

1 Mark R. Vermeulen [CSBN 115381]
2 Law Office of Mark R. Vermeulen
3 755 Florida Street #4
4 San Francisco, CA 94110.2044
5 Phone: 415.824.7533
6 Fax: 415.824.4833

7 Lawrence E. Biegel [CSBN 44426]
8 Joseph A. Cisneros [CSBN 184907]
9 The Biegel Law Firm
10 2801 Monterey-Salinas Hwy., Suite A
11 Monterey, CA 93940
12 Phone: 831.373.3700
13 Fax: 831.373.3780

14 Michael D. Pepson [admitted *pro hac vice*]
15 Cause of Action
16 1919 Pennsylvania Ave. NW, Suite 650
17 Washington, D.C. 20006
18 Phone: 202.499.4232
19 Fax: 202.300.5842

20 Attorneys for Defendant
21 NANCY BLACK

22 UNITED STATES DISTRICT COURT
23 NORTHERN DISTRICT OF CALIFORNIA
24 SAN JOSE DIVISION

25 UNITED STATES OF AMERICA,) No. CR 12-0002 EJD
26)
27 Plaintiff,)
28 v.)
29 NANCY BLACK,)
30 Defendant.)

31 **DEFENDANT NANCY BLACK'S RESPONSE**
32 **TO THE GOVERNMENT'S SENTENCING MEMORANDUM**

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

INTRODUCTION

1
2 Defendant Nancy Black, through counsel, submits this response to the *Sentencing Memorandum*
3 *of the United States* (Doc. 66; “*Govt. Sent. Memo.*”) to address a few points important to the Court’s
4 sentencing decision. First, this response addresses the Government’s proffered conclusions regarding
5 the purported dangers and impact of Ms. Black’s activities in connection with the free-floating blubber
6 and her filming the orcas’ predation behaviors. *See Govt. Sent. Memo* at 5:2-7:8. Second, this
7 memorandum sets forth a more complete, appropriate analysis regarding the determination of an
8 appropriate fine, including an examination of the Government’s proffered (but truncated) comparison to
9 the civil forfeiture applied to Jean-Michel Cousteau’s Ocean Futures Society (“Ocean Futures Society”
10 or “Cousteau’s OFS”). *See id.* at 9:16-10:7. Finally, this memorandum addresses the significant, long-
11 standing contributions that Ms. Black has made to the scientific community’s knowledge of marine
12 mammals (and particularly orcas) and to related environmental education and awareness among the
13 Monterey Bay community, all of which the Court should consider in determining the appropriate
14 sentence.
15
16
17

MEMORANDUM

18
19 **I. The Fine Sought By The Government Is Excessive And The Rationale For It Is Lacking**

20 The Government asks the Court to impose a fine that is *five times* the *maximum* guidelines fine
21 set forth in the Fine Table of U.S.S.G. § 5E1.2(c) and *fifty times* the minimum. The Government seeks
22 to justify its position by, *inter alia*, relying on letters submitted by limited persons within the National
23 Oceanic and Atmospheric Administration (“NOAA”) and by related purported “dangers” the
24 Government proffers as inherent in the activities that led to this misdemeanor conviction. The
25 Government’s effort is unavailing. While the NOAA letters appear to imply that their conclusions are
26 based on a consensus within NOAA and its scientists, this plainly is not so. There is no such consensus;
27
28
29
30

1 there is, in fact, concerted dissent within NOAA from the views set forth in those letters and the further
2 conclusions that the Government seeks to extrapolate from them. Rather than reiterate here the
3 defense's earlier discussion of the muzzling of the dissenting views and the alternative analysis they
4 provide, the defense will refer the Court to the earlier discussion of this issue set forth in the defense's
5 *Sentencing Memorandum* (Doc. 67; "*Def. Sent. Memo.*") at pp. 6:11-8:20 and in defense counsel's
6 November 4, 2013 letter of objections to the draft Presentence Report ("PSR") at pp. 1-4.¹ *See also Def.*
7 *Sent. Memo* at 14:4-16:4 (addressing the NOAA bullet-point paragraphs that the Probation Office
8 proposes be incorporated into the PSR, and the alternative analysis presented by the defense).
9

10
11 The Government also argues that given "the change in technology and culture that has occurred
12 since the offense ..., without a significant fine (\$25,000) and a healthy term of probation, there will be
13 an incentive for boneheads, extreme sports folks, and amateur 'researchers' to 'take their chances' each
14 Spring off Monterey in order to get some fantastic footage of the spectacular killer whales." *Govt. Sent.*
15 *Memo* at 7:18-8:8. While the Government's logic is difficult to follow, the defense will note some
16 simple facts in response. First, Ms. Black never posted video of the orcas' behavior on YouTube or
17 other social media; her focus was on the research and the advancement of scientific knowledge of the
18 orcas' predation behaviors, which is consistent with her long-standing dedication and contributions to
19 the community, including the community that studies marine mammal behavior. *See* section III, *post*
20 (addressing Ms. Black's contributions to the field of study and to public awareness through the years);
21 *see also* the letters of reference attached hereto as Attachment F,² along with the letters of reference
22
23
24

25
26 ¹ As noted in the PSR, the defense's Nov. 4 objections letter was submitted to the Court by the
27 Probation Office.

28 ² Regarding the Attachments attached to this *Response*, the lettering sequence employed
29 continues sequentially from the lettering sequence used in the *Def. Sent. Memo*, which ended with
30 Attachment E.

1 from numerous researchers and others, attached as Attachment A to the *Def. Sent. Memo.* Second, the
2 fact that in the eight-plus years that NOAA and the Department of Justice have been pressing this matter
3 (and publishing their progress in prosecuting Ms. Black via press releases) there have been no instances
4 in which others have sought to obtain and post “fantastic footage of the spectacular killer whales” cuts
5 directly against the Government’s current argument that a hefty fine is necessary to curtail future
6 hypothetical unrelated activities.³ And finally, if deterrence is sought,⁴ the punishment that Nancy Black
7 has suffered already (with the attendant ignominy and marginalization) is more than sufficient to deter
8 any rational non-bonehead from undertaking such activities in the future.
9

10 **II. Proper Disparity Analysis Demonstrates That The Fine Sought By The Government** 11 **Is Inappropriate And Excessive**

12 **A. Aspects To Be Included In The Court’s Disparity Analysis**

13 In seeking a fine of \$25,000, the Government proposes that the Court ignore, in its disparity
14 analysis, the administrative fines imposed in other actions involving violations of the Marine Mammal
15 Protection Act (“MMPA”), which include other instances of “feeding” (aside from the Government’s
16 very limited, truncated comparison to the civil forfeiture agreed to by Cousteau’s Ocean Futures Society,
17 which is discussed below). *See Govt. Sent. Memo* at 9:16-24. By omission, the Government also
18 ignores the framework for analysis set forth in U.S.S.G. § 5E1.2 (addressing “Fines for Individual
19
20
21

22 ³ The Government’s reference to the video posted on July 20, 1023 involving the mouth-open
23 feeding activity of humpback whales (*see Govt. Sent. Memo.* at 7:23-28) is wholly inapt. That footage,
24 while dramatic, appears clearly to have been obtained serendipitously (and legally) and it has nothing to
25 do with the issues in the present case.

26 ⁴ *Cf.* Doob and Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 *Crime*
27 *and Justice: A Review of Research* 143 (Michael Tonry, ed., 2003), along with Raymond Paternoster,
28 *How Much Do We Really Know About Criminal Deterrence?*, *The Journal of Criminal Law and*
29 *Criminology* (2010) (both studies undertaking comprehensive reviews of the studies and literature
30 examining whether punishment actually deters, and finding that it does not (cited and briefly excerpted
in the *Def. Sent. Memo.* at 22:15-23:15)).

1 Defendants”) and the applicable fine guideline range of \$500 to \$5,000. The Government’s position is
2 unreasonable and untenable; it should be rejected.

3 Appropriate disparity analysis must include NOAA’s *Policy for the Assessment of Civil*
4 *Administrative Penalties and Permit Sanctions* (2011) and the framework it establishes for appropriate
5 fines or penalties. *See Def. Sent. Memo.* at 17:9-20:7 (demonstrating that NOAA’s Penalty Matrix for
6 similar violations results in a civil fine range of \$2,000-\$3,000, at worst, and a significantly lesser fine if
7 all aspects are considered). Appropriate analysis also must include the dispositions reached in
8 comparable (and more egregious) matters involving violations of the MMPA that have resulted merely
9 in civil assessments of several thousand dollars. *See Def. Sent. Memo.* at 20:8-22:6. And in the context
10 of “feeding” violations, NOAA dispositions make clear that even when the feeding activity is
11 undertaken by commercial operators taking paying tourists on excursions to see marine mammals, only
12 minor civil assessments are applied. *See, e.g.,* Attachment G (2010 NOAA Notice of Violation and
13 Assessment of Civil Penalty (“NOVA”) against Sunshine Watersports of P.C. Inc. assessing \$5,000
14 penalty for unlawfully feeding wild marine mammals in violation of the MMPA); Attachment H (2009
15 NOAA NOVA against Aquatic Adventures Management Group, Inc. assessing \$5,000 penalty for
16 unlawfully feeding wild marine mammals in violation of the MMPA); Attachment I (2009 NOAA
17 NOVA against Chancey & Mannino assessing \$5,000 penalty for unlawfully feeding wild marine
18 mammals in violation of the MMPA).

19 The Government also seeks to justify its request for a \$25,000 fine by the fact that Ms. Black
20 was charged criminally rather than being fined through administrative means. This fact cuts directly
21 against the Government’s argument, for by charging and prosecuting her criminally the Government
22 already has treated her disproportionately vis-à-vis the many others who have violated MMPA
23 regulations. The Government should not now be permitted to pile on an additional excessive fine.
24
25
26
27
28
29

1 **B. A Proper, Complete Comparison To The Civil Forfeiture Applied To**
2 **Cousteau’s Ocean Futures Society Further Demonstrates The Excessiveness**
3 **Of The Government’s Requested Fine**

4 The Government proposes that for disparity purposes, the Court should compare only the value
5 of the vessel forfeited by Cousteau’s Ocean Futures Society vis-à-vis the fine to be imposed on Ms.
6 Black. Such a single-aspect comparison would be no comparison at all. But even if the Court examined
7 only the resolution reached in connection with Ocean Futures Society’s misconduct and the disposition
8 reached in the present case, a proper, complete comparison makes clear that the Government’s proposed
9 fine against Ms. Black must be rejected for several interrelated reasons.

10 First, the actions undertaken by Cousteau’s OFS were far more egregious than the actions
11 undertaken by Ms. Black. *See* stipulated factual statement set forth in the civil *Complaint for Forfeiture*
12 filed in United States v. The 25 Foot ... Vessel, Manfish, No. CV 13-2690 EJD (Doc. 1 at 4:5-7:11)
13 (attached here as Attachment J) (e.g., “Actions on board the Manfish included handling, towing, cutting,
14 tying-off, and offering the blubber to orcas”; OFS’s crew repeatedly drove their vessel up to the carcass
15 of the gray whale calf as the orcas were feeding, and “[o]ver the course of two hours, this pattern of
16 interaction occurred multiple times”; “At one point, the Manfish inadvertently backed up over the
17 carcass as the orcas were actively feeding, and video footage of the scene demonstrates the refracted
18 waves and wake from the Manfish splashing over the carcass.”).⁵

19 Second, while Cousteau’s OFS forfeited a vessel valued between \$35,000 and \$65,000,⁶ they
20 earned over \$1,000,000 in connection with their related filming activities. Those activities were
21
22
23
24

25
26 ⁵ Ocean Futures Society’s mendacious, opportunistic attempt to blame Ms. Black for its own
27 actions has been addressed previously. *See Def. Sent. Memo.* at 12:16-14:2.

28 ⁶ The complaint for forfeiture set the value of the vessel at \$35,000, a valuation prepared by the
29 Government set the value at \$65,000 and a valuation prepared by the defense set the value at \$57,500.

1 undertaken under contract with KQED, by which Cousteau's OFS produced a piece entitled "The Gray
 2 Whale Obstacle Course," as set forth in the April 20, 2004 production agreement executed by
 3 Cousteau's OFS and KQED. See Attachment K (April 20, 2004 production agreement letter between
 4 Cousteau's OFS and KQED; total value of the contract being \$1,050,750, with a payment of \$105,000
 5 made to Cousteau's OFS upon signing the production agreement that day). The significant advance
 6 payment and earnings make clear that the forfeiture of the Manfish was simply a minor cost of doing
 7 business for Cousteau.
 8

9 And the following chart addresses additional components necessary for a just comparison:
 10

Aspect for comparison	Cousteau's Ocean Futures Society	Nancy Black
Criminal vs. civil	Civil forfeiture of vessel	Criminal proceedings; criminal conviction
Effect on ability to conduct research?	Unknown; likely none	Effectively prohibited from pursuing research as a marine biologist from 2004 to the present; shunned by scientific community through NOAA's actions
Community service?	No	Yes; 300 hours
Federal probation?	No	Yes; 1 to 5 years ⁷
Legal fees	Unknown; involving a stipulated civil forfeiture	Over \$100,000, involving a criminal investigation and prosecution
Income derived from illegal activity	\$1,050,750 (including \$105,000 advance paid upon signing the production contract with KQED on 04/20/04)	\$0
Monetary fine/penalty	Forfeiture of vessel (valued between \$35,000 and \$65,000)	To be determined by the Court at sentencing

25
 26
 27 ⁷ The significance of probation and the substantial restrictions of a person's liberty resulting from
 28 being on probation is eloquently set forth by the U.S. Supreme Court in *Gall v. United States*, 552 U.S.
 29 38, 48 (2007).

1 Add to all the above the strain and anxiety that Ms. Black has had to endure in connection with
2 this federal criminal investigation and prosecution from 2005 to the present, and it is clear that there is
3 no comparison to the punishment that Ms. Black has suffered, least of all by a comparison to the civil
4 forfeiture in the matter involving Cousteau's OFS.
5

6 **III. Ms. Black's Substantial, Significant Contributions Through The Years To The**
7 **Scientific Knowledge Base Involving Orcas And Their Behavior In Northern**
8 **California, And Her Contributions To The Monterey Bay Community, Should Be**
9 **Considered By The Court**

10 The PSR addresses some of Ms. Black's scientific background, work and contributions. *See*
11 PSR at ¶¶ 77-79. To flesh out these aspects more fully, the defense notes the following for the Court.

12 **A. The Breadth And Length Of Ms. Black's Contributions To The Scientific**
13 **Community**

14 Ms. Black is an internationally recognized and respected researcher and scientist. Her decades-
15 long study of the marine mammals of Monterey Bay and northern California, and in particular the orcas
16 found along the central California coast, has made her the acknowledged expert on the ecology and
17 behavior of these animals in this area. Her work is broad in terms of the number of scientific issues
18 researched, including the following:

- 19 • Orca population estimates, birth rates, mortality rates
- 20 • Photo-identification of all the orcas seen on the central California coast
- 21 • Genetic relationships among the orcas (including research into the orcas' matriline, identifying those matriline within the pods)
- 22 • Ecology of the orcas, particularly with respect to feeding behavior, including species of prey taken, preferences among prey, etc.
- 23 • Toxic contamination of whales due to pollutants
- 24
- 25

26 The length of time that Ms. Black has undertaken her research also is significant and valuable.
27 There are very few studies of wild populations of more than a few years duration, and Ms. Black's
28 continuous study of a population of orcas for more than 25 years, by which all the individuals have been
29

1 identified, is extremely valuable to other scientists. This work led to the creation of the first photo-
2 identification catalog of individual orcas found in California, which she co-authored and which was
3 published by NOAA as a scientific report because of its usefulness to other researchers. *See* Attachment
4 L (“Killer Whales of California and Western Mexico: A Catalog of Photo-Identified Individuals,” Black,
5 Schulman-Janiger, Ternullo & Guerrero-Ruiz, NOAA publication NOAA-TM-NMFS-SWFSC-247
6 (September 1997). Ms. Black also has contributed hundreds of photos of blue whales and humpback
7 whales with detailed ecological information to the researchers at Cascadia Research Collective, who
8 maintain the photo-identification catalogs for those species in the eastern North Pacific. *See, e.g.*, letter
9 from Robin W. Baird of the Cascadia Research Collective, attached to *Def. Sent. Memo.* at p. 46 of 120;
10 *see also* letter from Alisa Schulman-Janiger, attached to *Def. Sent. Memo.* at pp. 32-33 of 120.

13 Consistent with this, Ms. Black has funded the vast majority of her research through her own
14 funds rather than requesting government grants (as most researchers do), saving taxpayers tens of
15 thousands of dollars.

17 Ms. Black's surveys also have provided large amounts of information about a newly discovered
18 ecotype of orca, named the “offshore” ecotype, and she co-authored with several NOAA scientists the
19 first scientific paper that identified and described this ecotype. *See* Dalheim, Schulman-Janiger, Black,
20 Ternullo, Ellifrit & Balcomb, “Eastern temperate North Pacific offshore killer whales (*Orcinus orca*):
21 Occurrence, movements, and insights into feeding ecology,” *Marine Mammal Science* 24(3):719-729
22 (2008), available at
23 <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1020&context=usdeptcommercepub> (last
24 visited 01/07/14).

26 ///

28 ///

1 A particular focus of Ms. Black's research has been orca predation on gray whale calves during
2 their migration north.⁸ Prior to her research this predation had been observed and described by scientists
3 only on a couple of occasions. Ms. Black's intensive survey of orcas during these periods of gray whale
4 migration has allowed her to encounter and describe more incidents of orcas attacking gray whales than
5 all other researchers combined. She has shared her scientific findings of this behavior in numerous
6 scientific papers at major marine mammal conferences. *See* Attachment M (*Nancy Black's Scientific*
7 *Publications and Presentations*). In addition to the scientific papers, the length, breadth and rigor of her
8 work in this area can be appreciated by reviewing the two posters which she (along with others)
9 produced, outlining the extensive study of these creatures and providing a wealth of information in a
10 compact (albeit small font) form. *See* Attachment N ("Killer Whale Predation on Gray Whales in
11 Monterey Bay, California" (2005), available at
12 <http://www.nancyblacklegaldefense.org/Black%20poster%20Orca%20research%202005.PDF> (last
13 visited 01/07/14); Attachment O ("Ecology of Mammal-Hunting ('Transient') Killer Whales in
14 Monterey Bay, California: A 22-year Study" (2008), available at

15
16
17
18
19
20
21 ⁸ It should be noted that while her actions violated the "feeding" statute, her filming the orcas
22 underwater via a pole-cam was related to important research. The behavioral interactions within pods
23 have been a long-term focus of her research. Orcas show much learned behavior, including the
24 cooperative hunting of large prey species such as grey whale calves and identifying what species are
25 suitable prey and which individuals in that species are vulnerable to being attacked. The cooperative
26 hunting behavior reflects different roles for different members of the pod depending upon their sex, age
27 and experience. Ms. Black's dozens of hours of filming (above-water) orca attacks on dolphins,
28 porpoises, sea lions, elephant seals and grey whale calves is a resource that has been studied and remains
29 to be studied. (Much of this research currently is in the possession of the Government through its
30 seizure in connection with the search warrant executed years ago; the defense appreciates the
Government's indications that it is willing to discuss the return of these and other important items to Ms.
Black). Interactions between various members of the pod in feeding on the gray whale blubber was a
natural extension of her long-term study of behavior within killer whale pods.

1 <http://www.nancyblacklegaldefense.org/EcologyOfTransientKillerWhalesPoster.pdf> (last visited
2 01/07/14).

3 Because the pods of orcas found along the California coast range over vast distances from
4 Mexico to Alaska, and because the study of this species' ecology requires specialized knowledge from
5 multiple scientific disciplines, collaboration among researchers in different areas is critical to
6 understanding this species. Over the years, Ms. Black has developed professional relationships with
7 nearly all the researchers working on orcas in the Pacific and they routinely have shared information and
8 ideas.⁹

9
10
11 **B. Ms. Black's Contributions To The Community At-Large**

12 Ms. Black has a long history of supporting environmental education in the Monterey area. She
13 has been very generous for many years in provided complimentary whale-watching passes to schools
14 and community groups, who in turn sometimes use them as prizes or in auctions to raise money for the
15 schools or other community projects. The value of these passes is approximately \$15,000 per year, and
16 when the schools auction off these passes (as often occurs), the money raised for the schools and
17 community groups is multiplied.
18

19 Ms. Black also has been generous in offering researchers, educators and marine science graduate
20 students free passage on her whale-watching trips. In addition to operating many charter whale-
21 watching trips for school groups, Ms. Black has spoken at schools encouraging the students to learn
22 about and get involved in marine conservation.
23

24
25
26 ⁹ Since this investigation began, however, NOAA's Office of Law Enforcement has prevented
27 and discouraged both NOAA's own scientists and other scientists operating under NOAA MMPA
28 permits from cooperating or collaborating with Ms. Black on either a scientific or personal basis. These
29 actions by NOAA have been a significant setback to scientific advancement and a source of enormous
30 stress and disappointment to Ms. Black.

1 Ms. Black's whale-watching trips differ from her competitors' by having a stronger education
2 component. There is always one or more highly trained marine naturalist on each of her whale-watching
3 cruises to provide expert commentary regarding the ecology of Monterey Bay and to interpret the
4 behavior of the marine mammals being observed.

5 Ms. Black has always had a deep commitment to conservation. She was a critical and effective
6 advocate in the efforts that led to the ban on gillnet fisheries close to shore, which has allowed for the
7 recovery of the harbor porpoise in the Monterey area. She was a strong supporter of the creation of the
8 Monterey Bay National Marine Sanctuary and she has volunteered her time to ensure the protection of
9 the marine mammals within the Sanctuary. She belongs to and actively supports numerous local and
10 international conservation and animal welfare organizations.

13 Her commitment to environmental education also is visible in her work with National
14 Geographic TV and the BBC Natural History Unit in producing the first episode of "The Blue Planet," a
15 series that has been described as "the first ever comprehensive series on the natural history of the
16 world's oceans." It was a major production and a precursor (with comparable quality) to BBC's "Planet
17 Earth." "The Blue Planet" was broadcast on TV in 2001 in the United Kingdom, the United States, and
18 48 other countries, and subsequently was released on DVD and, in 2013, on Blu-Ray. Upon its first
19 transmission on BBC One, over 12 million people watched the series. The first episode that features the
20 orca attacks on gray whales, filmed with Ms. Black, won two Emmy awards including "Outstanding
21 Cinematography for Non-Fiction Programming," along with the 2002 Broadcasting Press Guild Award
22 for Best Documentary series and numerous other awards. These programs have been praised for their
23 scientific accuracy and their conservation messages. National Geographic Education went on to make a
24 shortened version for use in schools with multiple teacher and student resources, which is still available
25 for free at <http://education.nationalgeographic.com/education/media/secret-killers-of-monterey->
26
27
28
29

1 [bay/?ar_a=1](#) (last visited 01/07/14). BBC's work recently on a joint BBC/National Geographic TV
2 project led to remarkable video of orca behavior that had never been seen by scientists before, involving
3 humpback whales deliberately interfering as a group in an orca attack on a gray whale calf. *See*
4 Attachment P (BBC Nature News, May 9, 2012, "Humpback whales intervene in killer whale hunt,"
5 with a video clip available at <http://www.bbc.co.uk/nature/17991601> (last visited 01/07/14)).
6

7 Without Ms. Black's decades-long commitment to research and record the orcas' existence and
8 behavior, along with other rare events related to the marine mammal populations, valuable scientific
9 data would never have been acquired.
10

11 CONCLUSION

12 Ms. Black and her counsel respectfully request that the Court impose a sentence of two years
13 probation with the five special conditions of probation set forth in the *Plea Agreement* (and not the
14 additional special conditions proposed in the PSR), 300 hours of community service, a fine of \$500, and
15 a special assessment of \$25.
16

17 Dated: January 8, 2014

Respectfully submitted,

18 Mark R. Vermeulen
19 Lawrence E. Biegel
20 Michael D. Pepson
Attorneys for Defendant
NANCY BLACK

21 By: /S/
22 Mark R. Vermeulen
23
24
25
26
27
28
29
30