UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:	)	**DOCKET NUMBER**
	)	
Geoffrey A. Wilson, and Alaska Yacht Charters,	)	AK1100576, M/V Alaskan Story
	)	
	)	
	)	
Respondents.	)	

INITIAL DECISION AND ORDER

Date: June 13, 2013

Before: Susan L. Biro, Chief Administrative Law Judge, U.S. EPA[1]

Appearances: Garland M. Walker, Esq.
National Oceanic and Atmospheric Administration, U.S. Department of Commerce, Office of the General Counsel, Enforcement Section (Alaska)
Juneau, Alaska, for the Agency

Geoffrey A. Wilson (pro se)
Alaska Yacht Charters
Bainbridge Island, Washington, for Respondents

[1] The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011.

I. PROCEDURAL HISTORY

On July 8, 2011, counsel for the National Oceanic and Atmospheric Administration ("NOAA" or "Agency"), on behalf of the Secretary of Commerce, instituted this action by issuing a Notice of Violation and Assessment of Administrative Penalty ("NOVA") to Geoffrey A. Wilson and Alaska Yacht Charters, the operator and owner, respectively, of the Marine Vessel ("M/V") Alaskan Story ("Alaskan Story") ("Respondents"). The NOVA charges Respondents with "unlawfully allow[ing] the vessel to approach within 100 yards (91.4 m) of a humpback whale in violation of 50 C.F.R. § 224.103(b)(1)(i)," the Agency regulation implementing the Endangered Species Act, 16 U.S.C. §§ 1531–1543, and the Marine Mammal Protection Act, 16 U.S.C. § 1361 et seq. The Agency proposes a total penalty of $8,750. The NOVA advised the Respondents of their right to respond and request a hearing before an Administrative Law Judge (ALJ) within thirty days of receiving the notice.

On November 29, 2011, the Agency filed a memorandum with this Tribunal stating that it had received a request for a hearing from Respondents on September 26, 2011, and that the Agency preferred the hearing be held in Juneau, Alaska. The Agency submitted a copy of Respondents' hearing request and a copy of the Agency's NOVA with its memorandum.

On December 1, 2011, the undersigned issued a Notice of Transfer and Assignment of Administrative Law Judge and Order Setting Schedule for Preliminary Positions on Issues and Procedures (PPIP) ("PPIP Scheduling Order"). In the PPIP Scheduling Order, the undersigned set forth various prehearing filing deadlines and procedures, and ordered the parties to file their respective PPIPs on or before January 6, 2012. After being granted extensions of time to file their PPIPs, the Agency and Respondents filed their PPIPs on January 12, 2012 and January 23, 2012, respectively.

On January 30, 2012, the undersigned issued an Order Scheduling Hearing ("Hearing Order"), which scheduled the hearing for April 24–26, 2012. On March 23, 2012, the undersigned granted Respondents' Motion for Continuance and rescheduled the hearing to commence on August 6, 2012.

On May 30, 2012, the Agency filed a Motion for Issuance of Subpoenas for the Deposition of Tom Greig and Candy Greig. On June 14, 2012, the undersigned granted the Agency's Motion and issued subpoenas for the depositions of the two witnesses.

On July 3, 2012, the Agency filed a list of Proposed Joint Stipulations and stated that the list would be finalized "within the next week." No finalized list was filed with this Tribunal, but during the hearing the parties stipulated to the admissibility of Agency Exhibits 1 through 21. Tr. at 13.[2]

On July 11, 2012, the Hearing Clerk issued a Notice of Hearing Location informing the parties of the time and place for hearing.

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[2] Citations herein to the transcript are made as follows: "Tr. at [page #]." The Agency's exhibits are referenced herein as "AX1," etc., and Respondent's exhibits are referenced as "RX1," etc.

The Agency filed its Prehearing Brief on July 12, 2012. Respondents filed their Prehearing Brief on July 13, 2012.

In accordance with the Notice of Hearing Location, the hearing in this matter was held beginning at 9:00 a.m., on Monday, August 6, 2012, at the Juneau Federal Building, Conference Room #443B/445C, 4th Floor, 709 W 9th Street, Juneau, Alaska 99801. The parties gave opening statements. The Agency then presented its evidence, introducing twenty-two exhibits and the live testimony of one witness: Aleria Jensen. Respondents submitted ten exhibits and introduced the testimony of three witnesses: Stacey Williams, Officer Paul Vincent, and Geoffrey Wilson.

On August 7, 2012, the parties were provided an electronic copy of the transcript. The undersigned issued a Post-Hearing Scheduling Order on August 20, 2012, which set forth deadlines for the submission of post-hearing briefs. The Agency filed its Closing Brief on September 10, 2012. Respondents filed their Initial Post-Hearing Brief on October 11, 2012. The Agency filed its Reply Brief on October 24, 2012. Respondents did not file a response to the Agency's Reply Brief and thus the record in this matter closed on October 24, 2012.

II. FACTUAL BACKGROUND

On the morning of July 16, 2010, Respondent Geoffrey Wilson had been preparing his clients, passengers aboard the M/V Alaskan Story, to fish for salmon near Parker Point on the western side of Admiralty Island, Alaska. AX2, AX4, RX1, RX2, RX10. While preparing his clients in the aft cockpit, Mr. Wilson's First Mate, Kjersti Madsen, was on the bridge at the helm of the vessel when she spotted a pod of whales. Tr. at 107, 110–11; RX1, RX2, RX10. Ms. Madsen announced over the vessel's public address system that she spotted the whales about one and three-quarters of a mile north of the vessel. RX1, RX2, RX10. Mr. Wilson's clients then decided that they would rather engage in whale-watching than fish for salmon. RX1, RX2, RX10. As such, Mr. Wilson returned to the bridge and obtained from Ms. Madsen information as to the general location of where she had spotted the whales. Ms. Madsen then returned to the cockpit to stow the fishing gear and help prepare the passengers to watch the whales from the foredeck of the vessel. Respondent Wilson promptly headed in the direction of the whales at about four to six nautical miles per hour ("knots"). Tr. at 101, 112; RX10.

Mr. Wilson navigated the Alaskan Story on a northerly course in pursuit of the pod of whales but had not yet spotted the pod when he was joined on the bridge by one of his clients, William "Billy" Lewis. RX1. While on the bridge with Mr. Wilson, Mr. Lewis sighted the pod of whales at a distance of about one-quarter to one-half mile north and approximately 150 to 200 yards off of the starboard side (to the east) of the vessel. RX1. On this northerly course, Mr. Wilson approached a small fishing vessel named the Vision Quest and stopped the Alaskan Story between the Vision Quest and the shoreline of Admiralty Island. Tr. at 101; RX10. Feeling that he was in the way of the Vision Quest, Mr. Wilson then moved his vessel about fifty yards further east towards Admiralty Island. Tr. at 101; RX10. As Mr. Wilson slowed the Alaskan Story to about one knot, the pod of whales suddenly breached the surface of the water within no more than 10 yards of the vessel. AX1 (Telephonic Deposition of Thomas G. Greig, Tr. at 13),

AX2, RX1, RX2, RX10. Mr. Wilson "briefly put the vessel in reverse then neutral." Tr. at 105, 120–21; RX2. Two of the passengers on the Vision Quest, Mary Greig and Thomas Greig, testified that the Alaskan Story essentially drove through the pod of six to eight humpback whales. AX1 (Telephonic Deposition of Thomas G. Greig, Tr. at 13), AX2, AX3 (Telephonic Deposition of Mary M. "Candy" Greig, Tr. at 13), AX4, AX20. Mr. Greig took photos of this encounter that were admitted into evidence. AX5–11. Mr. Lewis also took photos that were admitted into evidence. AX12–15. Mr. Wilson denied ever seeing any indication of the presence of humpback whales until they surfaced at that point in time. Tr. at 100.

Ms. Greig reported this incident to Officer Paul Vincent of the National Marine Fisheries Service that same day and followed up with a written statement approximately two weeks later. AX1 (Telephonic Deposition of Thomas G. Greig, Tr. at 7–8), AX2, AX3 (Telephonic Deposition of Mary M. "Candy" Greig, Tr. at 6), RX9.

Officer Vincent, contacted Mr. Wilson two days later, in Sitka, Alaska, when the Alaskan Story returned to port. Tr. at 66; RX9. Officer Vincent testified that he made contact with Mr. Wilson and interviewed Mr. Lewis about the encounter with the pod of humpback whales. Tr. at 67–69. Officer Vincent testified that Mr. Wilson was very cooperative during the investigation and facilitated Officer Vincent's recovery of photographs from Mr. Lewis's camera. Tr. at 70–72; see AX12–15.

Aleria Jensen, testified, on cross-examination by Mr. Wilson, to the typical behaviors of humpback whales in the waters off of South Central Alaska. She testified that there are times when whales will approach a boat. Tr. at 27. She described the phenomenon known as "bubble-net feeding" or "lunge-feeding," as a feeding behavior where a group of humpback whales coordinate to amass a large amount of herring in a ball by blowing bubbles underwater and then taking turns to lunge through the mass of herring, mouths-open to feed on the fish. Tr. at 31, 41–43. She testified that the humpback whales are capable of diving hundreds of feet below the surface of the water and remaining under for ten minutes before surfacing a mile or more away without warning save for the bubbles that one would see as the whales surfaced. Tr. at 32, 50. She testified that other cues of this type of feeding activity may be: (i) the sight of seagulls circling an area preparing to dive for the herring as the fish get closer to the surface, (ii) the sight of the water beginning to "boil with herring" as the fish near the surface, or (iii) the sound of feeding calls that "emanate up through the water." Tr. at 43–45.

The Greigs testified that the pod had been engaged in "bubble-net feeding" during the morning of July 16, 2010. AX1 (Telephonic Deposition of Thomas G. Greig, Tr. at 10–11), AX2, AX3 (Telephonic Deposition of Mary M. "Candy" Greig, Tr. at 10). Mr. Wilson testified that he saw no evidence of whales or bubble-net feeding until just before the whales surfaced near the Alaskan Story. Tr. at 118–19.

III. APPLICABLE LAW AND REGULATIONS

A. Liability

i. The Endangered Species Act

In 1973, Congress enacted the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, as amended, "[t]o provide for the conservation of endangered and threatened species of fish, wildlife, and plants" that are "of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." Pub. L. No. 93-205, § 2, 87 Stat. 884, 884 (1973). Section 4 of the ESA directs the Secretary of Commerce, in coordination with the Secretary of the Interior, to determine any species that are endangered or threatened using certain criteria and to list any such species in the Federal Register. 16 U.S.C. § 1533. Section 9 of the ESA provides, in pertinent part:

> [W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to . . . *take* any such species within the United States or the territorial sea of the United States.

16 U.S.C. § 1538(a)(1)(B) (italics added). As it is used in the ESA, "[t]he term 'take' means to harass, harm, *pursue*, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (italics added).

ii. The Marine Mammal Protection Act

Congress enacted the Marine Mammal Protection Act of 1972 ("MMPA"), 16 U.S.C. § 1361 et seq., as amended, based on findings that "certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities" and that "the primary objective of their management should be to maintain the health and stability of the marine ecosystem." 16 U.S.C. § 1361(1) and (6), Pub. L. No. 92-522, § 2, 86 Stat. 1027, 1027 (1972). The MMPA provides, in pertinent part, as follows:

> (a) Taking
> Except as provided . . . it is unlawful–
>
> (2) * * * *
>
> (A) for any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States . . . .

16 U.S.C. § 1372(a)(2)(A).

A "marine mammal" is "any mammal which (A) is morphologically adapted to the marine environment . . . or (B) primarily inhabits the marine environment . . . ." 16 U.S.C. § 1362(6).

"The term 'take' means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(13).

"The term 'harassment' means any act of *pursuit*, torment, or *annoyance* which—

> (i) has the potential to injure a marine mammal or marine mammal stock in the wild; or
>
> (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption or behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.

16 U.S.C. § 1362(18)(A) (italics added).

iii. Implementing Regulations

NOAA has promulgated regulations to implement the aforementioned statutes. According to these regulations, the humbpack whale is listed as an endangered species, pursuant to the ESA. 50 C.F.R. § 224.101(b). The regulations governing approaching humpback whales in Alaska provide in pertinent part:

> (1) Prohibitions. Except as provided under paragraph (b)(2) of this section, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or to cause to be committed, within 200 nautical miles (370.4 km) of Alaska, or within inland waters of the state, any of the acts in paragraphs (b)(1)(i) through (b)(1)(iii) of this section with respect to humpback whales (Megaptera novaeangliae):
>
> (i) *Approach, by any means*, including by interception (i.e., placing a vessel in the path of an oncoming humpback whale *so that the whale surfaces within 100 yards* (91.4 m) of the vessel), within 100 yards (91.4 m) of any humpback whale.

50 C.F.R. § 224.103(b) (italics added). This regulation is designed to implement the prohibition against taking under both the ESA and MMPA. Regulations Governing the Approach to Humpback Whales in Alaska, 65 Fed. Reg. 39336, 39338 (June 26, 2000) (proposed rule). The purpose of prohibiting people from approaching humpback whales in the waters off Alaska is "to minimize disturbance that could adversely affect the individual animal and to manage the threat to these animals caused by whale watching activities." Regulations Governing the Approach to Humpback Whales in Alaska, 66 Fed. Reg. 29502, 29503 (May 31, 2001) (final rule).

B. Penalty

The Endangered Species Act provides, in pertinent part, that "[a]ny person who knowingly violates . . . any provision of this chapter, or any provision of any . . . regulation issued in order to implement subsection (a)(1) . . .(B) . . . of section 1538 of this title, may be assessed a civil penalty by the Secretary of not more than $25,000 for each violation." 16 U.S.C. § 1540(a)(1).

The Marine Mammal Protection Act provides, in pertinent part, that "[a]ny person who violates any provision of this subchapter or . . . regulation issued thereunder . . . may be assessed a civil penalty by the Secretary of not more than $10,000 for each such violation." 16 U.S.C. § 1375(a)(1).

The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended by the Debt Collection and Improvement Act of 1996, Pub. L. 104-134, resulted in the Secretary increasing the maximum civil penalties under the ESA and the MMPA to $32,500 and $11,000 per violation, respectively. 15 C.F.R. § 6.4(f)(10), (13)(i) (Dec. 11, 2008).

In determining an appropriate penalty, the applicable regulations provide in pertinent part:

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

15 C.F.R. § 904.108(a).

Pursuant to 5 U.S.C. § 3344 and 5 C.F.R. § 930.208, the U.S. Office of Personnel Management approved an agreement between the Agency and the U.S. Environmental Protection Agency ("EPA"), which holds that EPA Administrative Law Judges may preside over certain Agency administrative enforcement proceedings initiated pursuant to the Endangered Species Act and other statutes.

IV. DISCUSSION

A. Legal Standard Governing Mental State ("*Mens Rea*")

Both the Endangered Species Act and the Marine Mammal Protection Act make it unlawful to "take" a humpback whale. The Marine Mammal Protection Act imposes strict liability for "taking" a protected marine mammal (i.e., no specific mental state need be proven). *In re Creighton*, NOAA Docket No. SW030133, 2005 WL 1125361 (ALJ, Apr. 20, 2005) ("Marine Mammal Protection Act is a strict liability statute, and no specific intent is required . . . . Whether a respondent appreciates the consequences of his or her actions is irrelevant since voluntary actions are sufficient to constitute a violation of the MMPA."). However, under the

Endangered Species Act where the penalty is in excess of $500, liability for "taking" only attaches to violations committed "knowingly." 16 U.S.C. §§ 1375(a)(1), 1540(a)(1). "The term 'knowingly' has been construed . . . to require only the commission of voluntary acts which cause or result in the violation." *In re Huber*, NOAA Docket No. 133-285, 1994 WL 1246350 at *3 (ALJ, April 12, 1994) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 588 (1971) (holding that "knowingly" related to knowledge of the facts not the law.); accord *United States v. Jonas Bros. of Seattle*, Inc., 368 F. Supp. 783 (D. Alaska 1974) (requiring only a showing that the acts involved were voluntary and intentional)); see also *In re Kuhn*, NOAA Docket No. 733-038, 732-054, 1988 WL 248035 (ALJ, Dec. 16, 1988). Thus, Respondents may be found liable under the ESA if they voluntarily intended to cause the acts that constitute the violation.

B. The Agency's Burden of Proof

Findings based on the facts alleged in the NOVA and the evidence presented at the hearing are made below. To prevail on its claims that Respondents Wilson and Alaska Yacht Charters violated the Acts and the regulations, the Agency must prove facts constituting the violations by a preponderance of reliable, probative, substantial, and credible evidence. 5 U.S.C. § 556(d); *In re Watson*, NOAA Docket No. PI0900579, 2001 WL 3524743 (ALJ, July 17, 2010) (citing *Cuong Vo*, NOAA Docket No. SE010091FM, 2001 WL 1085351 (ALJ, Aug. 17, 2001)); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). Direct and circumstantial evidence may establish the facts constituting a violation of law. *In re Watson*, NOAA Docket No. PI0900579, 2001 WL 3524743 (ALJ, July 17, 2010) (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764–765 (1984)).

C. Liability

On July 16, 2010, Respondents Wilson and Alaska Yacht Charters were operating the M/V Alaskan Story within 200 nautical miles of Alaska. Tr. at 101–02; AX1 (Telephonic Deposition of Thomas G. Greig, Tr. at 13), AX2, AX3 (Telephonic Deposition of Mary M. "Candy" Greig, Tr. at 13), AX4–15, RX1–2, RX9–10. While seeking to obtain a closer view of a pod of humpback whales, the Respondents moved the M/V Alaskan Story such that the vessel drove amongst the pod of whales as they surfaced during a lunge feeding session. AX1 (Telephonic Deposition of Thomas G. Greig, Tr. at 13), AX2, AX3 (Telephonic Deposition of Mary M. "Candy" Greig, Tr. at 13), AE4, AE20.

The Agency argues that Respondent violated the law by driving the Alaskan Story within 100 yards of the humpback whales. 50 C.F.R. § 224.103(b)(1)(i). In support thereof, it first relies upon the statements from Mr. and Mrs. Grieg that the whales were visible on the surface of the water as the Alaskan Story approached the vicinity. AX1, AX3. Second, photos from July 16, 2010, taken by the Griegs and Billy Lewis showing the Alaskan Story within several yards of the whales. AX5–15. Third, the Agency introduced videos and stock photos from Respondents' website showing on other occasions whales very close to their boat, as circumstantial evidence of Respondent Wilson's intent in this case. AX16–19.

Respondent Wilson, on the other hand, argues that because he did not intend to approach the whales so closely and did not know the precise location of the whales, he is therefore not liable for the alleged violation. RX10; Respondent's Initial Post-Hearing Brief. Respondent also states that "this is not a strict-liability case." Respondent's Initial Post-Hearing Brief at 6. The MMPA is, however, a strict liability statute, as is the ESA for penalties not more than $500. 16 U.S.C. § 1540(a)(1). For penalties over $500, the ESA requires that the actions constituting the violation be committed "knowingly." *Id.* This does not necessarily mean that the person intended to break the law. Rather, it means that the person knowingly engaged in the actions which resulted in the law being broken. *In re Huber*, NOAA Docket No. 133-285, 1994 WL 1246350 at *3 (ALJ, Apr. 12, 1994); *In re Kuhn*, NOAA Docket No. 733-038, 732-054, 1988 WL 248035 (ALJ, Dec. 16, 1988). This distinction is material here, where although Respondent asserts he did not know that he was as close to the whales as it turned out he actually was, he does not dispute that he knowingly piloted his boat to the location with the intention of being in close proximity to the whales, and such intent came to fruition. Such knowledge of his actions triggers liability under the ESA. *Id.*

Mr. Wilson's first mate had seen the pod of whales and told him where they were and he set off in that direction for the express purpose of giving his passengers a good whale-watching experience. Tr. at 107, 110–11; RX1, RX2, RX10. While piloting the Alaskan Story to the area where the violation ultimately occurred, Mr. Wilson was joined on the bridge by one of his passengers who stated that he saw the pod of whales about one-half to three quarters of a mile ahead of the Alaskan Story. RX1. Mr. Greig from the F/V Vision Quest testified that he had last seen the pod on the surface blowing their spouts about five minutes prior to the Alaskan Story coming abeam of the Vision Quest. AX1 (Telephonic Deposition of Thomas G. Greig, Tr. at 26). This timing is also consistent with Mr. Wilson's own testimony about how long it took for him to travel one and three quarters of a mile to where the whales were last seen. Tr. at 116. The undersigned finds credible Mr. Wilson's testimony that he had not personally observed the pod prior to their breach, but this does not disprove that he was at least reckless to the substantial risk that piloting the Alaskan Story under power and under those circumstances to where others had last seen the whales could interfere with the natural movements of the humpback whales. Particularly telling is the fact that Mr. Wilson has over twenty-two years of experience chartering boats in Southeast Alaska and is aware of the rules regulating the distance one must maintain while observing humpback whales, and the behavior of whales, but he failed to act prudently in this instance to maintain an adequate distance when he knew a pod of humpback whales were in the immediate area into which he piloted his vessel. Tr. at 102, 120, 124; RX1–5; AX 2 (Mr. Grieg stating the Alaskan Story "turned toward shore to where the whale *had been*" and began to move "in the same direction the whale headed before *they dove and disappeared.*").

Respondent Wilson argues that the whales just appeared around his boat without warning and that the Alaskan Story was stopped in the water at the time. Respondent's Initial Post-Reply Brief at 6. He suggests that the Respondents did not "approach" the humpback whales, but instead the whales approached him and his vessel from below, such that no violation occurred. *Id.* at 7. The regulations do not define "approach," but this term has been interpreted by the Agency and in previous decisions under this regulation to mean "some active movement toward the humpback whale." *In re Rundle*, NOAA Docket No. PI0800817, 2009 WL 2053601 (ALJ, June 29, 2009) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that an agency's

interpretation of its own regulations is entitled to deference and controls unless plainly erroneous or inconsistent with the regulation)).

Here, it is clear that Mr. Wilson knowingly and actively moved the Alaskan Story toward the pod of humpback whales, starting from a distance of approximately 1.75 miles away and ending up substantially less than 100 yards away from the whales. Indeed, Respondent Wilson admits "[i]t is clear that the Alaskan Story was closer than 100 yards from the humpback whales. I would estimate that it was just a matter of yards from the animals." RX10 (Argument of Geoffrey A. Wilson). While seeking to obtain a closer view of a pod of humpback whales, the Respondents knowingly moved the vessel to approach within 100 yards of the whales, such that the vessel ended up being right amongst the pod of whales as they surfaced during a lunge feeding session. 50 C.F.R. § 224.103(b)(1)(i); AX1 (Telephonic Deposition of Thomas G. Greig, Tr. at 13), AX 2 (Mr. Grieg stating the Alaskan Story "turned toward shore to where the whale *had been*" and began to move "in the same direction the whale headed before *they dove and disappeared.*"), AX3 (Telephonic Deposition of Mary M. "Candy" Greig, Tr. at 13), AE4, AE20. It is also clear that driving the Alaskan Story on top of and into a pod of humpback whales constituted harassment, because it had the potential to injure the whales and disturb their feeding. 16 U.S.C. § 1362(18)(A). In conclusion, Respondents Wilson and Alaska Yacht Charters are liable for taking by "harassment" humpback whales in the coastal waters of Alaska in violation of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B), the Marine Mammal Protection Act, 16 U.S.C. § 1372(a)(2)(A), and their implementing regulation at 50 C.F.R. § 224.103(b)(1)(i); NOVA at 1.

D. Ultimate Findings of Fact and Conclusions of Law

Each exhibit entered, although perhaps not specifically mentioned in this decision, has been carefully reviewed and given thoughtful consideration. Upon thorough and careful review of the entire record, applicable regulations, statutes and case law, I find that the Agency has proven the violation alleged in the NOVA by a preponderance of the evidence.

1. Respondents Geoffrey A. Wilson and Alaska Yacht Charters are "persons" as defined by both the Marine Mammal Protection Act and the Endangered Species Act, and are subject to the jurisdiction of the United States. 16 U.S.C. §§ 1362(10), 1532(13); Tr. at 72, 102.

2. The humpback whale is a marine mammal as that term is defined by Section 3(5) of the MMPA, 16 U.S.C. § 1362(6).

3. The humpback whale is an "endangered species" as that term is defined by Section 3(6) of the ESA, 16 U.S.C. § 1532(6), and is listed as endangered pursuant to Section 4 of the ESA, 16 U.S.C. § 1533, at 50 C.F.R. § 224.101(b).

4. On July 16, 2010, Respondents Wilson and Alaska Yacht Charters were operating the M/V Alaskan Story within 200 nautical miles of Alaska. Tr. 101–02; AX1 (Telephonic Deposition of Thomas G. Greig, Tr. at 13), AX2, AX3 (Telephonic Deposition of Mary M. "Candy" Greig, Tr. at 13), AX4–15, RX1, RX2, RX9, RX10. 50 C.F.R. § 224.103(b).

5. While seeking to obtain a closer view of a pod of humpback whales, the Respondents knowingly moved their vessel to approach within 100 yards of the whales, such that the vessel drove above and amongst the pod of whales as they surfaced during a bubble-net feeding session. AX1 (Telephonic Deposition of Thomas G. Greig, Tr. at 13), AX2, AX3 (Telephonic Deposition of Mary M. "Candy" Greig, Tr. at 13), AX4, AX20.

6. The aforesaid facts constitute a violation of 50 C.F.R. § 224.103(b)(1)(i), a regulation implementing the prohibition against "taking" certain animals protected under the Endangered Species Act and the Marine Mammals Protection Act. Regulations Governing the Approach to Humpback Whales in Alaska, 66 Fed. Reg. 29502, 29503 (May 31, 2001) (final rule), 65 Fed. Reg. 39336, 39338 (June 26, 2000) (proposed rule).

7. For such violation, Respondents are jointly and severally liable for a civil penalty pursuant to the Endangered Species Act and the Marine Mammals Protection Act. 16 U.S.C. § 1540(a)(1) and § 1375(a)(1).

E. Civil Penalty Assessment

At the hearing, the Agency submitted a Penalty Matrix for the Endangered Species Act ("Penalty Matrix") (AX21), which indicates that the Agency considers this to be a gravity offense level II violation for endangered species with a culpability rating of "intentional." This Penalty Matrix is an excerpt of NOAA's Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions ("Penalty Policy").[3] The Penalty Policy, dated March 16, 2011, was designed to help NOAA attorneys determine fair, consistent and appropriate penalties that would serve as a deterrent to potential violators and eliminate economic incentives for noncompliance. Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions, 76 Fed. Reg. 20959, 20959 (Apr. 14, 2011).

The Agency's penalty analysis is not presumed accurate and its proposed penalty is not presumed appropriate. Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35631, 35631 (June 23, 2010); *In re Nguyen*, NOAA Docket No. SE0801361FM, 2012 WL 1497024, at *8 (ALJ, Jan. 18, 2012); 15 C.F.R. § 904.204(m). Further, the presiding judge need not state good reasons for departing from the Agency's analysis or the guidelines set forth in the Penalty Policy materials. *Id.* Since the Agency did not introduce the entire Penalty Policy into evidence, the undersigned will consider only the ESA Penalty Matrix and the regulations at 15 C.F.R. § 904.108(a) in determining the appropriate penalty.[4]

i. Gravity

[3] This Agency Penalty Policy is accessible to the public at the following URL: http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf.

[4] Because the Agency elected to pursue a single penalty under the Endangered Species Act, which provides for a greater maximum penalty than what is available under the Marine Mammal Protection Act, this discussion only addresses those statutory and regulatory factors pertinent to the Endangered Species Act.

The Penalty Matrix's first calculation is the gravity-of-offense level, which takes into account the fact that the violation involved a commercial enterprise's violation of distance restrictions for watchable wildlife. AX21. During the hearing, the Agency offered the testimony of Aleria Jensen, a marine mammal specialist, who described the growth of the whale watching industry in Alaska and the need for these regulations to protect the population of humpback whales around Alaska because the "take" provisions in the ESA and the MMPA alone were insufficient to prevent the kind of disturbances this industry growth presented to the humpback whales. Tr. at 16–18. Ms. Jensen testified that the humpbacks summertime feeding in Alaskan waters is "crucial" to them because "[t]hey're only feeding for half the year, so to be here to forage in an uninterrupted manner is just absolutely paramount for them." Tr. at 20.

The gravity level proposed by the Agency, which is the second lowest of four levels, appears to be well founded. The nature and circumstances of this violation is such that it could interrupt the feeding patterns of humpback whales. The growth of the whale-watching community in Alaska that instigated the promulgation of these regulations indicates that this type of violation will have a negative cumulative effect on the humpback whale population's feeding pattern. The potential consequences of the violation were quite serious in that the Alaskan Story, a large 90 foot motorized yacht, drove through a pod of approximately six to eight humpback whales. AX1 (Telephonic Deposition of Thomas G. Greig, Tr. at 13), AX2, AX3 (Telephonic Deposition of Mary M. "Candy" Greig, Tr. at 13), AX4-16.

ii. Culpability

The second metric is the violator's culpability level. The Penalty Matrix indicates that there are four categories: intentional, recklessness, negligence, and unintentional (including accident, mistake, and strict liability). AX21. The Agency asserts that Respondent's culpability level should be considered "intentional." AX21. The Agency argues that the Respondents' website which contains videos depicting close encounters with humpback whales is circumstantial evidence that the Respondents acted consistent with their marketing materials in this instance by seeking to provide their customers with an up-close experience with humpback whales. Agency's Closing Brief at 6; AX16–19. However, the undersigned does not find that the Agency has clearly established by a preponderance of the evidence that Respondent's culpability level was intentional. Rather, the undersigned concludes that Respondent's culpability level in this case was reckless.

It was not clearly established by the evidence proffered by the Agency that, during his approach, Respondent Wilson knew with certainty the precise location of the whales. In support of NOAA's assertion that the violation was intentional, Tom Grieg stated that it was not much longer than five minutes from the time persons on board the Vision Quest were watching whales to the time the Alaskan Story arrived. AX1 (Telephonic Deposition of Thomas G. Greig, Tr. at 26). Mr.Greig also stated "[i]t was clear to me that the [Alaskan Story] vessel was aware of the pod of whales as the whale spouts were quite visible . . . ." AX2. However, Mr. Grieg also stated that the Alaskan Story "turned toward shore to where the whale *had been*" and that the Alaskan Story began to move "in the same direction the whale headed before *they dove and disappeared.*" *Id.* (emphasis added).

Respondent's argument is that the whales had dove deep below the water surface as part of their "bubble net feeding" technique, were mostly underwater and not visible on the surface and then, to his surprise, the whales suddenly came up out of the water within yards of his boat. RX10; Tr. at 117, 120. When Alaskan Story first mate Kjersti Madson first spotted the humpback whales approximately 1.75 miles away, Mr. Wilson did not himself see the whales. RX10. Tr. at 112. Further, Mr. Wilson testified that, when he pulled the Alaskan Story up near the Vision Quest, he thought the whales were "a half a mile or a quarter mile ahead of me at the time." Tr. at 101. "My feeling was we were about – we were well away from the whales." Tr. at 116. "I was moving in the direction of whales that I thought were a considerable distance away." Tr. at 113. Under questioning by the Court, Mr. Wilson repeatedly testified that he did not see the whales, even when the Alaskan Story was in close proximity to the Vision Quest. Tr. at 118–119.

NOAA's sole witness at the hearing, Aleria Jensen, testified on cross-examination that she has many times witnessed humpback whales disappear below the water surface and come up ten minutes later a mile or more away and that there was no warning as to where the whales are going to come up except the bubbles that might come up at the same time as the whales. Tr. at 32. In her deposition testimony, Mary "Candy" Grieg stated that she had been watching the whales for about an hour, had seen them lunge up "once or twice" about twenty to thirty minutes before the incident, but she did not at any time notice any whales coming up individually. AX3 (Telephonic Deposition of Mary M. "Candy" Greig, Tr. at 23). Respondent Wilson testified that it probably took him approximately between five and 15 minutes from the time first mate Kjersti Madson first spotted the whales to the time the Alaskan Story first neared the Vision Quest (Tr. at 115-116), so the whales were not visible above the surface of the water during his approach.

First mate Kjersti Madson provided a written statement to Respondent which included the following description of the event:

> We were searching the water with our eyes ~300-500 yards ahead of the boat for the whales as that is where I had seen them surfacing once before. All of a sudden we saw the whales much too close to the boat starting to surface . . . . We were all taken by surprise as we had not seen any bubbles rise to the surface in warning and the whales had moved substantially closer than when originally spotted.
>
> This was an extremely rare event as Geoff has been diligent about staying a minimum of 100 yeards away when watching whales at all times fore [sic] the 4 months I was in his employment.

RX2.

It seems unlikely that Respondent Wilson intentionally desired to come as close to the whales as he actually did. In fact, Mr. Wilson testified on direct that "when the whales came up, I was shocked and really upset." Tr. at 105, see also Tr. at 120. He further testified regarding the close proximity to the whales that he found himself in on this occasion, "it's not good for the whales or for the boat to be in that situation. I do everything I can to avoid that happening." Tr.

at 122–123. He explained that not only can the whales be harmed, but expensive parts of his boat could get damaged. Tr. at 123.

In responding to questions from the Court, Mr. Wilson testified "You know something? It's not the $8,500. Mr. Walker has accused me of intentionally running my boat into humpback whales. That's – that's what we're here about. . . . I can't imagine anything worse than – why would anybody intentionally run a boat into swimming whales? Nobody would do that. I certainly wouldn't do that. Nobody. I mean what he's charging me with, nobody would do." Tr. at 125-26.

Billy Lewis, a paid passenger aboard the Alaskan Story, sent to Mr. Wilson an email with his recollection of the event, which states that they anticipated the whales would surface on the right side of the boat, but "we saw the bubbles form around the boat and within seconds the whales began to surface right by the boat." RX1. Lewis' email concludes with the statement "I also recall that you were visibly shaken as a result of this event as you had been clear to us during our entire journey that we had to be at least 100 yards away from the whales." *Id.*

Lastly, Mr. Wilson has over twenty-two years of experience chartering boats in Southeast Alaska, is aware of the rules regulating the distance one must maintain while observing humpback whales, and has no prior such violations on his record. Tr. at 86, 102, 124. Mr. Wilson offered the statements of several seemingly knowledgeable people who have taken trips aboard the Alaskan Story many times and who all agree that Mr. Wilson has always shown respect for humpback whales and all of the wildlife in Alaska, as well as the 100 yard rule for humpback whales. RX3–5. The undersigned finds these statements to be credible.

The undersigned can understand that witnesses on the Vision Quest such as the Greigs would be upset seeing the whales surface in such close proximity to the Alaskan Story, but that does not necessarily make the violation intentional. Also, whereas the Agency's photo exhibits provide significant evidence of liability, i.e., that the Alaskan Story was well within 100 yards of the humpback whales, those photos do not prove Respondent actually intended that result. The same can be said regarding the photos and videos on Respondent's website that the Agency has introduced into evidence as circumstantial proof of Respondent's intent to approach closer than 100 yards from the humpback whales on the date in question. AX16–19; Tr. at 53–55. The photos also do not show whether the boat approached the whales or the whales approached the boat. Tr. at 92 (Testimony of NOAA Officer Paul Vincent). Further, Ms. Jensen testified that merely posting photos that depict close encounters with humpback whales is not illegal. Tr. at 49.

On the other hand, while not clearly intentional, Respondent's behavior did rise to the level of recklessness regarding compliance with the regulation in question. In his haste to provide his clients with a close-up whale watching experience, he knowingly proceeded without adequate caution in the face of a known and substantial risk of approaching too close (i.e., illegally) to the humpback whales. Although Respondent could not see their precise location, he knew the general vicinity where the whales were recently spotted by his first mate only several minutes before. He also had many years of experience and is knowledgeable both of the applicable regulations and of humpback whale behavior. Respondent provided no evidence of

any precautionary measures he employed to ensure that his vessel did not come within 100 yards of the humpback whales. Therefore, I find that Respondent's culpability level was reckless.

Viewing the gravity level ("II") and culpability level ("Reckless") as they relate on the Agency's Penalty Matrix for the Endangered Species Act ("Matrix"), the base penalty range available for this violation is $3,500-$6,000.

iii. Prior History

Respondents have had no previous violations. Tr. at 86.

iv. Ability to Pay

The violator's ability to pay is to be considered if raised and supported by the alleged violator. 15 C.F.R. § 904.108. No evidence of the Respondents' inability or ability to pay was submitted at any time in this proceeding and the Agency did not adjust its proposed penalty based on this factor.

Upon consideration of all the foregoing, it is determined that for this single violation a civil penalty in the amount of $5,000 is appropriately imposed against Respondents Wilson and Alaska Yacht Charters. In arriving at this penalty, the undersigned considered Mr. Wilson's more than two decades of experience of operating a commercial yacht charter in Alaskan waters and his knowledge of the regulations governing these at-sea encounters with humpback whales. Tr. at 124; RX1–5

ORDER

A total penalty of **$5,000** is hereby **IMPOSED** on **Respondents Geoffrey A. Wilson and Alaska Yacht Charters**, jointly and severally, for the violation of which they have been found liable herein.

As provided by 15 C.F.R. § 904.105(a), payment of the penalty in full shall be made within **30 days** of the date this decision become final Agency action, by check or money order made payable to the "Department of Commerce/NOAA," or by credit card information and authorization, provided to:

NOAA
Office of General Counsel
U.S. Department of Commerce
P.O. Box 21109
Juneau, AK 99802

PLEASE TAKE NOTICE, that any petition for reconsideration of this Initial Decision must be filed with the undersigned within **20 days** after the Initial Decision is served. 15 C.F.R. § 904.272. Such petition must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. *Id.* Within **15 days** after a

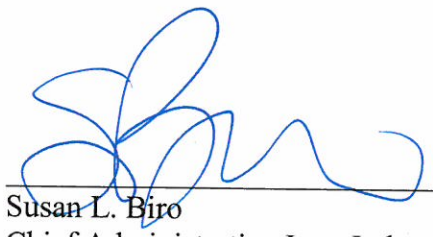
petition is filed, any other party to this proceeding may file an answer in support or in opposition. The undersigned will rule on any petition for reconsideration.

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

PLEASE TAKE FURTHER NOTICE, that this Initial Decision becomes effective as the final Agency action **60 days** after service, on **August 12, 2013**, unless the undersigned grants a petition for reconsideration or the Administrator reviews the Initial Decision. 15 C.F.R. § 904.271(d).

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

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency[5]

June 13, 2013
Washington, D.C.

[5] As stated above, the Administrative Law Judges of the U.S. EPA are authorized to hear cases pending before the Agency pursuant to an agreement effective September 8, 2011.

TITLE 15 -- COMMERCE AND FOREIGN TRADE
SUBTITLE B -- REGULATIONS RELATING TO COMMERCE AND FOREIGN TRADE
CHAPTER IX -- NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE
SUBCHAPTER A -- GENERAL REGULATIONS
PART 904 -- CIVIL PROCEDURES
SUBPART C -- HEARING AND APPEAL PROCEDURES
DECISION

15 CFR 904.271-273

§ 904.271 Initial decision.

(a) After expiration of the period provided in § 904.261 for the filing of reply briefs (unless the parties have waived briefs or presented proposed findings orally at the hearing), the Judge will render a written decision upon the record in the case, setting forth:

(1) Findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law, or discretion presented on the record;

(2) An order as to the final disposition of the case, including any appropriate ruling, order, sanction, relief, or denial thereof;

(3) The date upon which the decision will become effective; and

(4) A statement of further right to appeal.

(b) If the parties have presented oral proposed findings at the hearing or have waived presentation of proposed findings, the Judge may at the termination of the hearing announce the decision, subject to later issuance of a written decision under paragraph (a) of this section. In such cases, the Judge may direct the prevailing party to prepare proposed findings, conclusions, and an order.

(c) The Judge will serve the written decision on each of the parties, the Assistant General Counsel for Enforcement and Litigation, and the Administrator by certified mail (return receipt requested), facsimile, electronic transmission or third party commercial carrier to an addressee's last known address or by personal delivery and upon request will promptly certify to the Administrator the record, including the original copy of the decision, as complete and accurate.

(d) An initial decision becomes effective as the final administrative decision of NOAA 60 days after service, unless:

(1) Otherwise provided by statute or regulations;

(2) The Judge grants a petition for reconsideration under § 904.272; or

(3) A petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative under § 904.273.

§ 904.272 Petition for reconsideration.

Unless an order or initial decision of the Judge specifically provides otherwise, any party may file a petition for reconsideration of an order or initial decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. Petitions must be filed within 20 days after the service of such order or initial decision. The filing of a petition for reconsideration shall operate as a stay of an order or initial decision or its effectiveness date unless specifically so ordered by the Judge. Within 15 days after the petition is filed, any party to the administrative proceeding may file an answer in support or in opposition.

§ 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision within 30 days after the date the decision is served. The petition must be served on the Administrator by registered or certified mail, return receipt requested at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Copies of the petition for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel for Enforcement and Litigation at the following address: Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse, modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

(c) Review by the Administrator of an initial decision is discretionary and is not a matter of right. If a party files a timely petition for discretionary review, or review is timely undertaken on the Administrator's own initiative, the effectiveness of the initial decision is stayed until further

order of the Administrator or until the initial decision becomes final pursuant to paragraph (h) of this section.

(d) A petition for review must comply with the following requirements regarding format and content:

(1) The petition must include a concise statement of the case, which must contain a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the petition;

(2) The petition must set forth, in detail, specific objections to the initial decision, the bases for review, and the relief requested;

(3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statutes, regulations, and principal authorities. Petitions may not refer to or incorporate by reference entire documents or transcripts;

(4) A copy of the Judge's initial decision must be attached to the petition;

(5) Copies of all cited portions of the record must be attached to the petition;

(6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and

(7) Issues of fact or law not argued before the Judge may not be raised in the petition unless such issues were raised for the first time in the Judge's initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content requirements in paragraph (d) of this section without further review.

(f) No oral argument on petitions for discretionary review will be allowed.

(g) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. An answer must comport with the format and content requirements in paragraphs (d)(5) through (d)(7) of this section and set forth detailed responses to the specific objections, bases for review and relief requested in the petition. No further replies are allowed, unless requested by the Administrator.

(h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said

petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective date 150 days after the petition is served.

(i) If the Administrator issues an order denying discretionary review, the order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final agency decision. The Administrator need not give reasons for denying review.

(j) If the Administrator grants discretionary review or elects to review the initial decision without petition, the Administrator will issue an order to that effect. Such order may identify issues to be briefed and a briefing schedule. Such issues may include one or more of the issues raised in the petition for review and any other matters the Administrator wishes to review. Only those issues identified in the order may be argued in any briefs permitted under the order. The Administrator may choose to not order any additional briefing, and may instead make a final determination based on any petitions for review, any responses and the existing record.

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

(l) An initial decision shall not be subject to judicial review unless:

(1) The party seeking judicial review has exhausted its opportunity for administrative review by filing a petition for review with the Administrator in compliance with this section, and

(2) The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the Judge's initial decision has become the final agency decision under paragraph (h) of this section.

(m) For purposes of any subsequent judicial review of the agency decision, any issues that are not identified in any petition for review, in any answer in support or opposition, by the Administrator, or in any modifications to the initial decision are waived.

(n) If an action is filed for judicial review of a final agency decision, and the decision is vacated or remanded by a court, the Administrator shall issue an order addressing further administrative proceedings in the matter. Such order may include a remand to the Chief Administrative Law Judge for further proceedings consistent with the judicial decision, or further briefing before the Administrator on any issues the Administrator deems appropriate.

In the Matter of Geoffrey A. Wilson & Alaska Yacht Charters, Respondents
Docket No. AK1100576, M/V Alaskan Story

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision And Order,** dated June 13, 2013 was sent this day in the following manner to the addressees listed below:

Maria Whiting-Beale

Maria Whiting-Beale
Staff Assistant

Dated: June 13, 2013

Original By Hand Delivery To:

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