \$2,000 suspended for a period of three years on the condition of no similar violations during the suspension period.

The Agency's notice charged the captain and vessel owner with harassment in August 2006, as the Juneau-based tour boat AWESOME ORCA was conducting a wildlife viewing cruise in Stephens Passage near North Pass in Southeast Alaska. During the tour, NOAA alleged that the captain maneuvered the vessel into the path of three oncoming whales, placing the vessel closer than 100 yards from the endangered humpback whales. Subsequently, one whale collided with the vessel causing one of the passengers to fall and suffer a head injury.

A specific regulation governing interactions with these whales in Alaska became effective on July 2, 2001. The regulation prohibits approaching humpback whales, by any means within 100 yards, including by interception. This regulation was promulgated under The Endangered Species Act which protects threatened and endangered species such as humpback whales. The Endangered Species Act also prohibits the disruption of normal behavior or prior activity of a humpback whale by any other act or omission.

The whale approach regulations protect the endangered whales and also have the ancillary benefit of protecting individuals and property from the potentially harmful consequences of too close interaction with these large marine mammals.

"This case clearly demonstrates that failure to observe the proper whale watching restrictions can result in harm to both whales and humans," said NOAA Special Agent Scott Allee, NOAA Fisheries Service's Office of Law Enforcement – Alaska Division & investigating agent.

The case was prosecuted by NOAA's Office of General Counsel for Enforcement and Litigation.