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13  
14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16  
17 SAN JOSE DIVISION

18 UNITED STATES OF AMERICA, ) Case No. 5:12-cr-00002-EJD  
19 Plaintiff, ) PLEA AGREEMENT  
20 v. )  
21 NANCY BLACK )  
22 )

23 I, Nancy Ann Black, the defendant herein, and the United States Attorney's Office for the  
24 Northern District of California and the Environmental Crimes Section of the United States  
25 Department of Justice (together and hereinafter, the "Government") enter into this written plea  
26 agreement (the "Agreement") pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal  
27 Procedure:  
28

**FILED**  
APR 23 2013  
RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

11A

1 The Defendant's Promises

2 1. I agree to plead guilty to Count Three of the Indictment in the above-captioned matter,  
3 *i.e.*, Violation of a Marine Mammal Protection Act Regulation (Prohibiting Feeding).

4 2. I am guilty of Count Three because I knowingly violated the Marine Mammal Protection  
5 Act ("MMPA") by violating the MMPA regulation that prohibits the feeding of marine mammals  
6 in the wild, in contravention of 16 U.S.C. § 1375(b), 50 C.F.R. §§ 216.3, 216.11(b), and I agree  
7 that the elements of the offense are as follows: (1) without a permit and unlawfully; (2) in the  
8 waters of the Northern District of California, specifically within the Monterey Bay National  
9 Marine Sanctuary; (3) I knowingly offered and gave food, specifically chunks of gray whale  
10 blubber; (4) to marine mammals, specifically killer whales (*Orcinus orca*), that were in the wild.  
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13 I agree that the maximum penalty for Count Three is as follows:

- 14 a. Maximum prison term One (1) year
- 15 b. Maximum fine \$100,000 fine
- 16 c. Maximum supervised release One (1) year
- 17 d. Restitution To be determined by Court
- 18 e. Mandatory special assessment \$25.00
- 19 f. Maximum term of probation Five (5) years

20 3. I acknowledge that pleading guilty to these charges may have consequences with regard to  
21 my ability to maintain and/or obtain governmental licenses and certifications, *e.g.*, vessel  
22 operator license, state research permits, and federal research permits. Nevertheless, I affirm that  
23 I want to plead guilty regardless of any licensing and certification consequences that may result  
24 from my guilty plea. I understand that the Government sets forth its understanding of the non-  
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1 binding nature of this Agreement on other state and federal agencies at numbered paragraph 20  
2 *infra*.

3 4. **FACTUAL BASIS SECTION.** I agree that I am guilty of the offense to which I am  
4 pleading guilty. I agree that the following facts are true, and if brought to trial, the Government  
5 could prove the following facts beyond a reasonable doubt, and that the following facts do not  
6 represent the entirety of the Government's evidence against me, and that these stipulated facts  
7 are sufficient to support a conviction of Count Three of the Indictment, as follows:  
8

9 I understand that the gray whale (*Eschrichtius robustus*) is a baleen whale with a principal  
10 range in the North Pacific Ocean. The entire North American gray whale population migrates  
11 past the Monterey, California coastline every winter and spring. I understand that these whales  
12 have one of the longest animal migrations known, traveling over 12,000 miles from their summer  
13 feeding grounds in the Bering Sea to their winter breeding grounds in Baja California and back  
14 again. Gray whales are easily observed as they hug the coastline during migration. Along the  
15 entire Pacific coast, killer whales ("orcas") prey on gray whales. Mother/calf pairs are most  
16 susceptible to orca attacks in Monterey Bay during the months of April and May.

17 On the occasions when orcas manage to kill a gray whale, the pod of orcas does not always  
18 eat all of the gray whale at once. Often, portions of the carcass, including strips and chunks of  
19 blubber (some over six feet in length and weighing over a hundred pounds), remain floating or  
20 semi-submerged after a kill. Chunks of gray whale blubber have been observed to persist in the  
21 general area of a kill, depending on wind and currents, for 24 to 72 hours. Orcas and sea birds  
22 feed on these chunks of blubber while they are still available in the area.

23 On or about April 25, 2004, I was on my research vessel, named the "Black Dog," with my  
24 assistants on the waters off Monterey, California, within the Monterey Bay National Marine  
25 Sanctuary, when we encountered a place where orcas had killed a gray whale calf. I was  
26 observing the orcas as they fed on pieces of gray whale blubber that were floating in the water.  
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1 After grabbing a piece of blubber, I or my crew cut a hole at the edge of the piece of blubber, and  
2 then inserted a rope through the hole to stop the blubber from floating away from the boat.

3 After inserting the rope, we returned the piece of blubber to the water and monitored the  
4 feeding behavior of the orcas. The orcas ate the blubber off of the rope. After the orcas  
5 consumed the blubber we had handled, we repeated the process with other pieces of floating  
6 blubber in succession.

7 During this time, I directed another crewmember to film the underwater feeding activity of  
8 the orcas. At least twice that day, the Black Dog drifted away from the orcas' main feeding area  
9 and my crew and I moved the vessel back to its original site while keeping the tethered blubber  
10 in the water. After re-positioning, we continued to monitor the orcas' activity in the hope of  
11 recording their feeding behavior with the underwater camera.

12 I had a valid research permit that allowed me to conduct research on orcas in the North  
13 Pacific Ocean by approaching them under parameters defined by the permit, photographing  
14 them, and collecting tissue samples from them, but that permit did not allow me or my crew to  
15 collect chunks of gray whale blubber from the orcas' kill, use a rope to stop the blubber from  
16 floating away, or put the chunks back in the water so that the orcas could eat the blubber chunks.

17 On or about April 11, 2005, I was involved in a similar incident involving the collection of  
18 floating blubber and offering it to orcas utilizing the rope method (described above) in Monterey  
19 Bay.

20 Completely separate from my activities onboard my research vessel, on or about October 24,  
21 2005, I met with a Sanctuary Officer and a NOAA Investigative Agent at their offices in  
22 Monterey, California. The Sanctuary Officer was investigating the potential harassment of an  
23 endangered humpback whale (*Megaptera novaengliae*) that was reported to have occurred on or  
24 about October 12, 2005, in the Monterey Bay National Marine Sanctuary. The interaction with  
25 the humpback whale was filmed by one of my crewmembers with a camera that uses a Fuji Film  
26 mini DVM 60 video cassette. During a telephone call before the October 24 meeting, the  
27 Sanctuary Officer asked if I had any videotape of the humpback whale encounter. I told him that  
28 a crewmember had taped it, and he asked me to provide the videotape. I voluntarily agreed to

1 provide the videotape during the October 24 meeting, but before the meeting, I took the original  
2 videotape, put the video footage on my computer, and edited it to remove several minutes of  
3 footage that included some footage of the humpback whale between two vessels that belonged to  
4 my whale watching business, extraneous footage, and sounds. I then put the edited footage on  
5 another Fuji Film mini DVM 60 video cassette and dated it "10/12/05." When I met with the  
6 Sanctuary Officer on October 24, 2005, he asked me if I had the video recording of the October  
7 12, 2005 encounter, and I produced the mini DVM video cassette dated 10/12/05 with the edited  
8 footage. I did not tell him that I had put edited footage on the cassette tape, even though I knew  
9 that I had. I agree that by not disclosing the editing of the video, I could have impeded or  
10 influenced NOAA's investigation into the humpback whale incident.

11 5. I agree to give up all rights that I would have if I chose to proceed at trial, including the  
12 rights to a jury trial with the assistance of an attorney; to confront and cross-examine prosecution  
13 witnesses; to remain silent or testify; to move to suppress evidence or raise any other Fourth or  
14 Fifth Amendment claims; to any further discovery from the Government; and to pursue any  
15 affirmative defenses and present evidence. I also agree to waive venue, if necessary, for the  
16 charges filed in this case. I further agree to waive any claim that the statute of limitations or  
17 laches precluded the Government from filing the charge to which I am pleading guilty.

18 6. I agree to give up my right to appeal my conviction, the judgment, and orders of the Court.  
19 I also agree to waive any right I have to appeal any aspect of my sentence.

20 7. I agree not to file any collateral attack on my conviction or sentence, including a petition  
21 under 28 U.S.C. § 2255 or 28 U.S.C. § 2241, or a motion under 18 U.S.C. § 3582, at any time in  
22 the future after I am sentenced, except that I reserve the right to claim that my counsel was  
23 ineffective in connection with the negotiation of this Agreement, the entry of my guilty plea, or  
24 in connection with sentencing. I understand that the Government might not preserve any  
25 physical evidence obtained in this case and in no way shall I rely on the Government preserving  
26 physical evidence for any purpose. I make no and hereby waive any claim to physical evidence,  
27 papers, or electronic media in the possession, custody, or control of the Government. I further  
28 waive any and all rights under the Freedom of Information Act relating to the investigation and

1 prosecution of the above-captioned matter and further agree not to file any request for documents  
 2 from any federal government agency or department of the Executive Branch.

3 8. I agree that I waive any right to seek attorney's fees or litigation expenses under 18 U.S.C.  
 4 § 3006A (the "Hyde Amendment"), and I acknowledge that the Government's position in the  
 5 instant prosecution was not vexatious, frivolous, or in bad faith. I also agree not to state or allow  
 6 my agents to state anything that is counterfactual to what is contained herein.

7 9. I agree not to ask the Court to withdraw my guilty plea at any time after it is entered unless  
 8 the Court declines to accept the sentence agreed to by the parties. I agree that the Government  
 9 may withdraw from the Agreement if the Court does not accept the agreed upon sentence set  
 10 forth herein.

11 10. While advisory, I agree that the Court will use the Sentencing Guidelines to calculate my  
 12 sentence. I understand that the Court must consult the Guidelines and take them into account,  
 13 together with the factors set forth in 18 U.S.C. § 3553(a), in formulating my sentence. I agree  
 14 that the Sentencing Guidelines offense level will be calculated as follows and that I will not ask  
 15 for any other adjustment to or reduction in the offense level or for a downward departure or  
 16 variance from the offense level and Guidelines range as determined by the Court. The parties  
 17 agree that I am a Criminal History Category I.

- |    |    |   |    |
|----|----|---|----|
| 18 | a. | <u>Base Offense Level, USSG §2Q2.1:</u>     | 6  |
| 19 | b. | <u>Role in the Offense, USSG §3B1.1(c):</u> | +2 |
| 20 | c. | <u>Acceptance of Responsibility:</u>        | -2 |

21 If I meet the requirements of USSG §3E1.1, I may be  
 22 entitled to a two level reduction for acceptance of  
 23 responsibility, provided that I forthrightly admit my  
 24 guilt, cooperate with the Court and the Probation Office  
 25 in any presentence investigation ordered by the Court, and  
 continue to manifest an acceptance of responsibility through  
 and including the time of sentencing.

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| 26 | d. | <u>Adjusted Offense Level:</u> | 6 |
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1       11. **THE SENTENCE.** I agree that a reasonable and appropriate disposition of this case  
2 under the Sentencing Guidelines and 18 U.S.C. § 3553(a), and the sentence to which the parties  
3 have agreed, is as follows:

4               **(a) No Incarceration. A Term of Probation of One (1) to Five (5) Years.** I agree that  
5 each party shall argue for a term of probation between one (1) to five (5) years, and that I shall  
6 be bound by the Court's sentence within that range. No matter the term of probation, in addition  
7 to whatever other conditions of probation are imposed by the Court, I agree to accept and be  
8 bound by the following five (5) Special Conditions of Probation:  
9

10               **Special Condition of Probation No. 1.** Nancy Black shall be prohibited from selling,  
11 marketing, or utilizing in advertising video, photographs, digital images, and screen captures of  
12 any pole-cam and/or underwater footage of orca(s) or gray whale(s) that were obtained by her,  
13 her employees, or her research assistants in 2004 or 2005.  
14

15               **Special Condition of Probation No. 2.** Unless specifically permitted in writing by an  
16 authorized permitting official of NOAA, Nancy Black shall not offer, give, or attempt to give  
17 any marine mammal any blubber, food, or non-food item, nor shall she operate a vessel from  
18 which this activity is permitted to occur.  
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20               **Special Condition of Probation No. 3.** Unless specifically permitted in writing by an  
21 authorized permitting official of NOAA, Nancy Black shall not collect, possess, retrieve, pull  
22 onboard, touch, swim with, handle, or tie any marine mammal, alive or dead, including parts  
23 thereof, wherever they may be found, nor shall she operate a vessel from which this activity is  
24 permitted to occur. Marine mammal "parts" includes blubber and all other submerged parts,  
25 semi-submerged parts, floating parts, and parts found on the beach or on land, but excludes  
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1 marine mammal feces and those marine mammal parts lawfully possessed by Nancy Black at the  
2 time of sentencing.

3       **Special Condition of Probation No. 4.** If Nancy Black obtains a federal or state permit  
4 related to marine biology, marine mammals, research, or vessel operation, Nancy Black shall  
5 make herself familiar with the permit's terms and conditions and shall comply with the permit's  
6 terms and conditions.

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8       **Special Condition of Probation No. 5.** Nancy Black shall not sell any media (including  
9 post cards, calendars, DVDs, photographs, videos, brochures, and digital images) that includes  
10 videos or images taken during research activity under a NOAA permit.

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12       **(b) Criminal Fine Determined by the Court.** The parties have not agreed on a  
13 particular fine or a fine range. I understand that the Government might argue for a fine from  
14 zero dollars up to the statutory maximum of one hundred thousand dollars. I understand that I  
15 shall be permitted to advocate for my own fine level, including zero. However, as long as the  
16 fine does not exceed the statutory maximum, I shall agree to pay the fine imposed by the Court.  
17 If the Court imposes a fine, I agree to transmit at sentencing, a check payable to "NOAA  
18 Finance" with the note, "U.S. v. Nancy Black," to the following address NOAA Finance, ATTN:  
19 Asset Forfeiture Fund Payment, 20020 Century Blvd., Germantown, Maryland 20874. NOAA  
20 will provide a receipt to establish that payment has been received, which Nancy Black shall  
21 promptly file with the Court as proof of payment.

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24       **(c) Restitution.** The parties agree that restitution is not applicable to this case.

25       **(d) 300 hours of Community Service.** Nancy Black shall be sentenced to complete 300  
26 hours of community service. The community service obligation must be completed before the  
27 last ninety (90) days remaining in the probation term. The form and judgment as to the  
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1 defendant's compliance with the 300-hour community service obligation is within the discretion  
2 of the U.S. Probation Office and the Court. Nevertheless, if Nancy Black is permitted by the  
3 Probation Office to utilize a vessel or whale watching activity to fulfill her community service  
4 obligations, then the vessel's trip must be at least three hours long, must consist of entirely non-  
5 paying passengers, and the hours credit for the community service shall be counted from the time  
6 the last line is cast from the dock/mooring until the last dock line is affixed to the vessel upon  
7 return to the dock. Nancy Black is to seek no publicity, advertising, or marketing benefit from  
8 her community service activities, nor shall Nancy Black or her companies, Monterey Bay Whale  
9 Watch and Monterey Bay Boat Charters, seek any tax deduction or business expense offset for  
10 community service activity.  
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12  
13 **(e) Special Assessment.** Nancy Black shall pay a special assessment of \$25.00.

14 12. I agree that regardless of any other provision of this Agreement, the Government may  
15 provide the Court and the Probation Office with additional information relevant to the charged  
16 offense and the sentencing decision.  
17

18 13. I agree that any fine and the special assessment imposed by the Court against me will be  
19 immediately due and payable and subject to immediate collection by the Government, and I  
20 understand that the Government may seek immediate collection of the entire fine and special  
21 assessment from any assets without regard to any schedule of payments imposed by the Court or  
22 established by the Probation Office. I agree that I will make a good faith effort to pay whatever  
23 fine may be imposed on the day of sentencing. Before or after sentencing, I will upon request of  
24 the Court, the Government, or the Probation Office, provide accurate and complete financial  
25 information, submit sworn statements concerning my assets and my ability to pay, and release  
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1 funds under my control in order to pay any fine. I agree to pay the special assessment at the time  
2 of sentencing.

3 14. I agree not to commit or attempt to commit any crimes before sentence is imposed. I also  
4 agree not to violate the terms of my pretrial release; not to intentionally provide false information  
5 to the Court, the Probation Office, Pretrial Services, or the Government; and to comply with the  
6 other promises I have made in this Agreement. I agree that if I fail to comply with any of the  
7 promises that I have made in this Agreement, then the Government will be released from all of  
8 its promises in this Agreement, including those set forth in the Government's Promises section  
9 below, but I will not be released from my guilty plea.  
10

11  
12 15. I agree that this Agreement contains all of the promises and agreements between the  
13 Government and me, and supersedes any other agreements, written or oral. No modification of  
14 this Agreement shall be effective unless it is in writing and signed by all parties.  
15

16 16. I agree that this Agreement binds the U.S. Attorney's Office for the Northern District of  
17 California and the U.S. Department of Justice's Environmental Crimes Section only, and does  
18 not bind any other federal, state, or local agency.  
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20 The Government's Promises

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22 17. After the sentence for Count Three of the Indictment is imposed by the Court, the  
23 Government agrees to dismiss the remaining counts and the forfeiture allegation contained in the  
24 Indictment.

25 18. The Government agrees not to file any additional criminal charges against the defendant  
26 arising from or related to any and all conduct, such conduct known to the Government as of the  
27 date the last person signed this Agreement, that concerned the take or feeding of marine  
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1 mammals, vessel operation, the finance and operation of Monterey Bay Whale Watch and  
2 Monterey Bay Boat Charters, and/or the alteration of video derived from whale watching  
3 activities, including statements regarding such footage, that occurred from January 1, 2004,  
4 through April 15, 2013.  
5

6 19. The Government agrees that the reasonable and appropriate sentence in this case is as set  
7 forth above unless the defendant violates the terms of this Agreement or fails to accept  
8 responsibility.  
9

10 20. The Government agrees that this Agreement is binding only upon the parties to this  
11 Agreement. This Agreement is not meant to bind any other federal Executive Branch agency or  
12 State of California agency. With regard to licensing and certification decisions made by a  
13 governmental entity that is not a party to this Agreement, those decisions shall remain within the  
14 sound discretion of those entities.  
15

16  
17 The Defendant's Affirmations

18 21. I confirm that I have had adequate time to discuss this case, the evidence, and the  
19 Agreement with my attorneys and that my attorneys have provided me with all the legal advice  
20 that I requested.  
21

22 22. I confirm that while I considered signing this Agreement, and at the time I signed it, I  
23 was not under the influence of any alcohol, drug, or medication that would impair my ability to  
24 understand the Agreement.  
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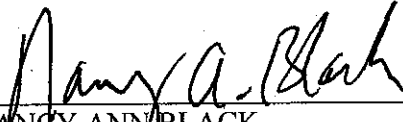
26 23. I confirm that my decision to enter a guilty plea is made knowing the charges that have  
27 been brought against me, any possible defenses, and the benefits and possible detriments of  
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proceeding to trial. I also confirm that my decision to plead guilty is made voluntarily, and no one coerced me or threatened me to enter into this Agreement.


So agreed and accepted:

Dated: 4/23/13

  
NANCY ANN BLACK  
Defendant

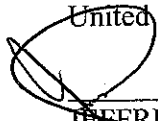
IGNACIA S. MORENO  
Assistant Attorney General of the Environment  
and Natural Resources Division

Dated: April 23, 2013

  
CHRISTOPHER L. HALE  
Trial Attorney

MELINDA HAAG  
United States Attorney


Dated: 4/23/13

  
JEFFREY D. NEDROW  
JEFFREY B. SCHENK  
Assistant United States Attorneys

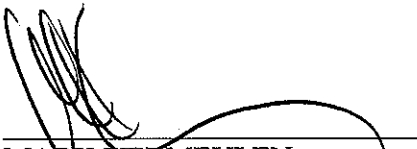
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24. I have fully explained to my client all the rights that a criminal defendant has and all the terms of this Agreement. In my opinion, my client understands all the terms of this Agreement and all the rights my client is giving up by pleading guilty, and, based upon the information now known to me, my client's decision to plead guilty is knowing and voluntary.

Dated: 4-21-13

  
LAWRENCE E. BIEGEL  
Attorney for Defendant

Dated: 04/23/13

  
MARK VERMEULEN  
Attorney for Defendant