

184:6; 188:24-189:14. Respondent Paasch also argued that he had used the same VMS reporting system as Respondent Churchman (Stipulation ¶ 43), and knew that Churchman had never been notified by NOAA that the reported area of fishing was within the RCA. Furthermore, Respondent Paasch argued that he was aware that Respondent Churchman had NOAA observers on his vessel while he fished in those areas, and that neither the observers nor anyone from NOAA ever informed Churchman that he was within the RCA. Finally, Respondent Paasch claimed that he knew that Churchman was actively involved in state and federal hearings regarding the preservation of marine resources and the promulgation of fishing regulations, and concluded that Churchman was correct in stating that the area was not within the RCA.

Respondent Paasch's arguments thus center upon his reliance on the information provided by Respondent Churchman and his knowledge of Respondent Churchman's commendable history in the fishery. Yet, Respondent Paasch admitted that he never personally checked to make sure that the coordinates provided by Respondent Churchman were outside the RCA boundary. See Tr. 184:17-21; 183:23-184:6.

Respondent Paasch's arguments about such detrimental reliance are mitigating factors and have been taken into account in reducing the proposed sanction. However, such mitigation is not entitled to major weight. Specifically, a fisherman is under an independent duty to be aware of the laws and regulations applicable to any fishing activities. Reliance on another for understanding one's own compliance with such laws and regulations is not a valid excuse. Indeed, individuals engaging in a highly regulated industry bear the responsibility of knowing and complying with all the regulations. See, e.g., In re Peterson, 6 O.R.W. 486, 490 (NOAA 1991). A respondent's confusion or ignorance of the fishing regulations is not an excuse to liability. See In re Duong Vo, 1998 WL1277937 (NOAA 1988). Respondent Paasch's professed

inability to accurately plot his coordinates to be sure he was not fishing in the RCA (see Tr. 171:6-20; 183:10-16) simply does not excuse him from compliance. The fact that he did not trust himself to make sure he was fishing outside the boundaries of the RCA (id.) does not make his reliance on fishing coordinates provided by Respondent Churchman either justified or reasonable, regardless of what he “knew” about Respondent Churchman’s history in the fishery.

Respondent Paasch received the public notices that would have provided the coordinates for the RCA boundaries, but chose not to look at such information. Tr. 184:22-185:12; 185:22; 186:16. Respondent Paasch cannot excuse his own negligence in ensuring he was in compliance with all the applicable Agency rules and regulations by claiming reasonable reliance on Respondent Churchman’s compliance. To find otherwise would seriously undermine the entire regulatory regime that rests in significant part on participants in the fishery having a non-delegable obligation to know and comply with the applicable law and regulations.

3. Respondents’ Arguments Concerning NOAA Enforcement Selection, Issuance of Verbal or Written Warnings, and Alleged Detrimental Delay in Bringing Charges against Respondent Churchman.

Several of Respondents’ arguments offered to excuse or otherwise minimize the fact of their respective violations require more thorough discussion. Specifically, Respondents tried to demonstrate that the Agency was handling their cases differently than that of another fisherman, Mr. John Mellor, who had received several warnings for his incursions into the RCA.

Respondents also argued generally that NOAA’s policies and practices should have led to the issuance of a verbal or written warning in their respective cases. Finally, Respondent Churchman argued that the Agency failed to inform him that he was making unlawful incursions into the RCA and so several of the admitted violations occurred in part due to Agency inaction and delay in contacting him about the earlier incursions into the RCA.

a) NOAA Enforcement Selection

Respondents argued that the Agency treated another RCA violator – Mr. John Mellor – who had multiple violations within the same general time frame as Respondents differently than Respondents. See Respondents' Post Hearing Brief at 14-18. Respondents maintained that similarly situated parties should be treated the same and that giving Mr. Mellor warnings for his violations was inconsistent with seeking a monetary sanction against Respondents. Id.

Mr. Mellor had three separate incidents of violation: (1) incursions into the RCA on three dates due to a broken hydraulic system on one date and having the wrong coordinates in his plotter on the two other dates (see Resp. Exh. V); (2) a VMS outage due for approximately one week due to the unit being unplugged by Mr. Mellor's crew while he was out of the country (see Resp. Exhs. X, Y); and (3) incursions into the RCA on a single date to retrieve some lost gear (see Resp. Exh. W). On each of these occasions, Mr. Mellor was given a warning, and the Agency brought no enforcement actions to seek monetary sanctions. Id. Respondents maintained that like Mr. Mellor's case, Respondents' cases should have been disposed of with warnings and not an effort to impose monetary penalties because Respondents' incursions were similarly inadvertent. See Respondents' Post Hearing Brief at 17-18.

Respondents' arguments that the Agency's enforcement actions are arbitrary and capricious have no merit. It is well accepted that a prosecutor's choice of one out of a number of subjects for investigation or prosecution is well within the prosecutor's discretion and cannot be considered arbitrary for that reason alone. See generally In the Matter of: Chincoteague Seafood Co., 4 O.R.W. 649, 650 (NOAA App. 1986); see also In re Glenn Mealman, 64 Agric. Dec. 928, 936, 2005 WL 6231870 at *6 (U.S.D.A. 2005) ("It is axiomatic in administrative law that the agency has prosecutorial discretion to pursue those violators where it can make its case . . .

violators are not excused because violations in similar circumstances were not prosecuted, or the violator was not sanctioned in the same fashion as other violators”). Indeed, those who would challenge an agency’s broad discretion to prosecute have a heavy burden to sustain to overcome an agency’s enforcement of the statutes and regulations for which it is responsible. See Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999); see also Esmail v. Macrane, 53 F.3d 176, 178-79 (7th Cir. 1995) (“simply failing to prosecute all known lawbreakers, whether because of ineptitude or (more commonly) because of lack of adequate resources [is not actionable]”); Beverly Enterprises, Inc. v. Herman, 130 F. Supp. 2d 1, 15 (D.D.C. 2000) (agency’s consideration of only three companies for selection from computerized list of numerous contractors in area was not arbitrary).

Here, the undersigned will not second guess the judgment of the Agency with respect to its charging decisions. First, the record does not support Respondents’ claim of inappropriate selective enforcement. Mr. Mellor’s conduct and circumstances of violations are distinct from those of Respondents. See Tr. 89:9-94:24; 109:14-110:12; 110:14-22; Resp. Exhs. V, W, X. The surface similarities between Mr. Mellor’s offenses and Respondents’ do not mandate that these cases be treated the same.

Second, even if Respondents could establish that the Agency chose to enforce the RCA regulations in some instances and not in others under similar circumstances, the Agency’s decision would not be subject to judicial review so long as the motivation was not unlawfully discriminatory. See, e.g., In the Matter of Smith, 5 O.R.W. 122 (NOAA App. 1988). As the Supreme Court said in Wayte v. United States, 470 U.S. 598, 608 (1985), “the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional

rights.” Here, no such evidence was offered or received for the record. NOAA’s decision not to bring an enforcement action against Mr. Mellor for his RCA activities does not exculpate

Respondents from liability

b) Issuance of Verbal or Written Warnings

Respondents argued that under the facts and circumstances of their cases and based upon NOAA’s enforcement policies, procedures, practices and precedent, either a verbal or written warning was the appropriate disposition of their cases. Respondents’ Post Hearing Brief at 2. Whether NOAA complied with its policies is a legitimate question as agencies should not deviate from stated policies without explaining such deviation, as an agency generally should adhere to its own policies and not deviate from past practices without explanation. See, e.g., Henry v. I.N.S., 74 F.3d 1, 6 (1st Cir. 1996) (noting that agencies do not have carte blanche to adopt “significantly inconsistent policies” and should generally apply the same rules to similarly situated individuals).

If the Agency has generally applicable policies with respect to the issuance of written or verbal warnings, Respondents arguably are entitled to treatment under the requirements of such policy. But here no policy precluded or even discouraged NOAA’s bringing an enforcement action against Respondents. See, e.g., Resp. Exhs. Y (50 C.F.R. § 600.740 – indicating the range of enforcement choices); Z (March 16, 2010 memorandum from Ms. Schiffer, NOAA General Counsel – outlining the discretionary nature of charging decisions); CC (NOAA Enforcement Operations Manual, § 5.8); DD (Agency’s Response to Respondents’ First Set of Interrogatories – indicating the enforcement process and applicable policies and procedures).

Nothing in the Agency’s rules, regulations, or policies mandated that the Special Agents act in a way other than they did. Indeed, Agency regulations and policies cited by Respondents

provide that Special Agents are afforded discretion in the issuance of a verbal or written warning. See, e.g., Resp. Exh. Z at page 2 (agent may provide a verbal or written warning or issue a “Fix-It Ticket” where the violation is minor or technical). Therefore, the undersigned will not find the Agency’s actions with respect to the enforcement choices it made against Respondents unlawful or contrary to existing Agency policies and practice.⁹

c) Alleged Detrimental Delay in Bringing Charges against Respondent Churchman

Respondent Churchman argued that the Agency inappropriately stacked the charges against him and failed to tell him that he had been fishing in the RCA immediately upon the Agency’s learning of his incursions. However, Respondent Churchman’s arguments must be rejected as the Agency did nothing inappropriate or unlawful in the timing of its investigation or enforcement proceedings.¹⁰ No Agency policy or procedure required NOAA to initiate contact with Respondent Churchman upon learning of his possible illegal activity.

Special Agent Roy received information about Respondent Churchman’s possible RCA violations from the VMS staff on April 7, 2008. However, before he had an opportunity to call Respondent Churchman to set up an interview, Special Agent Roy was contacted by Respondent Churchman July 2008. This contact occurred as a result of Respondent Churchman learning that Special Agent Roy had been investigating his fish landings. Tr. 112:18-114:21. Special Agent Roy adequately explained why he did not initiate contact with Respondent Churchman due to the nature of the investigation into Respondent Churchman’s case and other official duties and cases. Tr. 116:19-121:4; 125:17-127:13; 151:24-152:6. No mandatory timeframe was violated and

⁹ Just because the majority of RCA incursions might be disposed of with a written or verbal warning (see Resp. Exhs. A, C), does not mandate that Respondents are entitled to such disposition.

¹⁰ See, e.g., Resp. Exh. B (Groundfish Advisory Subpanel Report – April 2009) (suggesting that notification should occur promptly after the first incident, which was a recommendation but does not represent a mandatory Agency policy).

Respondent Churchman's efforts to blame the Agency for his continued illegal activity following April 7, 2008 are completely misplaced and accordingly rejected.

B. Respondents' Degree of Culpability

Both Respondents failed to ensure that their activities complied with the applicable laws and regulations. Respondent Paasch engaged in his fishing activities without independently checking whether the coordinates provided by Respondent Churchman were outside the RCA boundaries. While the undersigned finds that Respondent Paasch did not intentionally violate the Magnuson Act and the regulations at issue, his failure to independently verify the legality of his fishing activities amounts to inexcusable neglect. One commercial fisherman cannot rely upon information provided by another to excuse his own unlawful conduct.

Respondent Churchman's case is more troubling than Respondent Paasch's. The record evidence clearly established that Respondent Churchman: (1) believed that, at best, his two fishing spots were near or right on the RCA line; (2) knew that drift could carry him over where he thought the line would be while reeling in his lines; and (3) nevertheless fished there anyway. Furthermore, even after hearing about NOAA's enforcement contacts with Respondent Paasch, he continued to fish in the area without verifying that he was doing so legally. Contrary to Respondent Churchman's assertions, such actions were not reasonable and suggest a willful disregard for the laws and regulations.

On the other hand, the record reveals no evidence that either Respondent tried to hide their conduct (e.g., tampering with VMS units), failed to comply with applicable trip limits, or attempted to impede the Agency's investigation into their respective violations. Indeed, both Respondents were cooperative during their respective interviews with the NOAA Special Agents.

See Tr. 31:16-18; 39:23-25. Furthermore, neither Respondent has fished in the RCA once being informed by NOAA personnel of the incursions.

C. Respondents' Prior Offenses

Neither of the Respondents has any prior offenses of the Magnuson Act in the past five years. Stipulation ¶¶ 25, 46.

D. Other Matters As Justice Requires

Several additional matters must be considered to assess the proper sanction in these cases. Respondent Churchman has a commendable history in fishery management conservation efforts. See, e.g., Resp. Exhs. H, I, J, K & L. He also has significant support from members of his community who attest to his respect for the marine environment and his character. Id.; Resp. Exhs. N-S.

However, the undersigned finds Respondent Churchman's testimony less than credible on several points as indicated in this Initial Decision and Order. Indeed, the undersigned is particularly troubled by Respondent Churchman's efforts to cast the Agency as being at fault for his own unlawful conduct (i.e., by never telling him he was fishing in the RCA; allegedly "stacking" the charges against him, etc.). As indicated in prior discussion, the undersigned finds that Respondent Churchman at the very least maintained a willful ignorance of the law.

Respondent Paasch, in particular, testified at the hearing in a forthright manner, and he also stopped fishing in the RCA area as soon as he became aware of it.

Both Respondents are individual, longline fisherman and not large-scale commercial operators, which the Agency admitted in its PPIPs. See, e.g., Agency PPIP (Churchman) at 7 ("Respondent's violations are offset by the fact that Respondent runs a relatively small scale operation by the standards of the PCGF"); Agency PPIP (Paasch) at 6 (same). Although neither

Respondent submitted any evidence about their respective inability to pay the sanction the Agency sought, it only stands to reason that the impact of any sanction assessed would impact such individuals more significantly than if imposed against a larger commercial enterprise.

The deterrent effect of a monetary sanction can thus be accomplished in these cases by imposing a significant sanction against each Respondent that encompasses not only the value of the unlawful catch but also an additional amount. This amount should not, however, be so large that it renders the deterrent punitive. Nevertheless, as the undersigned articulated in a prior decision (see In re Pesca Azetca, S.A. de C.V (F/V AZETCA 1), 2009 WL 3721029, subsequently affirmed by the Administrator – see 2010 WL 1676739) a sanction amount should be large enough to alter the economic calculus that might lead Respondents and other participants in the fishery to simply account for any possible sanction as the cost of doing business.¹¹

E. The Appropriate Monetary Sanction Amount

The undersigned finds the Agency's proposed sanctions (which was based on a multiplier of 3.8 times the gross value of the illegal catch in Respondent Paasch's case and 7.5 times the gross value of the illegal catch in Respondent Churchman's case) too high under all the facts and circumstances. Respondents' respective values for their illegal catch was relatively modest compared to the amount of the Agency's suggested penalty, and, as the Agency admitted, Respondents are small-scale independent fisherman. However, Respondents' arguments that only a de minimis penalty or warning simply be imposed for their violations are rejected for all the reasons given in this Initial Decision and Order.

¹¹ Unlike the respondents in the Pesca Azteca case, Respondents here are a much smaller scale operation and the impact of the sanction need not reach such levels to make the requisite deterrent effect.

Clearly, the sanction amount must be sufficient to serve as a deterrent to Respondents and others who might believe that violations will not result in any significant sanctions. Recouping just the value of the unlawful catch could not serve such a purpose because potential violators could just write off the loss of such catch (or its value) as the cost of doing business.

After weighing all the applicable factors and the facts and circumstances of Respondents' violations, the undersigned finds that some additional amounts above the value of the catch is appropriate. Therefore the undersigned imposes an assessed sanction of \$2,500.00 per violation (i.e., \$5,000.00) plus the \$3,754.00 value of the illegal catch for a total of \$8,754.00 against Respondent Paasch and \$4,000 per violation (i.e., \$16,000.00) plus the \$5,786.00 value of the illegal catch for a total of \$21,786.00 against Respondent Churchman.

VIII. Order

WHEREFORE:

IT IS HEREBY ORDERED that a civil penalty in the total amount of **TWENTY ONE THOUSAND SEVEN HUNDRED EIGHTY-SIX DOLLARS** (\$21,786.00) is assessed against Respondent Josh W. Churchman and a civil penalty in the total amount of **EIGHT THOUSAND SEVEN HUNDRED FIFTY-FOUR DOLLARS** (\$8,754.00) is assessed against Respondent Edward T. Paasch.

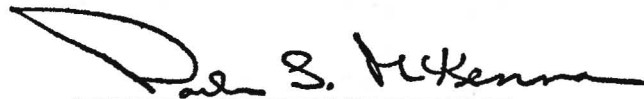
PLEASE BE ADVISED that a failure to pay the penalty within thirty (30) days from the date on which this decision becomes final Agency action will result in interest being charged at the rate specified by the United States Treasury regulations and an assessment of charges to cover the cost of processing and handling the delinquent penalty. Further, in the event the penalty or any portion thereof becomes more than ninety (90) days past due, an additional penalty charge not to exceed six (6) percent per annum may be assessed.

PLEASE BE FURTHER ADVISED that any party may petition for administrative review of this decision. The petition for review must be filed with the Administrator of the National Oceanic and Atmospheric Administration within thirty (30) days from the day of this Initial Decision and Order as provided in 15 C.F.R. § 904.273. Copies of the petition should also be sent to the ALJ Docketing Center, NOAA counsel, and the presiding judge. A copy of 15 C.F.R. § 904.273 is attached as **Attachment D** to this order.

If neither party seeks administrative review within 30 days after issuance of this order, this Initial Decision will become the final decision of the agency.

IT IS SO ORDERED.

Done and dated this 18th day of February, 2011
at Alameda, CA.

A handwritten signature in black ink, appearing to read "Parlen L. McKenna", written over a horizontal line.

HON. Parlen L. McKenna
Administrative Law Judge
United States Coast Guard

ATTACHMENT A: LIST OF WITNESSES AND EXHIBITS¹²

Agency Witnesses

1. Special Agent Roy (NOAA)
2. Special Agent Call (NOAA)

Respondents' Witnesses

1. Josh Churchman
2. Edward Paasch

Agency's Exhibits (Agency Exh. 1 through Agency Exh. 51).

1. NOAA Offense Investigation Report for Josh Churchman, with cover sheets
2. Copy of 50 C.F.R. 660.306(h)(2)
3. Copy of 50 C.F.R. 600.382
4. Copy of 2008 Federal Pacific Groundfish Fishery Limited Entry Permit for the F/V PALO
5. Memorandum of Interview with Josh Churchman
6. Written Statement of Josh Churchman
7. F/V PALO Plotter Way Points overlaid on NMFS Vessel Monitoring System (VMS) Chart
8. Photographs of F/V PALO plotter way points 042, 048, 070, and 066
9. F/V PALO plotter way points 066, 070, 048, and 042 overlaid on VMS Chart
10. Photographs of F/V PALO plotter way points 019, 015, 059, and 065
11. F/V PALO plotter way points 019, 015, 059, and 065 overlaid on VMS Chart
12. Photographs of F/V PALO plotter way points of Nontrawl RCA South of Bodega Bay, CA
13. VMS Chart of May 16, 2008 fishing trip for F/V PALO
14. VMS Chart and Excel spreadsheet of May 16, 2008, fishing trip of F/V PALO
15. California Department of Fish & Game Landing Receipt C115919
16. VMS Chart of May 26, 2008 fishing trip for F/V/ PALO
17. VMS Chart and Excel spreadsheet of May 26, 2008, fishing trip of F/V PALO
18. California Department of Fish & Game Landing Receipt C115920
19. VMS Chart of May 28, 2008 fishing trip for F/V/ PALO
20. VMS Chart and Excel spreadsheet of May 28, 2008, fishing trip of F/V PALO
21. California Department of Fish & Game Landing Receipt C115921
22. VMS Chart of July 13, 2008 fishing trip for F/V/ PALO
23. VMS Chart and Excel spreadsheet of July 13, 2008, fishing trip of F/V PALO
24. California Department of Fish & Game Landing Receipt C115924

¹² The characterization of the Exhibits is taken directly from the parties' Joint Stipulation, which agreed upon the admission of all the exhibits.

25. F/V PALO Vessel Registration and Commercial Fish Business Permit for Josh Churchman
26. F/V PALO CA Department of Motor Vehicle Registration
27. Enforcement Action Report #108596, with certified mail receipt
28. E-mails from Josh Churchman to CDF&G Employee Joanna Grebel, May 20, 2008 through September 4, 2008
29. Copy of Federal Register Notice 69 Fed. Reg. 11182 (March 7, 2003)
30. Copy of Federal Register Notice 71 Fed. Reg. 78638 (December 29, 2006)
31. Copy of NMFS Public Notices, Pacific Coast Groundfish Fishery, Changes to Commercial and Recreational Management Measures, December 28, 2006 and April 25, 2007
32. Notice of Violation and Assessment of Administrative Penalty for Josh Churchman, issued July 29, 2009 (with certified mail receipt)
33. NOAA Offense Investigation Report for Ed Paasch, with cover sheets
34. Copy of 2008 Federal Pacific Groundfish Fishery Limited Entry Permit for the F/V HAZEL A
35. Memorandum of Interview with Edward Paasch
36. Written Statement of Edward Paasch
37. VMS Chart of March 7, 2008 fishing trip for F/V HAZEL A
38. VMS Chart and Excel spreadsheet of March 7, 2008, fishing trip of F/V HAZEL A
39. California Department of Fish & Game Landing Receipt E129491
40. VMS Chart of April 1, 2008 fishing trip for F/V HAZEL A
41. VMS Chart/Excel spreadsheet of April 1, 2008, fishing trip of F/V HAZEL A
42. California Department of Fish & Game Landing Receipt E129493
43. 2008-09 Commercial Fish License Application and Commercial Boat Registration Application for HAZEL A
44. F/V HAZEL A CA Department of Motor Vehicle Registration
45. Enforcement Action Report #108593, with certified mail receipt
46. Notice of Violation and Assessment of Administrative Penalty for Edward Paasch, issued July 29, 2009 (with certified mail receipt)
47. NOAA Civil Administrative Penalty Schedule, West Coast Groundfish Fishery
48. Affidavit of Frank Lockhart
49. History of the 150 Fathom Line of the Nontrawl Rockfish Conservation Area (with supporting documentation)
50. VMS Charts of potential RCA incursions by John Mellor (F/V HIGH HOPES) on September 13-14, 2007.
51. Two VMS Charts showing Churchman's historic fishing efforts from 2004-2008 (as recorded by the VMS Office) and supporting documentation

Respondents' Exhibits (Resp. Exh. A through Resp. Exh. FF)

- A. Tape recording of Dayna Matthews' presentation to the Pacific Fisheries Management Council on April 9, 2009, with supporting documentation
- B. Groundfish Advisory Subpanel Report On Review of Implementing Regulations for the VMS, April, 2009

- C. Enforcement Consultants Report On Review of Implementing Regulations for the VMS, April, 2009
- D. Affidavit of John Mellor, dated September 25, 2009
- E. Record of NOAA WCGOP observers on Respondent Churchman's vessel from Janell Majewski, Observer Program Manager, dated August 19, 2009
- F. Report of the Inspector General of the Commerce Department, issued January 22, 2010, criticizing NOAA's enforcement of regulations as arbitrary and selective
- G. Memo dated February 3, 2010, from Jane Lubchenco, NOAA Administrator, in response to IG Report
- H. June 11, 2009 Press release from NOAA announcing that on June 9, 2009, Josh Churchman was named national volunteer of the year by the National Maritime Sanctuary
- I. Letter to the editor of *West Marin Citizen*, dated November 5, 2009, from Alistair Lizaranzuo, former observer for Cal Fish and Game, regarding Josh Churchman and his efforts to protect the fishery
- J. Article in the May 6, 2010 *West Marin Citizen* regarding Josh Churchman's work in disseminating the Marine Life Protection Act habitat conservation plan
- K. Edward Ueber, Letter of June 11, 2010
- L. Susan M. Sogard, Ph.D., Letter of June 15, 2010
- M. Donald C. Smith, Ph.D., Letter of June 12, 2010
- N. Joe and Amelia Stratton, Letter of June 19, 2010
- O. Donald A. Read, Letter of June 20, 2010
- P. Walter H. Hoffman, Letter of June 21, 2010
- Q. Suzanne Bartlome, Letter of June 22, 2010
- R. Eleanor Lyman, Letter of June 22, 2010
- S. Petition signed by 379 member of the Bolinas community
- T. Copy of 16 U.S.C. §1858(a)
- U. Copy of 15 C.F.R. §904.204(m) (as amended 6/23/19 – 75 Fed. Reg. 35361)
- V. Incident Data Sheet and Offense Investigation Report re John Mellor for RCA incursions of 8/30/07, 9/13/07 and 9/14/07
- W. Incident Data Sheet and Offense Investigation Report re John Mellor for RCA incursion on 7/3/08
- X. Incident Data Sheet and Case Management Sheet re John Mellor for non-functional VMS unit from 3/20/08-4/2/08
- Y. Copy of 50 C.F.R. §600.740
- Z. Memo dated March 16, 2010 from Lois Schiffer, NOAA General Counsel, re Interim Procedures re Enforcement Actions
- AA. VMS Response Protocol for Southwest Region – RCA Incursions
- BB. Preface to NOAA Civil Administrative Penalty Schedule
- CC. NOAA Enforcement Operations Manual, Sections 5.8.1 through 5.8.6
- DD. Agency's Response to Respondents' First Set of Interrogatories
- EE. 15 C.F.R. 904.400
- FF. 15 C.F.R. 660.314(b)

**ATTACHMENT B: RULINGS ON PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Agency's Proposed Findings of Fact and Conclusions of Law:

A) Proposed Findings of Facts For Josh W. Churchman

1) Respondent Josh W. Churchman ("Churchman") is a person subject to the jurisdiction of the United States under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. §1802) (hereinafter, Magnuson Act). Joint Stipulation to Facts, Law, and Admission of Evidence, ¶1 (hereinafter "Stipulation").

RULING: Accepted and Incorporated.

2) At all relevant times, Churchman was the owner and operator of the F/V PALO (CA Registration #CF5511FZ). Stipulation ¶2.

RULING: Accepted and Incorporated.

3) At all relevant times, Pacific Coast Groundfish Fishery Limited Entry Permit Number GF0056 was held by Churchman and was registered to the F/V PALO. Stipulation ¶3.

RULING: Accepted and Incorporated.

4) Pacific Coast Groundfish Limited Entry Permit GF0056 includes a longline gear endorsement. Stipulation ¶4.

RULING: Accepted and Incorporated.

5) On or about May 16, 2008, in the Exclusive Economic Zone of the United States at approximately 38° 27.4190N, 123° 35.4025W, Churchman operated the F/V PALO in a Nontrawl Rockfish Conservation Area (RCA) by fishing with nontrawl fishing gear in violation of 50 C.F.R. 660.306(h)(2). These coordinates are approximately .87 miles inside the western boundary of the Nontrawl RCA. Stipulation ¶5.

RULING: Accepted and Incorporated.

6) As a result of the fishing operations on May 16, 2008, Churchman landed approximately \$2,104.00 worth of groundfish and other fish species. Stipulation ¶6.

RULING: Accepted and Incorporated.

7) On or about May 26, 2008, in the Exclusive Economic Zone of the United States at approximately 38° 27.1462N, 123° 35.2990W, Churchman operated the F/V PALO in a Nontrawl RCA by fishing with nontrawl fishing gear in violation of 50 C.F.R. 660.306(h)(2). These coordinates are approximately .84 miles inside the western boundary of the Nontrawl RCA. Stipulation ¶7.

RULING: Accepted and Incorporated.

8) As a result of the fishing operations on May 26, 2008, Churchman landed approximately \$1,529.00 worth of groundfish and other fish species. Stipulation ¶8.

RULING: Accepted and Incorporated.

9) On or about May 28, 2008, in the Exclusive Economic Zone of the United States at approximately 38° 26.1373N, 123° 34.1253W, Churchman operated the F/V PALO in a Nontrawl RCA by fishing with nontrawl fishing gear in violation of 50 C.F.R. 660.306(h)(2). These coordinates are approximately 1.44 miles inside the western boundary of the Nontrawl RCA. Stipulation ¶9.

RULING: Accepted and Incorporated.

10) As a result of the fishing operations on May 28, 2008, Churchman landed approximately \$1,578.00 worth of groundfish and other fish species. Stipulation ¶10.

RULING: Accepted and Incorporated.

11) On or about July 13, 2008, in the Exclusive Economic Zone of the United States at approximately 38° 25.4058N, 123° 34.7772W, Churchman operated the F/V PALO in a Nontrawl RCA by fishing with nontrawl fishing gear in violation of 50 C.F.R. 660.306(h)(2). These coordinates are approximately .5 miles inside the western boundary of the Nontrawl RCA. Stipulation ¶11.

RULING: Accepted and Incorporated.

12) As a result of the fishing operations on July 13, 2008, Churchman landed approximately \$575.00 worth of groundfish and other fish species. Stipulation ¶12.

RULING: Accepted and Incorporated.

13) The relevant fishing operations by the F/V PALO were all conducted with set/fixed longline gear. Gov't Exhs. 15, 18, 21, and 24.

RULING: Accepted and Incorporated.

14) On April 18, 2008, Edward T. Paasch was interviewed by Special Agent Derek Roy and Special Agent Nicholas Call regarding possible violations of the Magnuson Act. Stipulation ¶40.

RULING: Accepted and Incorporated.

15) Approximately one to two weeks after the interview of Edward T. Paasch, his brother Kenny Paasch contacted Churchman and informed him that Special Agents from the NOAA Office for Law Enforcement had interviewed Edward Paasch regarding Magnuson Act violations. Transcript of Administrative Hearing Held July 13, 2010, p. 228/12 (hereinafter "Transcript").

RULING: Accepted and Incorporated.

16) Kenny Paasch told Churchman that Edward Paasch had been specifically contacted by NOAA enforcement personnel regarding illegal fishing inside the RCA. Transcript 228/14-15 and 229/16.

RULING: Accepted and Incorporated.

17) On May 20, 2008, Churchman initiated an e-mail communication with Joanna Grebel, an employee of the California Department of Fish & Game, requesting changes in the Nontrawl RCA coordinates. Stipulation ¶14 and Gov't Exh. 28.

RULING: Accepted and Incorporated.

18) Churchman was interviewed by Special Agent Derek Roy and Special Agent Nicholas Call regarding possible violations of the Magnuson Act on July 18, 2008. Stipulation ¶18.

RULING: Accepted and Incorporated.

19) After being shown copies of the applicable regulations and the Vessel Monitoring System chartlets showing the location of where Churchman had been fishing on the dates in question, Churchman acknowledged that he appears to have been in violation of the regulations. Stipulation ¶19.

RULING: Accepted and Incorporated.

20) During the interview, Churchman stated that he did not check the RCA boundaries after hearing from Kenny Paasch because he did not want anything to change his fishing spot. Gov't Exh. 5, p. 3, Transcript p. 39/19 and p. 157/23.

RULING: Accepted and Incorporated.

21) During the interview, Churchman acknowledged that he has been fishing in the same location for 20 years. Stipulation ¶20.

RULING: Accepted and Incorporated.

22) At the time of the interview, Churchman had the RCA boundary coordinates correctly entered into the plotter for the F/V PALO. Transcript 43/7.

RULING: Accepted and Incorporated.

23) At all relevant times, the western boundary of the Nontrawl RCA between 40°N and the U.S. border with Mexico was established by federal regulation along a set of specific coordinates generally following the 150 fathom depth contour. 71 Fed. Reg. 78638 (December 29, 2006). In the 2003 Emergency Rule establishing the 150 fathom depth contour as the western boundary of the Nontrawl RCA, no specific coordinates were provided for the line north of 38 degrees latitude. 68 F.R. 908 (January 7, 2003). In a correction to the Emergency Rule, coordinates for

the boundary line north of 38 degrees north latitude were added. 68 F.R. 4719 (January 30, 2003). A Final Rule again published the coordinates generally following the 150 fathom depth contour for the western boundary of the Nontrawl RCA on March 7, 2003. 68 Fed. Reg. 11182 (March 7, 2003). Additional coordinates further defining the western boundary of the Nontrawl RCA, and adding additional fishing grounds for the Nontrawl fleet in the approximate area of the violations at issue in this matter, were published in 2004 and 2006. Stipulation ¶23.

RULING: Accepted and Incorporated.

24) The Nontrawl RCA is a Groundfish Conservation Area for purposes of 50 C.F.R. 660.306(h)(2). 50 C.F.R. §660.302.

RULING: Accepted and Incorporated.

25) Churchman uses two specific fishing spots to target Chilipepper rockfish. Transcript 200/12-18. These fishing spots have been within the RCA since the inception of the RCA program in 2003. Gov't Exh. 49 and 51 (chartlet #2).

RULING: Accepted and Incorporated.

26) During the relevant dates, Churchman knew that his specific fishing spots for Chilipepper rockfish were within the RCA. See generally Gov't Exh. 28, Gov't Exh. 5 (p.3), Transcript pages 39/19, 157/23, 243/21 and 244/14.

RULING: Accepted in Part and Incorporated, Rejected in Part. Respondent Churchman clearly knew or should have known that his fishing spots were within the RCA. As discussed in this Initial Decision and Order, Respondent Churchman's knowledge of the fact that his fishing spots were within the RCA is especially more likely after he found out NOAA Special Agents had spoke with Respondent Paasch. Respondent Churchman's willful ignorance of his fishing spot locations following NOAA's interview with Respondent Paasch is considered an aggravating factor.

26) Churchman has no prior violations of the Magnuson Act within the last five years. Stipulation ¶25.

RULING: Accepted and Incorporated.

B) Proposed Conclusions of Law for Josh W. Churchman

27) Churchman is a person subject to the jurisdiction of the Magnuson Act. Stipulation ¶1.

RULING: Accepted and Incorporated.

28) It is unlawful under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act) for any person to violate "any regulation or permit issued pursuant to this Act." 16 U.S.C. §1857(1)(A).

RULING: Accepted and Incorporated.

29) The regulations for the Pacific Coast Groundfish Fishery make it unlawful for any person to operate any vessel registered to a limited entry permit with a longline or trap (pot) endorsement and longline and/or trap gear onboard in an applicable Groundfish Conservation Area, except for purposes of continuous transiting, . . . or except as authorized in the annual or biennial groundfish management measures at §660.382. 50 C.F.R. 660.306(h)(2).

RULING: Accepted and Incorporated.

30) On May 16, 2008, Churchman did violate the Magnuson Act (16 U.S.C. 1857(1)(A)) and regulations there under (50 C.F.R. §660.(h)(2)) by operating a vessel registered to a limited entry permit with a longline or trap(pot) endorsement and longline and/or trap gear on board in an applicable Groundfish Conservation Area.

RULING: Accepted and Incorporated.

31) On May 26, 2008, Churchman did violate the Magnuson Act (16 U.S.C. 1857(1)(A)) and regulations there under (50 C.F.R. §660.(h)(2)) by operating a vessel registered to a limited entry permit with a longline or trap(pot) endorsement and longline and/or trap gear on board in an applicable Groundfish Conservation Area.

RULING: Accepted and Incorporated.

32) On May 28, 2008, Churchman did violate the Magnuson Act (16 U.S.C. 1857(1)(A)) and regulations there under (50 C.F.R. §660.(h)(2)) by operating a vessel registered to a limited entry permit with a longline or trap(pot) endorsement and longline and/or trap gear on board in an applicable Groundfish Conservation Area.

RULING: Accepted and Incorporated.

33) On July 13, 2008, Churchman did violate the Magnuson Act (16 U.S.C. 1857(1)(A)) and regulations there under (50 C.F.R. §660.(h)(2)) by operating a vessel registered to a limited entry permit with a longline or trap(pot) endorsement and longline and/or trap gear on board in an applicable Groundfish Conservation Area.

RULING: Accepted and Incorporated.

34) The Magnuson Act is a strict liability statute. See Northern Wind, Inc. v. Daley, 200 F.3d 13, 19 (1st Cir. 1999).

RULING: Accepted and Incorporated.

C) Proposed Findings of Facts For Edward T. Paasch

35) Respondent Edward T. Paasch ("Paasch") is a person subject to the jurisdiction of the United States under the Magnuson Act. Stipulation ¶30.

RULING: Accepted and Incorporated.

36) At all relevant times, Paasch was the owner and operator of the F/V HAZEL A (CA Registration #CF6246FF). Stipulation ¶31.

RULING: Accepted and Incorporated.

37) At all relevant times, Pacific Coast Groundfish Fishery Limited Entry Permit Number GF0125 was held by Paasch and was registered to the F/V HAZEL A. Stipulation ¶32.

RULING: Accepted and Incorporated.

38) Pacific Coast Groundfish Limited Entry Permit GF0125 includes a longline gear endorsement. Stipulation ¶33.

RULING: Accepted and Incorporated.

39) On or about March 7, 2008, in the Exclusive Economic Zone of the United States at approximately 38° 25.4882N, 123° 34.6124W, Paasch operated the F/V HAZEL A in a Nontrawl Rockfish Conservation Area (RCA) by fishing with nontrawl fishing gear in violation of 50 C.F.R. 660.306(h)(2). These coordinates are approximately .7 miles inside the western boundary of the Nontrawl RCA. Stipulation ¶34.

RULING: Accepted and Incorporated.

40) As a result of the fishing operations on March 7, 2008, Paasch landed approximately \$1,372.00 worth of groundfish and other fish species. Stipulation ¶35

RULING: Accepted and Incorporated.

41) On or about April 1, 2008, in the Exclusive Economic Zone of the United States at approximately 38° 25.3802N, 123° 34.2425W, Paasch operated the F/V HAZEL A in a Nontrawl RCA by fishing with nontrawl fishing gear in violation of 50 C.F.R. 660.306(h)(2). These coordinates are approximately .99 miles inside the western boundary of the Nontrawl RCA. Stipulation ¶36.

RULING: Accepted and Incorporated.

42) As a result of the fishing operations on May 26, 2008, Paasch landed approximately \$2,382.00 worth of groundfish and other fish species. Stipulation ¶37.

RULING: Accepted and Incorporated.

43) The relevant fishing operations by the F/V HAZEL A were all conducted with set/fixed longline gear. Gov't Exhs. 39 and 42.

RULING: Accepted and Incorporated.

44) Prior to conducting the relevant fishing operations at issue in this case, Paasch did not research the RCA boundary coordinates. Transcript p. 184/25 and 186/13.

RULING: Accepted and Incorporated.

45) Paasch was interviewed by Special Agent Derek Roy and Special Agent Nicholas Call regarding possible violations of the Magnuson Act on April 18, 2008. Stipulation ¶40.

RULING: Accepted and Incorporated.

46) During the interview, Paasch acknowledged that he had been fishing in the same area on a number of occasions adjacent to Respondent Churchman. Stipulation ¶41.

RULING: Accepted and Incorporated.

47) After being shown copies of the applicable regulations and the VMS Schematics showing the location of where Paasch had been fishing on the dates in question, Paasch acknowledged that he appears to have been in violation of the regulations. Stipulation ¶45.

RULING: Accepted and Incorporated.

48) At all relevant times, the western boundary of the Nontrawl RCA between 40°N and the U.S. border with Mexico was established by federal regulation along a set of specific coordinates generally following the 150 fathom depth contour. 71 Fed. Reg. 78638 (December 29, 2006). In the 2003 Emergency Rule establishing the 150 fathom depth contour as the western boundary of the Nontrawl RCA, no specific coordinates were provided for the line north of 38 degrees latitude. 68 F.R. 908 (January 7, 2003). In a correction to the Emergency Rule, coordinates for the boundary line north of 38 degrees north latitude were added. 68 F.R. 4719 (January 30, 2003). A Final Rule again published the coordinates generally following the 150 fathom depth contour for the western boundary of the Nontrawl RCA on March 7, 2003. 68 Fed. Reg. 11182 (March 7, 2003). Additional coordinates further defining the western boundary of the Nontrawl RCA, and adding additional fishing grounds for the Nontrawl fleet in the approximate area of the violations at issue in this matter, were published in 2004 and 2006. Stipulation ¶44.

RULING: Accepted and Incorporated.

49) The Nontrawl RCA is a Groundfish Conservation Area for purposes of 50 C.F.R. 660.306(h)(2). 50 C.F.R. §660.302.

RULING: Accepted and Incorporated.

50) Paasch uses two specific fishing spots to target Chilipepper rockfish. Stipulation ¶41 and Transcript p. 200/12-18. These fishing spots have been within the RCA since the inception of the RCA program in 2003. Gov't Exh. 49 and 51 (chartlet #2).

RULING: Accepted and Incorporated.

51) Paasch has no prior violations of the Magnuson Act within the last five years. Stipulation ¶46.

RULING: Accepted and Incorporated.

D) Proposed Conclusions of Law for Edward T. Paasch

52) Paasch is a person subject to the jurisdiction of the Magnuson Act. Stipulation ¶30.

RULING: Accepted and Incorporated.

53) It is unlawful under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act) for any person to violate "any regulation or permit issued pursuant to this Act." 16 U.S.C. §1857(1)(A).

RULING: Accepted and Incorporated.

54) The regulations for the Pacific Coast Groundfish Fishery make it unlawful for any person to operate any vessel registered to a limited entry permit with a longline or trap (pot) endorsement and longline and/or trap gear onboard in an applicable Groundfish Conservation Area, except for purposes of continuous transiting, . . . or except as authorized in the annual or biennial groundfish management measures at §660.382. 50 C.F.R. 660.306(h)(2).

RULING: Accepted and Incorporated.

55) On March 7, 2008, Paasch did violate the Magnuson Act (16 U.S.C. 1857(1)(A)) and regulations there under (50 C.F.R. §660.(h)(2)) by operating a vessel registered to a limited entry permit with a longline or trap(pot) endorsement and longline and/or trap gear on board in an applicable Groundfish Conservation Area.

RULING: Accepted and Incorporated.

56) On April 1, 2008, Paasch did violate the Magnuson Act (16 U.S.C. 1857(1)(A)) and regulations there under (50 C.F.R. §660.(h)(2)) by operating a vessel registered to a limited entry permit with a longline or trap(pot) endorsement and longline and/or trap gear on board in an applicable Groundfish Conservation Area.

RULING: Accepted and Incorporated.

57) The Magnuson Act is a strict liability statute. See Northern Wind, Inc. v. Daley, 200 F.3d 13, 19 (1st Cir. 1999).

RULING: Accepted and Incorporated.

Respondents' Proposed Findings of Fact and Conclusions of Law:

A. Findings of Fact.

1. Respondent Josh M. Churchman was in violation of 50 CFR 660.306(h)(2) on May 16, 2008, May 26, 2008, May 28, 2008 and July 13, 2008, for incursions within the non-trawl RCA on those dates. Joint Stipulation to Facts, Law and Admission of Evidence (hereinafter "Stipulation") (Paragraphs 5, 7, 9 and 11).

RULING: Accepted and Incorporated.

2. Respondent Edward T. Paasch was in violation of 50 CFR 660.306(h)(2) on March 7, 2008 and April 1, 2008 for incursion within the non-trawl RCA on those dates. (Stipulation, Numbers 34 and 36).

RULING: Accepted and Incorporated.

3. Respondent Churchman's incursions were inadvertent in that he was using the wrong coordinates in determining that he was not within the RCA on those dates. (Reporter's Transcript ("RT"), p. 217, 222, 247).

RULING: Rejected for the reasons given in this Initial Decision and Order.

4. Respondent Churchman's determination that he was not within the RCA was based on the following:

(a) He had been fishing in those same spots since 2003, when the boundaries of the RCA were established, and although his locations were constantly reported to NOAA through the VMS system, he had never been notified by NOAA that he was within the RCA until July 18, 2008. (Stipulation, Paragraphs 19, 24 and 29; Exhibit 6; RT 206, 210-211).

(b) On four separate occasions between July 20, 2006 and July 13, 2008, Respondent Churchman had observers on his vessel from the NOAA Groundfish Observer Program. Stipulation, Paragraphs 26 and 27. Although the observers noted each spot that he fished in, no one from that Program or from NOAA informed him that he was within the RCA, leading him reasonably to conclude that he was not in violation of the applicable regulations. (Stipulation, Paragraphs 28 and 29; RT, 201-202, 237-238).

(c) Respondent Churchman was aware that other fishermen who had been in violation of the same regulations had received verbal warnings of their violations, and he reasonably concluded that he would have received the same warning if he had been in such violation. (RT 241, lis. 15-25, 254-255).

RULING: Accepted and Incorporated in Part, Rejected in Part. The facts that Respondent had been fishing in generally the same spots since 2003; that his position was reported through the VMS system; that he was not notified by NOAA that he was within the RCA until July 18, 2008 are accepted. The fact that Respondent Churchman had NOAA contracted observers on his boat on the referenced dates is also accepted, as well as the fact that Respondent Churchman was aware other fishermen had been given verbal warnings for RCA incursions. However, to the extent this proposed finding of fact is

offered to support the inadvertence of Respondent Churchman's incursions and excuse his unlawful actions, it is rejected for the reasons given in this Initial Decision and Order.

5. Respondent Paasch's incursions were inadvertent in that he reasonably relied upon Respondent Churchman's experience in fishing in the same areas for a number of years. Specifically:

(a) Respondent Paasch had the same VMS reporting system as Respondent Churchman (Stipulation, Paragraph 43), and knew that Churchman had never been notified by NOAA that the reported area of fishing was within the RCA (RT, 184, 188-189).

(b) Respondent Paasch was aware the Churchman had NOAA observers on his vessel while he fished in those areas, and that neither the observers nor anyone from NOAA ever informed Churchman that he was within the RCA (RT, 189).

(c) Respondent Paasch knew that Churchman was actively involved in state and federal hearings regarding the preservation of marine resources and the promulgation of fishing regulations, and concluded that Churchman was correct in stating that the area was not within the RCA. (RT, 176).

RULING: Accepted and Incorporated in Part, Rejected in Part. The facts that Respondent Paasch had the same VMS system as Respondent Churchman and knew that Respondent Churchman had not been notified by NOAA that he was within the RCA are accepted. The fact that Respondent Paasch knew that Respondent Churchman had NOAA contracted observers on his boat is also accepted, as well as the fact that Respondent Churchman was involved in preservation efforts and regulatory activity. However, to the extent this proposed finding of fact is offered to support the inadvertence of Respondent Paasch's incursions and excuse his actions, it is rejected for the reasons given in this Initial Decision and Order.

6. NOAA's policies, practices and procedures for enforcement of the applicable regulation provide for a gradation of enforcement, going from a verbal warnings to a written warning to civil penalties to forfeiture to criminal proceedings. (RT, 76-77, 95 and Exhibits V, W, X, Y, Z, AA, CC, EE).

RULING: Accepted and Incorporated in Part, Rejected in Part. The fact that NOAA has various discretionary means available to it for the enforcement of the applicable laws and regulations is accepted. To the extent this proposed finding of fact states or implies that such "gradations" somehow limit the Agency's legitimate prosecutorial discretion, it is rejected.

7. NOAA policies provide that civil penalties are reserved for egregious offenders. (Exhibit C).

RULING: Rejected. This finding of fact misstates the discretionary nature of NOAA's civil enforcement proceedings.

8. Although Respondent Churchman learned in May, 2008, that NOAA representatives had contacted Respondent Paasch regarding the location of his fishing within the RCA, Churchman was reasonable in believing that the notification did not apply to where Churchman had been fishing based on the facts and circumstances set forth in Finding #4, above.

RULING: Rejected for the reasons given in this Initial Decision and Order.

9. Churchman's contacts with California Fish and Game in May, 2008, regarding the area he fished in, and seeking a change in two of the coordinates, was not an acknowledgment that he was in violation of the regulations, but was part of a continuing effort on his part to change the coordinates to reduce by-catch and make it easier to identify the RCA lines. (RT, 207-210, 235-236, Exhibit 51).

RULING: Rejected for the reasons given in this Initial Decision and Order.

10. That each Respondent, upon being informed by NOAA representatives that their fishing spots were within the RCA, immediately ceased fishing in those areas. (Stipulation Paragraph 21, Exhibits 6 and 36, RT 180, 246-247).

RULING: Accepted and Incorporated.

B. Conclusions of Law

1. Respondents were in violation of 50 CFR 660.306(h)(2) on the Stipulated dates.

RULING: Accepted and Incorporated.

2. Respondents' violations were inadvertent. Respondent Churchman was reasonable in concluding that he was not fishing within the RCA. Respondent Churchman's request to State Fish and Game for a change in certain RCA coordinates was consistent with prior such requests, and did not constitute an acknowledgment by him that his current fishing location constituted an incursion within the RCA. Respondent[] Paasch's violation was based on his reasonable reliance on Churchman's five-year experience of fishing in the same location without notice of violation.

RULING: Rejected for the reasons given in this Initial Decision and Order.

3. Respondents' violations were not egregious.

RULING: Rejected.

4. NOAA policy, procedures and practices provide for verbal or written warnings in lieu of the imposition of civil penalties. (15 CFR 904.400. 50 CFR Sec. 600.740, Exhibits AA, CC).

RULING: Accepted and Incorporated in Part, Rejected in Part. The fact that NOAA has various discretionary means available to it for the enforcement of the applicable laws and regulations is accepted. To the extent this proposed finding of fact states or implies that

such “gradations” somehow limit the Agency’s legitimate prosecutorial discretion, it is rejected.

5. The Administrative Law Judge is authorized to independently determine whether a written warning is appropriate, and the burden is on NOAA to justify the imposition of a civil penalty. (15 CFR 904.204(m), as amended June 23, 2010, and commentary thereto. Exhibit U).

RULING: Accepted and Incorporated in Part, Rejected in Part. The undersigned is empowered under 15 C.F.R. § 904.204(m) to assess a civil penalty de novo and NOAA must justify the reasonableness of its proposed civil penalty without the benefit of any presumption of the correctness of that penalty.

6. It is an established NOAA practice to issue warnings to first time offenders who inadvertently have incursions into an RCA. (Exhibits C, D, V, X and Z).

RULING: Rejected for the reasons given in this Initial Decision and Order.

7. Applying NOAA’s 14 factors in determining whether civil penalties are appropriate to the facts and circumstances of the case leads to the conclusion that civil penalties are not appropriate to these Respondents. Preface to NOAA Civil Administrative Penalty Schedule (Exhibit BB).

RULING: Rejected for the reasons given in this Initial Decision and Order.

8. NOAA’s decision to impose civil penalties rather than give verbal or written warnings to Respondents in these cases was arbitrary in that it constituted a departure from its own precedent, did not constitute the application of the same basic rules to all similarly situated supplicants, and was inconsistent with the agency’s administration of the statute. (Henry v INS (1st Cir. 1996) 74 F.3d 1, 6; Davila-Bardales v INS (1st Cir. 1994) 27 F3d 1; Chennault v Dept. of Navy (Fed.Cir 1986) 796 F. 2d 465, 467; Columbia Broadcasting System, Inc. v FCC (1971) 454 F. 2d 1018, 1026).

RULING: Rejected for the reasons given in this Initial Decision and Order.

9. Based on the mitigating and extenuating circumstances of Respondents’ cases, and in the furtherance of justice, the court concludes that the civil penalty imposed on either Respondent shall be in the amount of \$100, 16 USC Sec. 1858(a); 15 CFR 904.204(m) or in the alternative, a written warning shall be issued to each Respondent in lieu of assessing any civil penalty. 50 CFR Sec. 904.400; NOAA Manual Section 5.8.3.4 (Exhibit CC).

RULING: Rejected for the reasons given in this Initial Decision and Order.

ATTACHMENT C: CORRECTIONS TO THE HEARING TRANSCRIPT

Page No.	Line No.	Transcript	Ordered Correction
10	22	Jack Siedman	Insert "Mr. Siedman"
12	21	SIEDMAN	ORTIZ
14	7	sum	some
14	15	national fishery service	National Marine Fisheries Service
14	24	to	of
17	20	MPRM	NPRM
17	21	the inoperative	operative
22	4	Fishery	Sanctuaries
23	1	Glencove	Glynco
23	21	of	Delete "of"
23	23	act	access
23	24	that	Delete "that"
44	2	public register	public notice
45	5	and	an
67	4	TCL	GCEL
70	17	sever	severe
92	20	"fishing," and then he groundfish Rockfish?	"Fish Plan" and then Groundfish: Rockfish?"
118	5	did occur	did not occur
134	12	imputed	inputted
149	8	observes	observers
205	17	knew once	new ones
206	22	"They were in the act of changing lines impact since was required – we both have the same navigational units in there."	"The same exact spot I have fished since VMS was required. We both have the same Skymate units."
207	17	met	mean
214	25	their	there
215	18	legal	illegal
216	3	well	we'll
235	18	fishery trip service	Fishery Service
247	23	Jill	Joe
249	6	additional servers	anything adverse

ATTACHMENT D: PROCEDURES GOVERNING ADMINISTRATIVE REVIEW

49 C.F.R. § 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.

Certificate of Service

I hereby certify that I have served the preceding **Initial Decision and Order (SW0703629)** upon the following parties and limited participants (or designated representatives) in this proceeding by the methods indicated below:

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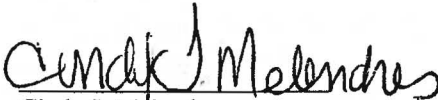
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Done and dated on this 18th day of February 2011 at
Alameda, California.


Cindy J. Melendres
Paralegal Specialist to the
Hon. Parlen L. McKenna