

**WELCOME TO THE
FISHERIES LAW ENFORCEMENT CONFERENCE**

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**NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
UNITED STATES DEPARTMENT OF COMMERCE**

**UNITED STATES ATTORNEY'S OFFICE
DISTRICT OF ALASKA**

**WILDLIFE AND MARINE RESOURCES SECTION
ENVIRONMENT AND NATURAL RESOURCES DIVISION
UNITED STATES DEPARTMENT OF JUSTICE**

UNITED STATES COAST GUARD

**ANCHORAGE, ALASKA
APRIL 30 - MAY 2, 1996**

FISHERIES LAW ENFORCEMENT CONFERENCE

Anchorage, Alaska
April 30 - May 2, 1996

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UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
OFFICE OF ADMINISTRATIVE LAW JUDGE
ALAMEDA, CALIFORNIA

In the Matter of:

KENNETH MISHLER
CLIPPER ENDEAVOR, LLC.

Docket No. AK034111A

Respondents

INITIAL DECISION AND ORDER

Issued: November 29, 2006

Issued by:

Hon. Parlen L. McKenna, Presiding

FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

APPEARANCES:

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FOR THE RESPONDENT

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PRELIMINARY STATEMENT

The National Oceanic and Atmospheric Administration (“NOAA” or “Agency”) initiated this proceeding through the issuance of a Notice of Violation and Assessment (“NOVA”) to CLIPPER ENDEAVOR, LLC and Kenneth Mishler (Respondents). The Agency charged Respondents with violating the Magnuson-Stevens Fishery Conservation and Management Act, (16 U.S.C. 1801 et seq) and its underlying regulations codified at 50 C.F.R. § 679.50 (g)(1)(vi). The NOVA charged Respondents with three (3) counts of unlawfully failing to notify a duly authorized observer at least fifteen (15) minutes before fish were brought onboard in order to allow sampling of the catch. The dates of the alleged violations were June 27, 2003, June 30, 2003, and July 3, 2003. The hearing in this case was held on May 18 and May 19, 2006.¹

After the hearing, the parties were provided an opportunity to file post-hearing briefs including proposed findings of fact and conclusions of law. The Agency submitted Proposed Findings of Fact or Conclusions of Law in its post hearing brief. While Respondents did not file Proposed Findings of Fact and Conclusions of Law, they did submit a brief with legal arguments to support their position.

After a careful review of the entire record in this matter, I find that NOAA has established by a preponderance of the reliable and credible evidence that Respondents violated the Magnuson-Stevens Fishery Conservation and Management Act at 16 U.S.C. § 1801 et seq, and its underlying regulations codified at 50 C.F.R. § 679.50(g)(1)(vi). Based on Joint Stipulation of the Parties number 1, the appropriate civil penalty in this case for the three (3) separate violations is three thousand (\$3,000.00) dollars.

¹ The July 3, 2003, violation was inadvertently omitted from the NOVA. That error was corrected at the hearing See IR-10, line 15.

JOINT STIPULATIONS OF THE PARTIES

On July 21, 2006, the parties filed the following Joint Stipulations:

1. The appropriate sanction upon a finding of three (3) separate violations of 50 C.F.R. § 679.50(g)(1)(vi) in this case is a civil penalty of \$3,000.00.
2. There were no telephones in the observer's stateroom on the CLIPPER ENDEAVOR and notice given per 50 C.F.R. § 679.50(g)(1) must therefore have been delivered either orally or physically when the observer was in that stateroom.
3. Because 50 C.F.R. 679.50(g)(1)(vi) permits an observer to waive the obligation of a vessel operator to provide notice prior to fish being brought onboard, an observer controls whether or not notice needs to be given with respect to a particular haul; if an observer notifies the vessel operator that he or she needs to be notified of a particular haul, the vessel operator then has an obligation to provide notice at least 15 minutes prior to fish being brought onboard from that haul.
4. A common side-effect of muscle relaxants is drowsiness and sedation; taking muscle relaxants will normally put a person to sleep.
5. The failure of an observer to fully sample a haul may have a significant and detrimental impact on the integrity of fisheries data that will be extrapolated from the observer's sample.
6. Except for the recitations of 50 C.F.R. § 679.50(g)(1)(vi) contained in the North Pacific Groundfish Program Observer Sampling Manual, the North Pacific Groundfish Observer Program has not provided further definition or interpretation of what constitutes notice under 50 C.F.R. § 679.50(g)(1)(vi), or how observers are to be notified in accordance with that provision.

7. Pursuant to 50 C.F.R. 679.50(g)(1)(vi), an observer may waive the obligation of a vessel operator to provide notice prior to fish being brought onboard if he or she specifically requests not to be notified.

8. Constructive notice prior to fish being brought on board the vessel does not satisfy the requirements of 50 C.F.R. § 679(g)(1)(vi).

9. Notice must be given in a way that it is actually heard or reasonable should have been heard by the observer in order to meet the criteria of 50 C.F.R. § 679.50(g)(1)(vi).

10. David Little was not onboard the CLIPPER ENDEAVOR at any time during the alleged incidents in this matter and has no first-hand knowledge of the actions or conversations of the vessel's crew or the observer during that time period.

11. Under Section 307 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1857), a violation of any regulation implemented under the Act constitutes a violation of the Act itself.

12. In all three instances in question in this matter, Sara Stetler was in her bunk when notice of an impending haulback was or should have been delivered pursuant to 50 C.F.R. 679.50(g)(1)(vi).

CONTROVERTED ISSUES TO BE DECIDED HEREIN

Pursuant to the agreement of both parties, the following controverted issues remain to be decided herein:

1. What constitutes adequate prior notification under 50 C.F.R. § 679.50 (g)(1)(vi); and
2. Was adequate prior notification given on the three occasions at issue in this case?

Legal and factual arguments raised in the Agency's and Respondent's post hearing briefs are addressed herein.

FINDINGS OF FACT

The following Findings of Fact and Conclusions of Law are based on a thorough and careful analysis of the documentary evidence, the testimonies of witnesses, and the entire record as a whole. Each exhibit entered, although perhaps not specifically mentioned in this decision, have been carefully reviewed and given thoughtful consideration.

1. The Joint Stipulations of the parties are hereby incorporated and made a part hereof.
2. On June 27, June 30 and July 3, 2003, CLIPPER ENDEAVOR, LLC was the owner of the F/V CLIPPER ENDEAVOR (USCG documentation number 633593) and held a federal fisheries permit for the vessel. Agency's Exhibit 4, pages 15-33 (hereinafter Ax. 4, pages 15-33).²
3. On June 27, 2003, June 30, 2003 and July 3, 2003, Kenneth Mishler was the operator of the F/V CLIPPER ENDEAVOR. Ax 4, pages 13-14; T-316;10-17.²
4. The Respondents are "persons" subject to the jurisdiction of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1801 *et seq*). Ax. 4.²
5. Federal regulations promulgated by the Agency require catcher and catcher/processor vessels fishing in the Alaska groundfish fishery to carry an observer 30% of the time if the vessel's overall length is between 60 and 125 feet. 50 C.F.R. § 679.50 (c)(1)(v).²
6. The F/V CLIPPER ENDEAVOR is a 124-foot longline catcher/processor that was permitted to, and in fact was, fishing in the Alaska Groundfish Fishery during 2003. Therefore the Respondents were required to carry an observer 30% of the time. Ax.4.²

² This Agency proposed Findings of Fact is hereby accepted and incorporated herein unless specifically rejected or modified.

7. Federal regulations require the operator of a vessel required to carry an observer to notify the observer at least 15 minutes before fish are brought on board to allow sampling of the catch unless the observer specifically requests not to be notified. 50 C.F.R. § 679.50(g)(1)(vi).²

8. 50 C.F.R. § 679.50(g)(1)(vi) is unambiguous and clear on its face. The vessel operator's argument that this regulation is vague and ambiguous is specifically rejected.³

9. On June 27, 2003, the Respondents unlawfully failed to notify the observer at least 15 minutes prior to fish being brought onboard in order to allow sampling of the catch, specifically by failing to give the observer a requested "wake-up call" or other notification prior to a haul the observer was scheduled to sample. Ax 2, page 177; Ax. 4.²

10. On June 30, 2003, the Respondents unlawfully failed to notify the observer at least 15 minutes prior to fish being brought onboard in order to allow sampling of the catch, specifically by notifying the observer of a haul she was scheduled to sample after haulback had already begun. Ax. 2, pages 178; Ax. 4.²

11. On July 3, 2003, the Respondents unlawfully failed to notify the observer at least 15 minutes prior to fish being brought onboard in order to allow sampling of the catch, specifically by failing to give the observer a requested "wake-up call" or other notification prior to a haul the observer was scheduled to sample. Ax. 2, pages 178-179, Ax. 4.²

12. Adequate notification for the purposes of 50 C.F.R. § 679.50(g)(1)(vi) is some form of actual verbal notification, given either in person or by electronic means (e.g., telephone, intercom or walkie-talkie) directly to the observer regardless of where on the vessel the observer is located and whether or not the observer is awake. To meet the requirements of the regulation, notice

³ As is set forth below, in the absence of a regulatory definition, the court can look to the plain meaning of the words. *U.S. v. Willifong*, 274 F.3d 1297, 1301 (2001). Webster's Third New International Unabridged Dictionary (Philip Babcock Gove, Ph.D., ed., Merriam-Webster Inc. 1993), defines "notify" as "to make known" and "at least" as "as a minimum".

must be given no less than fifteen minutes prior to fish being brought on board, so there is time for the observer to prepare to sample the catch, but not so far in advance as to render the notification meaningless and potentially interfere with the observer's performance of other duties.²

13. Since the observer has the regulatory authority to (1) establish the inside time parameter (15 minutes notification) and (2) relieve the operator of his duty to notify, as a matter of law the observer also has the lesser authority to designate the outside notification time parameter.

14. Since each observer has the authority to set the time and method of notification for both the outside and inside parameter, the fact that Agency counsel or multiple observers would consider different notification parameters appropriate is of no consequence. This conclusion is predicated on the fact that the authority to set time parameters rests with each individual observer.

15. Because the operator has the duty of notification, that responsibility cannot be discharged by delegation. While delegation is permissible, the operator is strictly liable in the event of non-notification.

16. Respondents argue that the Agency should adopt the following interpretation of 50 C.F.R. § 679.50(g)(1)(vi):

Any form of communication by the vessel operator or his or her designee that would cause a reasonable person in the place of the observer to understand that fish will be brought on board the vessel within a reasonable time period following delivery of such notice (but in no event less than fifteen minutes after such delivery) or within a reasonable time period following such time as may be designated in the notice.

Respondent's proffer is hereby rejected.

17. A general wake-up call to all members of the crew does not constitute notification to the observer under 50 C.F.R. § 679.50(g)(1)(vi). Notification shall be specific to the observer. Acknowledgement of the notification must be given by the observer to the person notifying the observer.

18. The observer has the authority under 50 C.F.R. § 679.50(g)(1)(vi) to establish the notice requirements on the operator subject to ex post facto complaints to the observers supervisor.

19. The observer asked to be notified of a particular haul, not the first haul of the day. (See Tr-54:11-20).

20. Hauls are numbered as the gear is set. Hauls may not be hauled back in the order of there numbers. (See Tr-227: 23 to 228: 1; and Agency's Ex. 8).

21. On June 21, 2003, the first haulback of the day is noted at 12:40 a.m. (See Agency's Ex. 8, page 11). On June 24, 2003, the first haulback of the day was at 11:23 a.m. (See Agency's Ex. 8).

22. David Little's testimony that the Captain "shut the boat down every night during the darkness" and "began hauling gear immediately at sunrise" is rejected as not credible. (See Tr-226: 6-15 and Agency's Ex. 8).

23. Respondent's assertion that the vessel operator satisfies 50 C.F.R. § 679.50(g)(1)(vi) when he provides any form of notice that fish are going to be brought onboard at least fifteen minutes before doing so is specifically rejected. (See discussion section)

24. The Agency witness testimony as to the interpretation of 50 C.F.R. § 679.50(g)(1)(vi) do not demonstrate that it is vague nor that it has been inconsistently applied by the Agency.

25. Adequate prior notification, for the purposes of 50 C.F.R. § 679.50(g)(1)(vi), was not given in the three instances at issue in this case.²

26. Respondents are liable for three counts of violating 50 C.F.R. § 679.50(g)(1)(vi).²
26. Respondents are liable for three counts of violating 16 U.S.C. § 1857(1)(A).²

DISCUSSION

In order to prevail on the NOVA instituted against Respondents, NOAA must prove by the preponderance of the evidence that Respondent's violated the Magnuson-Stevens Act and the underlying regulation at 50 C.F.R. § 679.50(g)(1)(vi). (See 5 U.S.C. § 556(d); In the Matter of: Cuong Vo, 2001 WL 1085351 (NOAA); Dept of Labor vs. Greenwich Collieries, 512 U.S. 267 (1994); Steadman vs. SEC, 450 U.S. 91, 100-103 (1981). Preponderance of the evidence means that the Agency must show it is more likely than not that Respondent's committed the violation with which they are charged. In the Matter of: John Fernandez, III, 1999 WL 1417462 (NOAA 1999). NOAA may rely on either direct or circumstantial evidence to establish the violations and satisfy the burden of proof. In the Matter of Cuong Vo, Id. The burden of producing evidence to rebut or discredit the Agency's evidence will only shift to the Respondent after NOAA proves the allegations contained in the NOVA by a preponderance of reliable, probative, substantial and credible evidence. Id.

Respondents are charged with three (3) offenses under the Magnuson-Stevens Act which prohibits a person from violating any of its underlying regulations. 16 U.S.C. § 1857 (1)(A). The governing regulations were promulgated at 50 C.F.R. Subpart E.

A. **What Constitutes Adequate Prior Notification under 50 C.F.R. § 679.50(g)(1)(vi)?**

The Alaska groundfish fishery regulations require that the operator of a fishing vessel "notify observers at least 15 minutes before fish are brought on board, . . . to allow sampling the catch, . . . unless the observers specifically request not to be notified." See 50 C.F.R. § 679.50(g)(1)(vi). The parties have stipulated that notification must be given; that such

notification must be at least 15 minutes before fish are brought onboard; that the notification must be delivered either orally or physically when the observer is in his/her stateroom; and that the observer has the sole authority to waive such notification. Thus, the dispute centers on whether the observer has the authority to establish the method of notification and whether it is permissible under the regulations for the operator to give the notification (1) the night before or (2) at a time greatly in excess to the commencement of the haulback (e. g., 4 hours, 2 hours, or 1 hour).

1. The Observer Has the Ultimate Authority to Establish the Method of Notification.

Respondents argue strongly that the operator of a vessel is extremely busy prior to the commencement of haulback; that operators need latitude in the timing of the notification process so that it does not slip through the cracks; and that the operator is the master of the overall vessel operations and therefore should be able to determine the method of notification. Importantly, there can be no dispute that the master of a fishing vessel controls (1) the overall operation of said ship and (2) every individual crew member/passenger/observer to insure the safety of life and property at sea. If an observer attempted to give the master instructions for notification that threatened the safety of the vessel or its crew, said master would be duty-bound to reject such instructions.

However, that is not the situation at bar. The notification request of an observer must be reasonable. If it is not, the master must comply (absent a safety issue) and issue a written complaint with the observer's supervisor. Based upon the record evidence herein, none of the observers instructions came anywhere close to falling into the safety category. Therefore, at the earliest reasonable opportunity, the operator and observer must meet to establish how notification is to be accomplished. If the parties cannot agree, the operator must abide by the observers

instructions absent a clear safety issue(s). The operators recourse is to complain to the observers supervisor.

As the Agency notes in its initial brief:

The meaning of this requirement [15 minute notification] is clear from the plain meaning of the language used. It means that operators must make the observer aware that fish will be brought onboard a minimum of fifteen minutes in advance. The regulation becomes even clearer when read in concert with the requirement that the operator provide the observer with reasonable assistance in carrying out their duties under 50 C.F.R. § 679.50(g)(1)(viii).⁴

In order to allow the observer time to prepare for sampling any fish that are brought onboard, the observer needs notification not less than fifteen minutes prior to any fish being brought onboard.⁵

In sum, notification fails to meet the requirements of 50 C.F.R. § 670.50(g)(1)(vi) and (viii) if it is not actual notice directed to the observer. The operator with or without the use of a designee, bears the burden to ensure that such notification was in fact received and acknowledged.

2. The Observer Has the Ultimate Authority to Establish the Outside Notification Parameter.

Since 50 C.F.R. § 679.50 (g)(1)(vi) does not establish an outside notification parameter, Respondents argue that the Agency should interpret it based on standards of reasonableness. I agree. I also find that such a standard should be easily ascertainable by employing common sense. Indeed, a reasonable person would conclude that the observer has the regulatory authority

⁴ The ninth circuit has held that, in the absence of a regulatory definition, the court can look to the plain meaning of the words. U.S. v. Willfong, 274 F.3d 1297, 1301 (2001). Webster's Third New International Unabridged Dictionary (Philip Babcock Gove, Ph.D., ed., Merriam-Webster Inc. 1993), defines "notify" as "to make known" and "at least" as "as a minimum".

⁵ The Supreme Court has also held that, in the absence of a definition included in regulation or statute, the purpose of the regulation may be considered in determining the true meaning of the rule. Hines v. Stein, 298 U.S. 94, 97 (1936). Here the purpose of the rule is included in the provision itself, prior notification is required so as "to allow sampling the catch." So, notification must be actual (because otherwise it's not enabling the observer to sample the catch) and must not occur less than fifteen minutes prior to fish being brought on board because that would hamper the observer's ability to be ready to sample the catch.

to relieve the operator of his duty to notify, that observer also has the lesser authority to designate the outside notification time parameter. To argue otherwise is illogical.

In this regard, if the notification is so far in advance that it has the potential to interfere with the observer actually observing the haulback, it violates 50 C.F.R. § 679.50 (g)(1)(vi) and (viii). This type of notice can potentially interfere with the observer being able to perform his/her regulatory duties. Under ordinary circumstances, one would think that the observer comes onboard the vessel and meets with the operator. Common sense would dictate that two reasonable people would instantly agree on the outside time notification parameter and the method of the notification. However, in this case that agreement did not occur. While different reasons were given for each of the three (3) failures to comply with the regulations, it is clear that there is a deeper issue involved. The record is unclear why Respondents could not easily rectify these problems. Maybe Respondents (1) resents the presence of an observer on his vessel; (2) did not personally like this observer; and/or (3) thinks that the regulation is ridiculous and that he does not have the time to comply. In any event, since Respondents seek "clarity" for issues that are (or should be) crystal clear, the rule will be as follows:

The observer has the sole discretion to establish the outside notification parameter. Any disputes (other than issues relating to the safety of life and property at sea for which the operator has sole control) shall be resolved after the trip between the operator and the observers' supervisor.

ORDER

WHEREFORE.

IT IS HEREBY ORDERED that Respondents violated 50 C.F.R. § 679.50(g)(1)(vi) and the Magunson – Stevens Fishery Conservation and Management Act (16 U.S.C. § 1857(1)(A) on June 27, 2003, June 30, 2003 and July 3, 2003; and

IT IS HEREBY FURTHER ORDERED that a civil penalty in the amount of THREE THOUSAND DOLLARS (\$3000) is assessed against Respondents Kenneth Mishler, Clipper Endeavor, LLC.

FURTHER, any party may decide to petition for administrative review of this decision. The petition for review must be filed with the Administrator of the National Oceanic and Atmospheric Administration (NOAA) within thirty (30) days from the date of this Initial Decision, as provided in 15 C.F.R. § 904.273. Copies of the petition shall be sent to the presiding undersigned judge, the ALJ Docketing Center, and NOAA counsel in Silver Springs, Md. A copy of 15 C.F.R. § 904.273 is attached herein.

If neither party seeks administrative review within thirty (30) days after issuance of this Order, the Initial Decision will become the final decision of the Agency.

PLEASE BE FURTHER 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.



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

Done and Dated on this 29th day of November, 2006
Alameda, California.

ATTACHMENT A
LIST OF WITNESSES AND EXHIBITS

Agency's Witnesses:

Sarah Stetler
Jennifer Ferdinand
Andy Mathews

Agency List of Exhibits:

<u>Exhibits</u>	<u>Description</u>
Agency No. 1	50 CFR § 679.50 et seq.
No. 2	Ms. Stetler's daily notes
No. 3	Selected sections of Magnuson Act
No. 4	Agency offense Investigation Report
No. 5	NOAA Penalty Schedule
No. 6	CV for Sarah Stetler
No. 7	CV for Jennifer A. Ferdinand
No. 8	Vessel Log Book – Fishing

Respondent's Witnesses:

David Little
Captain Jim Peterson
Captain Ken Mishler
Jose Vargus

Respondent's list of Exhibits:

- A. Copy of Groundfish Observer Program Regulations
- B. Copy of Letter from James Peterson to Bob Maier dated September 3, 2003
- C. Copy of NOAA Offense Investigation Report dated October 14, 2003
- D. Copy of Letter from Kenneth Mishler to D rue [sic] Mathews dated October 16, 2003
- E. Copy of Affidavit of Sarah Stetler dated July 16, 2003
- F. Copy of NOAA Observer Logbook (May 6, 2003 – July 7, 2003)
- G. Copy of 2003 Observer Manuel dated December 10, 2002
- H. Photograph of Interior of Clipper Endeavor
- I. Photograph of Interior of Clipper Endeavor
- J. Photograph of Interior of Clipper Endeavor
- K. Photograph of Interior of Clipper Endeavor
- L. Photograph of Interior of Clipper Endeavor
- M. Photograph of Interior of Clipper Endeavor
- N. Photograph of Interior of Clipper Endeavor
- O. Not offered into the record

Certificate of Service

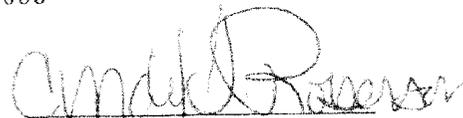
I hereby certify that I have served the attached Initial Decision and Order (AK034111A) upon the following parties and limited participants (or designated representatives) in this proceeding at their listed facsimile and by FEDEX (overnight delivery service):

ALJ Docketing Center
United States Coast Guard
40 South Gay Street
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Done and dated on this 29th day of November, 2006
Alameda, California



Cindy J. Roberson
Paralegal Specialist to the
Hon. Paul L. McKenna

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
WASHINGTON, D.C. 20230

In the Matter of:)
)

Lilo Maria Creighton,)
)

Respondent)
)
_____)

Docket No.
SW030133

ORDER GRANTING DISCRETIONARY REVIEW, IN PART, AND DENYING
DISCRETIONARY REVIEW, IN PART

FACTS:

On July 2, 2003, the National Oceanic and Atmospheric Administration (NOAA or the Agency) issued a Notice of Violation and Assessment (NOVA) to Respondent Lilo Creighton, who was charged with violating the Marine Mammal Protection Act (MMPA, 16 U.S.C. 1361 *et seq.*) and Agency regulations concerning the taking of marine mammals by harassment (50 C.F.R. 216.3, 216.11(b)). Specifically, the Agency charged Respondent with unlawfully taking harbor seals by harassment by swimming into Children's Pool Beach in La Jolla, California, and by walking up the beach causing a number of harbor seals to flee into the water from their hauled out positions on the beach, and assessed a civil penalty of \$1000.

A hearing was held before an Administrative Law Judge (ALJ) on January 22-23, 2004, and February 24-25, 2004. On April 20, 2005, the ALJ issued his Initial Decision, in which the Respondent was found liable for violating the MMPA and Agency regulations at 50 C.F.R. 216.11(b).

Pursuant to 15 C.F.R. Sec. 904.273, the Respondent filed a Petition for Administrative Review on May 10, 2005, requesting discretionary review by the Administrator of the Initial Decision. On June 10, 2005, the Agency filed a Partial Answer in Support of, and Partial Answer in Opposition to, Respondent's Petition for Administrative Review of Decision.

ORDERED:

Based on the Administrative Record in this matter, I hereby grant review on one of the grounds Respondent raised in her Petition, as re-phrased below. In addition, I hereby direct the parties to address a second issue I wish to review on my own initiative. Accordingly, I hereby direct the parties to submit briefs addressing the following two issues:

1. Whether the NOAA Administrator has the authority to interpret the law or adopt a policy to exclude from Level B Harassment (as defined in the Marine Mammal Protection Act) acts having the potential to disturb marine mammals that are part of a population that is in excess of Optimum Sustainable Population and growing. If so, how should such an interpretation or policy affect the decision in this case?
2. Whether the California Land Grant of Children's Pool Beach to the County and City of San Diego to maintain forever as a place for public swimming and recreation, and the City, County and State actions regarding Children's Pool Beach subsequent to that land grant, preclude the enforcement of the MMPA in this case.

The Parties' briefs shall be submitted on the following schedule and with the following word limits:

Respondent's opening brief shall be no longer than 4,000 words and shall be served within 40 days after the date of this order.

The Agency's brief shall be no longer than 4,000 words and shall be served within 30 days after the date on which Respondent's opening brief is due.

Respondent's reply brief, if the Respondent chooses to file one, shall be no longer than 2,000 words and served within 20 days after the date on which the Agency's brief is due.

Each brief shall include a certificate of word limit compliance signed by the party or counsel and stating the number of words in the brief has been counted by the word-processing system on which the brief was prepared and that the brief complies with the word limit set by this order.

All briefs shall cite and rely on documents from the record only and shall include an appendix containing copies of any documents cited or relied upon in the brief. These documents do not count against the word limit for the brief. Copies of portions of the United States Code, the federal regulations, case law or the Initial Decision do not need to be included in the appendix.

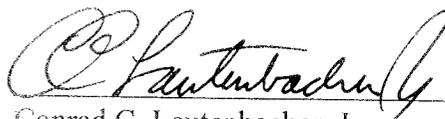
All briefs and supporting papers must be served on the Administrator at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue NW, Washington, D.C. 20230.

Copies of all briefs and supporting papers must be served upon (1) the other party's counsel (or the party, if that party is proceeding pro se), and (2) the NOAA Assistant General Counsel - Headquarters at the following address:

Assistant General Counsel-Headquarters, National Oceanic and Atmospheric Administration, Herbert Clark Hoover Building, 1401 Constitution Avenue, N.W., Room 5814-A, Washington, D.C. 20230.

Each party shall serve its briefs so they are received by the Administrator and the other parties on or before the date on which they are due.

Following the submission of the briefs, I will issue a written decision on this matter which will be transmitted to the parties in accordance with the requirements of 15 C.F.R. 904.273(i).

A handwritten signature in cursive script, appearing to read "C. Lautenbacher, Jr.", written in black ink.

Conrad C. Lautenbacher, Jr.
Vice Admiral, U.S. Navy (Ret.)
Under Secretary of Commerce for
Oceans and Atmosphere

CERTIFICATE OF SERVICE

I hereby certify that on this day, **March 7, 2006**, I have sent the attached "ORDER GRANTING DISCRETIONARY REVIEW, IN PART, AND DENYING DISCRETIONARY REVIEW, IN PART" by first class mail, to the following persons:

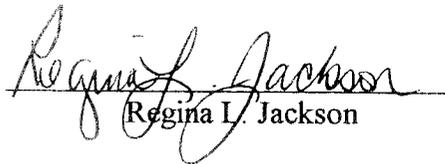
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Done and Dated: March 7, 2006


Regina L. Jackson



Federal Register

Friday,
March 10, 2006

Part II

Department of Commerce

National Oceanic and Atmospheric
Administration

15 CFR Parts 904
Civil Procedures; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 904

[Docket No. 040902252-6040-02; I.D. 092804C]

RIN 0648-AS54

Civil Procedures

AGENCY: Office of General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final rule.

SUMMARY: NOAA is amending its Civil Procedures governing NOAA's administrative proceedings for assessment of civil penalties; suspension, revocation, modification, or denial of permits; issuance and use of written warnings; and release or forfeiture of seized property. The intended impact of this action is to conform the civil procedure rules to changes in applicable Federal laws and regulations, improve the efficiency and fairness of administrative proceedings, clarify any ambiguities or inconsistencies in the existing civil procedure rules, eliminate redundant language and correct language errors and conform the civil procedure rules to current agency practice.

DATES: This rule becomes effective April 10, 2006.

SUPPLEMENTARY INFORMATION:**I. Background**

As announced in the **Federal Register** on October 12, 2004 (69 FR 60569), NOAA is amending its Civil Procedures governing the Agency's administrative proceedings for assessment of civil penalties; suspension, revocation, modification, or denial of permits; issuance and use of written warnings; and release or forfeiture of seized property. The initial comment period for the proposed rule closed on December 13, 2004. In response to requests from interested parties, the comment period was reopened on January 5, 2005 (70 FR 740), and the second comment period closed on January 31, 2005.

II. Revisions to Final Rule*General Revisions*

In addition to some grammatical and other non-substantive errors that were found in the language of the proposed rule, the Agency identified several inconsistencies in the use of terminology. Where these were found, a

single word or phrase has been selected to express each concept. These changes are enumerated below, in the order in which they first appear.

1. The phrase "civil penalty" is used in place of the words "penalty" and "assessment" and in place of the phrase "civil monetary penalty" for consistency and to clarify that the term is defined in § 904.2 to mean civil administrative monetary penalty.

2. The phrase "administrative proceedings" is used in place of the word "proceedings" and the word "adjudication" for consistency and to clarify that the phrase refers to the entire administrative process, from issuance of a NOVA through final disposition.

3. The phrase "permit sanctions" is used in place of the word "sanctions" to clarify that the phrase refers to sanctions on individual or vessel permits and to differentiate them from the sanctions discussed in § 904.204 (q).

4. The phrase "U.S. Government" is used in place of the word "government" to clarify that the phrase refers to the government of the United States of America.

5. When used in reference to the U.S. Government or an agency of the U.S. Government, the term "U.S." is used in place of "United States". Note, however, that "United States" continues to be used to refer to the Nation.

6. When used in reference to a time period that constitutes a deadline for the purposes of this Part, the number of days is written numerically (e.g., "30"). Where such reference included numbers that were written out in words (e.g., "thirty") or written both in words and numerically (e.g., thirty (30)), these references have been replaced with a numerical reference alone.

7. The phrase "Notice of Violation and Assessment" has been replaced with "NOVA" to reflect the fact that "NOVA" is defined in § 904.2 as meaning a Notice of Violation and Assessment of civil penalty.

8. The phrase "Notice of Permit Sanction" has been replaced with "NOPS" to reflect the fact that "NOPS" is defined in § 904.2 as meaning Notice of Permit Sanction.

9. The word "hearing" is used in place of the phrase "civil administrative hearing" to reflect that a definition of "hearing" has been added to § 904.2.

10. All reference to Notices that are not defined in § 904.2 have been capitalized (e.g., Notice of Appearance) to clarify that Notices constitute a particular type of document for the purposes of this Part.

11. "U.S. Department of Justice" is used in place of "Justice Department" for consistency and clarity.

12. "ALJ Docketing Center" is used in place of "Office of Administrative Law Judges" for consistency and accuracy.

13. "Judge" is used in place of "Administrative Law Judge" for consistency and to reflect that "Judge" is defined in § 904.2.

14. "Respondent" is used in place of "violation" in subpart E both for consistency and to reflect the fact that the term "respondent" is defined in § 904.2 to mean a person issued a written warning or a NOVA, NOPS, NIDP or other Notice.

15. "Violation" is used in place of "offense" except in reference to criminal offenses.

16. The names of the various Notices, such as Notice of Proposed Forfeiture, are capitalized for clarity.

Subpart A—General*1. Purpose and Scope*

Section 904.1: Paragraph (d) is intended to make clear that the procedures set forth in this Part apply not only to the enumerated statutes in paragraph (c), but also to all: later enacted statutes; amendments, modifications or recodifications of existing statutes; authorities granted to NOAA not within statutes otherwise administered by NOAA; and NOAA's enforcement of statutes or authorities not solely administered by NOAA.

2. Definitions

Section 904.2: The definition of "applicant" has been removed because the term is only used only once in this part.

A new definition of "civil penalty" was added to explain that the phrase refers to civil administrative monetary penalties.

A new definition of "hearing" was added to distinguish the term from the phrase "administrative proceeding" and explain that it refers to a civil administrative hearing on a NOVA, NOPS and/or NIDP.

The definition of "initial decision" was revised to clarify the distinction between an initial decision and a final administrative decision.

The definition of "party" was revised slightly to correct grammatical errors. No substantive changes were intended by these amendments.

A new definition of "respondent" was added to clarify that the term refers to a person issued a written warning, NOVA, NOPS, NIDP or other Notice.

The definition of the term "sanction" was replaced with a definition of

“permit sanction” to reflect the change in terminology described above.

The definition of “written warning” was revised to reflect the fact that no permit sanction or civil penalty is imposed or assessed in cases where a written warning is issued.

3. Filing and Service of Notices, Documents, and Other Papers

Section of 904.3: Paragraph (a) was revised to reflect that a Notice of Proposed Forfeiture, Notice of Seizure, Notice of Summary Sale or Written Warning may be served in the same manner as a NOVA, NOPS or NIDP.

Paragraph (b) was revised to clarify that service of documents and papers other than Notices is effective upon the date of postmark (or as otherwise shown for government franked mail).

4. Computation of Time Periods

Section 904.4: In paragraph (a), the title and paragraph designation of the paragraph were removed to reflect that paragraph (b) has been removed.

Paragraph (b) was removed to eliminate any confusion created by adding 3 days to the prescribed period when a document or paper other than a Notice is served by mail.

5. Appearance

Section 904.5: In paragraph (b), NIDP was added to the list of documents that may be issued in a matter regarding which an attorney or other representative might contact the Agency on behalf of a respondent.

Subpart B—Civil Penalties

1. Notice of Violation and Assessment (NOVA)

Section 904.101: In paragraph (a), the words “the person alleged to be subject to a civil penalty” were removed to reflect the fact that “respondents” is defined in § 904.2.

2. Final Administrative Decision

Section 904.104: In paragraph (a), the phrase “on the 30th day after” was replaced with the phrase “30 days after” for clarity.

3. Payment of Final Civil Penalty

Section 904.105: In paragraph (a), the word “NOVA” is used in place of “assessment” for clarity because the entire NOVA becomes a final administrative decision and order of NOAA under § 904.104 or under subpart C of this part. The words “by credit card” are added to reflect that payment of civil penalties may also be made by credit card.

4. Compromise of Civil Penalty

Section 904.106: In paragraphs (a) and (d), the words “imposed” and “imposition” were replaced with “assessed” and “assessment” for clarity, consistency and accuracy.

In paragraph (b), the words “other interested person” were replaced with “a representative subject to the requirements of § 904.5” to reflect the fact that only a representative who has entered an appearance pursuant to § 904.5 may negotiate a compromise civil penalty on behalf of a respondent.

In paragraph (c), the words “an assessment” were replaced with “a NOVA” and the words “is final” were replaced with “becomes final” to improve clarity and the words “or payable” were removed as redundant.

5. Joint and Several Respondents

Section 904.107: In response to a comment, the Agency has reconsidered its proposal, as presented in the proposed rule, to change the current language regarding hearing requests by joint and several respondents so that a hearing request by one joint and several respondent would no longer be considered a hearing request by all. This proposed change was intended to streamline administrative proceedings but, after reconsideration, the Agency has determined that it will further complicate rather than streamline proceedings. The Agency has changed the language in paragraphs (b) and (c) to further clarify how the hearing request process will work. While Paragraph (b) retains the language currently in the regulations, a new sentence was added to clarify the impact of settlement with one joint and several respondent on the others. Paragraph (c) was also amended to clarify that a decision by the Judge or the Administrator after a hearing requested by one joint and several respondent is not binding on other joint and several respondent(s) who have resolved the matter through settlement with the Agency.

In paragraph (a), the words “in total” were added to clarify that the total amount collected from all joint and several respondents may not exceed the total amount assessed.

In paragraph (b), some additional language was added to clarify that if the joint and several respondent who requests a hearing settles with the Agency prior to that hearing, upon notification by the Agency the remaining joint and several respondent(s) must affirmatively request a hearing or the case will be removed from the court’s docket as provided in § 904.213.

6. Factors Considered in Assessing Civil Penalties

Section 904.103: Paragraph (d) was revised to clarify that information relevant to a respondent’s ability to pay includes income tax returns and past, present and future income.

Paragraph (e) was modified to clarify the time period during which a respondent may submit information regarding their ability to pay an assessed civil penalty.

Paragraph (f) was revised to clarify that information regarding ability to pay submitted to the Judge prior to the hearing may also be considered in an administrative review.

Subpart C—Hearing and Appeal Procedures

1. Scope and Applicability

Section 904.200: In paragraph (a) the words “in administrative proceedings” were removed as redundant.

Paragraph (b) was revised to clarify the scope of the ALJ’s authority.

2. Hearing Requests and Case Docketing

Section 904.201: In paragraph (a) the words “requester” and “Notice” were replaced with “respondent” and “NOVA, NOPS or NIDP”, respectively, for clarity.

Paragraph (b) was revised, and paragraph (c) was removed to reflect the fact that decisions on the timeliness of hearing requests will be made by the Judge.

Paragraph (d) was redesignated as paragraph (c).

3. Duties and Powers of Judge

Section 904.204: A new paragraph (a) was added to make explicit that the Judge has the authority to rule on the timeliness of hearing requests.

The word “proceeding” was replaced with “hearing” for clarity and accuracy at the beginning of this section and in paragraph (b).

Paragraph (d) was amended for clarity.

In paragraph (f), the word “contested” was added before “discovery requests” to clarify the discovery requests on which the Judge will rule.

In paragraph (m), the word “civil” is added before “penalty” and the word “amount” is replaced with “civil penalty” for clarity and consistency.

In paragraph (l), the phrase “or of technical or scientific facts within the generalized or specialized knowledge of the Department of Commerce as an expert body;” was removed as overbroad.

In paragraph (q)(1), the word "adjudicatory" is replaced with "administrative" for consistency.

4. Disqualification of Judge

Section 904.205: In paragraph (a), the words "a particular case" are replaced with "an administrative proceeding" for clarity and consistency.

5. Pleadings, Motions, and Service

Section 904.206: In paragraph (d), the phrase "date of service thereof" is replaced with "service of the motion" for clarity.

In paragraph (e), the word "of" is replaced with "after" and the phrase "raised in the answer" is added to the second sentence for clarity.

6. Extensions of Time

Section 904.208: The words "and as provided in § 904.201(b)" are removed to reflect the fact that the language to which they were referring has also been removed.

7. Expedited Administrative Proceedings

Section 904.209: This section has been revised to better explain the process by which administrative proceedings may be expedited.

8. Failure To Appear

Section 904.211: This section has been revised to clarify that failure of any party (a respondent or the Agency) to appear at a scheduled hearing may result in an adverse ruling by the Judge.

9. Failure To Prosecute or Defend

Section 904.212: Throughout this section, "either" has been replaced with "any" to reflect the fact that there may be more than one respondent in any given administrative proceeding.

10. Consolidation

Section 904.215: The words "Chief Administrative Law" were added before "Judge" in response to a comment received on the proposed rule to reflect a decision made by the Agency that, as it is the Chief Administrative Law Judge who assigns Judges to hear the Agency's cases, it is appropriate that the Chief Administrative Law Judge make any decisions regarding consolidation. The phrase "either upon request of a party or *sua sponte*" was added for clarity.

11. Prehearing Conference

Section 904.216: In paragraph (a), the word "any" was added before "other time" to correct a grammatical error. The words "court reporter" have been used in place of "stenographer" for accuracy.

In paragraph (a)(5), "hearing" is replaced with "administrative proceeding" for accuracy.

Discovery

1. Discovery Generally

Section 904.240: In paragraph (a), the words "Preliminary Position on Issues and Procedures" have been removed to reflect that "PPP" is defined in § 904.2.

In paragraph (c), the word "the" is added before "hearing" to correct a grammatical error.

2. Subpoenas

Section 904.245: In paragraph (b), the timeframe for submitting applications for subpoenas was changed from 10 days to 15 days to avoid conflicts with paragraph (c).

In paragraph (d), "NOAA" was replaced by "the requesting party" for accuracy.

Hearings

1. Notice of Time and Place of Hearing

Section 904.250: In paragraph (c), the following changes were made for consistency and clarity: the words "all or part of a proceeding" are replaced with "one or more issues"; the words "substantially all important" are replaced with "such"; and the words "the proceeding" are replaced with "those issues".

In paragraph (d), the words "as provided in § 904.209" were added and subparagraphs (1) and (2) were deleted to reflect that the process for expediting administrative proceedings under this Part is described in § 904.209.

2. Evidence

Section 904.251: In paragraph (a)(3), the words "party charged" were replaced with "respondent" for clarity.

Paragraph (f) was revised to improve clarity: the phrase "stipulation in writing" was replaced with "written stipulation" and the words "involved in the proceeding" were removed.

3. Ex Parte Communications

Section 904.255: In paragraph (f), the words "or any other Notice" were added after "NIDP" to reflect the fact that the issuance of other Notices will trigger the rule regarding *ex parte* communications as well.

Post-Hearing

1. Recordation of Hearing

Section 904.260: In paragraph (b), the phrase "administrative proceeding" was replaced with "hearing" for accuracy.

2. Post Hearing Briefs

Section 904.261: In paragraph (a), the word "calendar" is removed as unnecessary.

Decision

1. Initial Decision

Section 904.271: Paragraph (c) is revised to reflect how and to whom the ALJ Docketing Center should serve initial decisions. It was also revised to reflect that the Judge will only certify the record to the Administrator upon request.

Paragraph (d) is revised to be consistent with § 904.273 and "30 days" is changed to "60 days".

In paragraph (d)(2), the words "rehearing or" are deleted to reflect that § 904.272 provides for petitions for reconsideration, not rehearing.

2. Administrative Review of Decision

Section 904.273: The first sentence of paragraph (a) is revised to clarify the language. No substantive change in the procedures is intended by these changes. A new sentence was added to the end of the paragraph to reflect the new requirement that copies of the petition and all other documents must be served on all parties and the Assistant General Counsel for Enforcement and Litigation (AGCEL) and to provide an address for such service on the AGCEL.

Paragraph (b) is redesignated as paragraph (c). The second sentence of the paragraph was removed to reflect the fact that service of petitions is described in paragraph (a). The third sentence of the paragraph is modified to reflect the fact that review undertaken on the Administrator's initiative must be timely and to include reference to new paragraph (h).

A new paragraph (b) is added to reiterate that the Administrator may undertake review of an initial decision on his or her own initiative.

Existing paragraph (c) is removed in its entirety.

A new paragraph (d) is added. This paragraph incorporates the language and substance of existing paragraph (d), as well as other format and content requirements for petitions for review.

Existing paragraph (e) is redesignated as paragraph (f).

A new paragraph (e) is added which explains that the Administrator may deny a petition for review if it is untimely or fails to meet the content and format requirements described in paragraph (d).

Existing paragraph (f) is redesignated as paragraph (g). A sentence is added that outlines the content and format

requirements for any answer. The last sentence of the paragraph is revised to clarify that no further replies are allowed unless requested by the Administrator.

Existing paragraph (g) is redesignated as paragraph (i) and has been revised to clarify the language. No substantive changes in procedure are intended by these revisions.

A new paragraph (h) is added to explain that, if the Administrator takes no action in response to a petition within 120 days of its service, the petition is deemed denied and the initial decision becomes the final Agency decision.

Existing paragraph (h) is redesignated as paragraph (j) and revised to clarify the manner in which issues for briefing will be identified and the fact that the Administrator may choose not to order additional briefing. In addition, the last sentence was removed as redundant.

Existing paragraph (i) is redesignated as paragraph (k) and revised for style and to explain that the Administrator's decision constitutes final Agency action for purposes of judicial review except where the Administrator decides to remand the case to the ALJ.

A new paragraph (l) is added to explain that initial decisions are not subject to judicial review unless the party has exhausted its opportunity for administrative review by filing a petition with the Administrator, and the Administrator has issued a final order on the petition that constitutes final Agency action or the initial decision has become final pursuant to new paragraph (h). As discussed below in the response to comments, this addition is based on comments concerning the importance and benefit of maintaining administrative review.

A new paragraph (m) is added to explain that, for the purposes of any subsequent judicial review of the Agency decision, any issues not identified in a petition for review, in an answer, by the Administrator, or in any modifications to the initial decision, are waived. This new paragraph (m) does not create any new requirement, as this rule is established in a large body of case law. The Agency concluded paragraph (m) was an appropriate addition to ensure that parties are aware of this requirement.

A new paragraph (n) is added to explain that, if during judicial review a decision is vacated or remanded by a court, the Administrator shall issue an order governing further administrative proceedings in the matter.

Subpart D—Permit Sanctions and Denials

General

1. Scope and Applicability

Section 904.300: In paragraph (a), the words "policies and" are removed for accuracy.

2. Bases for Permit Sanctions and Denials

Section 904.301: In paragraph (c), the words "the sanction of any vessel permit" are replaced with "a vessel's permit sanction" to improve clarity.

3. Notice of Permit Sanction (NOPS)

Section 904.302: In paragraph (a), the words "personally or by certified mail, return receipt request" are replaced with "as provided in § 904.3" to reflect that the modes of service are described in § 904.3.

In paragraph (b), the word "calendar" is removed as unnecessary.

4. Notice of Intent To Deny Permit (NIDP)

Section 904.303: In paragraph (a), the phrase "criminal fine" was added for accuracy.

In paragraph (b), "\$ 904.302(a)" is replaced with "\$ 904.3" to reflect the modes of service are described in § 904.3. The word "permit" is added before "applicant" to clarify that a NIDP may be issued to a person who has applied or is expected to apply for a permit.

5. Opportunity for Hearing

Section 904.304: In paragraph (b), the words "a judicial or administrative hearing" are replaced with "an administrative or judicial proceeding" for consistency and clarity.

6. Final Administrative Decision

Section 904.305: In paragraph (a), "on the 30th day after" was replaced with "30 days after" for clarity and consistency.

Permit Sanctions for Noncompliance

1. Compliance

Section 904.311: The words "fine or penalty" were replaced with "criminal fine or civil penalty" for clarity and consistency.

Subpart E—Written Warnings

1. Procedures

Section 904.402: In paragraph (a), the words "who finds a violation of one of the laws" is replaced with "or Agency counsel" to reflect that written warnings may be issued either by authorized

officers or by Agency counsel. The words "as provided in § 904.3" are added to clarify that written warnings will be served by the procedures described in § 904.3. The words "in lieu of other law enforcement action that could be taken under the applicable statute" are removed as unnecessary.

In paragraph (d), the words "civil or criminal" are replaced with "administrative or judicial" for consistency and accuracy.

2. Review and Appeal of a Written Warning

Section 904.403: Throughout this section, the word "respondent" replaces "person" both for accuracy and to reflect that the term "respondent" is defined in § 904.2 to include persons who have been issued a written warning.

Subpart F—Seizure and Forfeiture Procedures

1. Notice of Seizure

Section 904.501: This section is revised to clarify that Notices of Seizure will be served in the manner described in § 904.3.

2. Bonded Release of Seized Property

Section 904.502: In paragraph (b)(1) and paragraph (c), the term "petitioner" is replaced with "requester" for accuracy and consistency.

3. Administrative Forfeiture Proceedings

Section 904.504: In paragraph (b)(1), the words "If seized property is appraised at a value of \$500,000 or less, instead of referring the matter to the United States Attorney" have been removed as unnecessary because paragraph (a) already limits the application of this section to property that is determined under § 904.503 to have a value of \$500,000 or less. The words "personally, or by registered or certified mail, return receipt requested" have been replaced with "as provided in § 904.3" to reflect that procedures for service of Notices are already described in § 904.3.

In paragraph (b)(4), the words "30 days of final notice" are replaced with "30 days of the date the final Notice is" for clarity and to correct a grammatical error. The words "by registered or certified mail, return receipt requested" have been replaced with "as provided in § 904.3" to reflect that procedures for service of Notices are already described in § 904.3. The words "as provided in § 904.3" are added to clarify that the Declaration of Forfeiture will describe any efforts made, pursuant to § 904.3, to serve the Notice of Proposed Forfeiture.

4. Summary Sale

Section 904.505: In paragraph (c), the words “by registered or certified mail, return receipt requested” have been replaced with “as provided in § 904.3” to reflect that procedures for service of Notices are already described in § 904.3.

5. Return of Seized Property

Section 904.510: In paragraph (b), the words “by registered or certified mail, return receipt requested” have been replaced with “as provided in § 904.3” to reflect that procedures for service of Notices are already described in § 904.3.

III. Response to Comments

General Comments

Comment 1: One commenter suggested that NOAA’s Civil Procedure regulations should provide a mechanism for cases to be heard in front of a jury in U.S. District Court.

Response: This *Comment* is outside of the scope of the proposed rule, however, the Agency notes that jurisdiction is conferred by the Administrative Procedure Act (APA) and the statutes that NOAA enforces, and not by NOAA’s Civil Procedure regulations.

Comment 2: One commenter stated that the administrative process is unfair because the Administrative Law Judges (ALJs) are NOAA employees and therefore are not impartial.

Response: This *Comment* is outside of the scope of the proposed rule, however, the Agency notes that the ALJs who hear NOAA’s civil administrative enforcement cases are, in fact, employees of the U.S. Coast Guard, currently located within the Department of Homeland Security. The ALJs are, however, acting under NOAA’s delegated authority pursuant to the Oceans Act of 1992. See Section 5218 of H.R. 5617 (Public Law 102–587). Moreover, the APA requires review at the Agency level before cases proceed to U.S. District Court.

Comment 3: One commenter thought that NOAA’s Civil Procedure regulations should apply to Council members and NOAA scientists, and not solely to the commercial fishing industry.

Response: The 904 regulations apply to the civil administrative process that applies when anyone is charged with violating one of the statutes or regulations that NOAA enforces.

Comment 4: Two commenters expressed concerns with the rulemaking process and encouraged inclusion of the public in the process.

Response: NOAA published the proposed regulation in the **Federal Register** on October 12, 2004, and

provided for sixty days of public comments. Comments were solicited and accepted from all members of the public. On January 5, 2005, NOAA extended the *Comment* period for an additional thirty days. In addition, during the *Comment* period, NOAA added a link to the proposed regulations on the Web site for NOAA’s Office of General Counsel for Enforcement and Litigation. During the same time period, fact sheets detailing major changes in the proposed regulations was sent to all of the Fisheries Management Councils, posted in each of the regional offices and on each region’s Web site.

Comment 5: One commenter recommended that all civil penalties be increased by 2500%.

Response: Civil penalties are set by the individual statutes enforced by NOAA, as passed by the U.S. Congress. This rulemaking does not address the amounts of civil penalties and therefore, this *Comment* is not addressed further. The Agency notes, however, that civil monetary penalties are adjusted for inflation at least once every four years pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended by the Debt Collection Improvement Act of 1996 (Public Law 104–134). Adjusted civil penalty amounts are published in the **Federal Register**.

Comment 6: One commenter suggested that permit suspensions imposed on companies for criminal offenses should be permanent.

Response: NOAA’s Civil Procedure regulations deal exclusively with civil administrative enforcement procedures and do not address criminal offenses, thus this *Comment* is outside of the scope of the proposed rule, and is not addressed here.

Comment 7: One commenter expressed the opinion that permits are being inappropriately issued to individuals whose intent is to kill scarce animals.

Response: The 904 regulations do not relate in any way to the issuance of permits, therefore this *Comment* is outside of the scope of the proposed rule, and is not addressed here.

Section 904.3—Filing and Service of Notices, Documents and Other Papers

Comment 8: One commenter suggested that NOAA establish a definition for the phrase “last known address” in paragraph (a), to provide for clarity and ease of reference.

Response: The phrase “last known address” appears in paragraphs (a) and (b) of the regulation. NOAA’s longstanding use of the phrase “last known address” is comparable to the

method of service provision contained in the Federal Rules of Civil Procedure, Rule 5(b)(2)(B): “Mailing a copy to the last known address of the person served.” NOAA feels that the plain meaning of the phrase “last known address” is sufficiently apparent to make further clarification unnecessary.

Section 904.4—Computation of Time Periods

Comment 9: One commenter suggested that in paragraph (b) the phrase “take some proceedings” may not be grammatically correct. Perhaps the phrase “bring some proceeding” should be used.

Response: NOAA has decided to delete section § 904.4 (b), therefore this *Comment* is now moot.

Section 904.101—Notice of Violation and Assessment (NOVA)

Comment 10: One commenter noted that paragraph (b) raises questions regarding “ability to pay” that are addressed in comments on § 904.103.

Response: See NOAA’s response to comments pertaining to § 904.103.

Section 904.107—Joint and Several Respondents

Comment 11: One commenter thought that the Agency needs to clarify, in § 904.107 (b) and (c), the effect of a settlement with one joint and several respondent on the penalty assessed against the remaining respondent(s). The commenter suggested that any hearing with remaining joint and several respondent(s) be cast in terms of the total penalty assessment made with the understanding that, if there was a settlement payment, the Agency could only collect the remaining amount due after subtracting the amount of the settlement payment from the amount of the total assessment made.

Response: In light of comments received, as well as further internal review of the issue of joint and several liability, the Agency has decided not to make the changes to § 904.107 included in the proposed rule. However, the Agency has amended § 904.107(a) to clarify what happens to a hearing request when the requesting party settles with the Agency prior to the hearing.

Section 904.103—Factors Considered in Assessing Penalties

Comment 12: One commenter expressed concern that it is unclear whether “ability to pay” is considered in making the initial penalty assessment or is an affirmative defense that may be raised by the respondent. In paragraph (b), the proposed regulation provides

that "NOAA may, in consideration of a respondent's ability to pay, increase or decrease a penalty from an amount that would otherwise be warranted by other relevant factors." Whereas paragraph (c) provides, "the respondent has the burden of proving [an] inability [to pay]."

Response: Ability to pay must be considered by NOAA in determining an initial penalty assessment whenever the statute being enforced so requires. In those cases, it is the Agency's burden to show that it considered the respondent's ability to pay in determining the initial penalty assessment. Both in such cases, and in cases where the statute being enforced does not require that NOAA consider ability to pay, a respondent may seek to have the proposed penalty reduced based on alleged inability to pay. In those instances, the respondent must submit verifiable, complete and accurate financial information to support their claim. The burden of proving inability to pay lies with the respondent.

Comment 13: One commenter noted that the provisions in paragraph (e) establish three different time frames in which a respondent can submit financial information regarding ability to pay. They are: (a) Within sixty (60) days of receipt of the NOVA; (b) at least thirty (30) days in advance of the hearing if the respondent requested a hearing and wishes his or her inability to pay to be considered by the judge in the initial decision; and (c) at the hearing, in which case Agency counsel will have 30 days after the hearing in which to respond to the submission.

Response: In keeping with statutory requirements, for administrative efficiency, and to establish a single, consistent time frame for submitting ability to pay information, the language in paragraph (e) will be modified to clarify that in order to be considered by agency counsel, or in the initial decision of the administrative law judge, ability to pay information must be submitted to Agency Counsel at least 30 days prior to the hearing. Any information regarding the respondent's ability to pay submitted after that time may not be considered by Agency Counsel or by the judge. If the Judge decides to admit any information submitted less than 30 days in advance of the hearing then Agency Counsel will have 30 days to respond to the submission from the date of admission.

Section 904.200—Scope and Applicability

Comment 14: One commenter noted that in the preamble of the proposed regulations, the discussion of 904.200

(b) states: "Paragraph (b) would be amended to delegate authority to the Judges to make initial and final decisions, and to take other actions related to the conduct of hearings, *without that authority being subject to the administrative direction of the Chief Administrative Law Judge.*" The commenter finds the statement that the Judge's authority is not subject to the administrative direction of the Chief Administrative Law Judge both unnecessary and confusing. First, ALJs derive their independence from the APA, which sets out their duties and imperatives in some detail. See 5 U.S.C. 554; see also *Butz v. Economou*, 433 U.S. 473, 513 (1978). There has never been any question relating to the independence of ALJs or their authority to hear APA cases.

Second, the reference to "administrative direction" and the Judges not being subject to such direction is incorrect. Things like proper assignment of cases to judges are mandated. See 5 U.S.C. 3105. Further, judges' travel authorizations, procurement activities, use of legal assistance, hiring of court reporters, and many other aspects of "administrative direction," are valid and necessary. The commenter believes that the supplemental information remark regarding paragraph (b) is unnecessary, might be contrary to law and should be eliminated.

Response: The remarks in the preamble of the proposed regulations were not intended to conflict with existing law, or with the established administrative practices among ALJs who hear NOAA enforcement cases. This change was not included in the final language of NOAA's Civil Procedure regulations published here and therefore is to be given no effect.

Section 904.201—Hearing Requests and Case Docketing

Comment 15: In § 904.201, the commenter suggested replacing "Office of Administrative Law Judges" with "ALJ Docketing Center".

Response: The Agency agrees and has made this change throughout NOAA's Civil Procedure regulations.

Comment 16: One commenter suggested that NOAA rule on the timeliness of hearing requests because the ALJ is without authority to do so. If the Agency decides not to handle such rulings it needs to establish a procedure for alerting the docketing center of late filings.

Response: The Agency believes that the determination of whether a request is untimely properly lies with the ALJ. The determination that a request is

untimely is dispositive. It is therefore the role of the ALJ to consider the procedural history and any attendant arguments and render a final decision. This process is consistent with Federal District Court practice.

The Agency will forward any untimely hearing requests to the Chief Administrative Law Judge at the ALJ Docketing Center along with a Motion in Opposition, documentation of service and any other materials that support the Agency's claim that the hearing request is untimely. The Agency will request that the Chief Administrative Law Judge deny the untimely hearing request. The Chief Administrative Law Judge shall issue an order on the timeliness of the hearing request.

Section 904.202—Filing of Documents

Comment 17: One commenter suggested that discovery requests and answers be required to be filed with the ALJ in order to facilitate discovery, which can often become complicated and cause unnecessary delay.

Response: The Agency appreciates the fact that discovery might be facilitated by participation by the ALJ. However, discovery is an opportunity for both parties to develop their cases independent of judicial review. Issues relating to contested requests for discovery, failure to comply with discovery orders or requests, or timeliness of discovery, for example, are appropriate for adjudication by the ALJ prior to hearing. The content of discovery requests and responses, however, should remain between the parties. Information that is discoverable is not always admissible, therefore, to the greatest extent possible such information should not be provided to the ALJ in advance of the hearing. Therefore, the Agency declines to include this suggested change in the final rule.

Section 904.204—Duties and Powers of Judge

Comment 18: One commenter suggested changing § 904.204(k) to clarify that the section is only applicable to expert witnesses.

Response: This section affords the ALJ the authority to "require a party or witness at any time during the proceeding to state his or her position concerning any issue or his or her theory in support of such position." One commenter suggests that requiring a witness to state a position or theory is objectionable and irrelevant unless the witness is an expert. However, that is not true in an administrative hearing conducted pursuant to the APA. As stated at § 904.251(a)(2), all evidence

that is relevant, material, reliable, and probative is admissible at a hearing. Formal rules of evidence do not necessarily apply to administrative proceedings. The nature of an administrative hearing is less formal than a trial and the goal is to allow the parties to introduce any and all relevant evidence to assist the ALJ in making an informed decision. Should the ALJ feel that the position or theory of a party or witness would be informative or useful to the ALJ's determination, these procedural rules grant the ALJ the authority to solicit that information. The ALJ may ask a party or a witness any question they deem relevant and, as the trier of fact, determine the appropriate weight to attach. Additionally, nothing in this section prevents an ALJ from requiring that a party or witness be qualified as an expert before accepting opinion or theory testimony.

Comment 19: One commenter questioned the source of NOAA's authority to collect attorney's fees and expenses and whether this provision conflicts with the Equal Access to Justice Act.

Response: The regulation in question plainly states that the ALJ may "award attorney fees and expenses as provided by applicable statute or regulation." See 15 CFR § 904.204 (c). The qualification clearly limits the ALJ to awards of attorney fees that are expressly allowed by law under the statutes enforced by NOAA. Further, the regulation comports with the Equal Access to Justice Act (EAJA) in that EAJA expressly allows the payment of attorney fees and expenses to respondents in certain instances. See 5 U.S.C. 504 (a). Nothing in the clear language of this regulation expands or limits the ALJ's authority beyond what expressly exists in an applicable statute and/or regulation.

Comment 20: One commenter suggested that provisions for assessment of penalties and fees for violations of Agency procedural rules and ALJ orders be eliminated as few agencies allow for such. The commenter further suggests that if NOAA maintains these provisions a process needs to be established for determining and enforcing penalties.

Response: The commenter is correct that some Federal agencies do not give ALJs the authority to impose monetary sanctions for violations of the agency's procedural rules or an ALJ's order. However, a number of agencies do give the ALJ the authority to impose monetary sanctions, including: The Office of the Comptroller of the Currency, the FDIC, the Commodity Futures Trading Commission, the United States International Trade

Commission, the Social Security Administration, and the Department of Health and Human Services. The Federal Labor Relations Authority leaves open the possibility of monetary sanctions, but does not specifically address it in its regulations. Section 904.204 (q) lays out the grounds for imposing a sanction, the types of available sanctions and the procedures for imposing a sanction.

Comment 21: One commenter noted that the imposition of sanctions, under § 904.204 (q), is subject to interlocutory review. Interlocutory review is infrequently used in NOAA proceedings. The commenter suggests that allowing it here would cause delay. The commenter recommends that the Agency eliminate interlocutory review in its entirety because it is inconsistent with the elimination of the administrative appeals process and because most agencies do not allow for interlocutory review.

Response: While NOAA appreciates the fact that interlocutory review may cause delay in administrative proceedings, the Agency has chosen to keep the interlocutory review process. Although it is an infrequently exercised option, in certain instances it is important tool for all parties to address issues of immediate concern. Further, the Agency believes that it is appropriate for sanctions to be subject to interlocutory review in the same manner as other rulings by the ALJ. ALJ-imposed sanctions could dramatically affect the remainder of the case, and possibly the outcome, and therefore warrant interlocutory review. The commenter's concern with the inconsistency between the elimination of administrative appeals and interlocutory review is now moot as the Agency has decided not to eliminate administrative appeals.

Comment 22: One commenter suggested that § 904.204 (q) provide for the removal of counsel from the proceeding for misconduct. The commenter further suggests the development of provisions to prevent such counsel from representing clients in future administrative enforcement actions.

Response: The sanction provisions established in § 904.204 (q) are quite broad and allow the ALJs latitude to fashion an appropriate sanction. The Agency has articulated certain examples of types of sanctions, but did not make the list exhaustive in order to allow the ALJ to ensure that any sanction imposed meet the needs of that particular case. The language of § 904.204 (q)(2) reads: "Sanctions which may be imposed include, but are not limited to, one or

more of the following[.]" Under the Agency's reading of this language, an ALJ would be authorized to remove counsel or other authorized representative from the proceeding for misconduct. However, at this time, the Agency is not prepared to develop provisions that would extend such a removal beyond an individual case.

Comment 23: One commenter expressed concern that the authority to impose sanctions not be tailored to benefit only the Agency.

Response: The proposed rule adds a paragraph (q) to 15 CFR § 904.204. As indicated in paragraph (q), this gives the judge authority, upon the motion of any party, to impose sanctions on another party. The ability to be subjected to sanctions by the ALJ or to make a motion to impose sanctions on another party is identical for both the Agency and respondents. This change affects all parties equally.

Section 904.205—Disqualification of Judge

Comment 24: One commenter suggested that § 904.205 be revised to make clear that an adverse ruling on a motion to withdraw or disqualify a judge is not subject to interlocutory review.

Response: This comment is outside the scope of the proposed rule, as this provision has not been changed from its current iteration, however, the Agency continues to believe that adverse rulings on a motion to withdraw or disqualify a judge falls appropriately within the scope of issues on which a party may request interlocutory review.

Section 904.207—Amendment of Pleading or Record

Comment 25: One commenter suggested that § 904.207 (a) be revised to lengthen the time period allowed for amending a pleading or record.

Response: NOAA does not expect that allowing amendment of a pleading until 20 days before a hearing as a matter of course will cause the proceeding to be delayed. Historically, such amendments are unusual and, when made, generally do not dramatically change the theory of the case requiring new methods of proof or additional time to prepare a defense. Examples of such non-prejudicial amendments have included NOAA's withdrawal of one count out of multiple counts, addition of a necessary party such as the reinstated corporate form of an individually charged party, and correction of transposed numbers for a date of violation or vessel documentation. Allowing the parties to amend their pleadings until 20 days prior to hearing without leave of the

court facilitates administrative efficiency. In the event amendments made until 20 days prior to hearing are documented as causing significant delays in the proceedings, NOAA may revisit this section at another time to address the concern.

Section 904.211—Failure To Appear

Comment 26: A few commenters suggested that the language of § 904.211 (a) be revised to better describe the section's application to NOVAs, NOPSs and NIDPs and to clarify the language regarding dismissals and default judgments. Another commenter noted that the authority to enter a default judgment or impose sanctions should not be tailored to benefit only the Agency.

Response: The Agency agrees that the language of § 904.211 (a) should be revised to improve its clarity. This provision is not intended to benefit only the Agency, it is intended to treat parties equally. The proposed rule amends section 904.211 (a) to reflect that if the respondent fails to appear at a hearing then the ALJ is authorized to find the facts as alleged in the NOVA, NOPS and/or NIDP and enter a default judgment against the respondent. Similarly, if the Agency fails to appear at a hearing, the ALJ is authorized to dismiss the case against the Respondent(s) with prejudice. The final rule has been amended to clarify the Agency's intention as described above, and to address the other concerns raised by the commenters.

Comment 27: One commenter suggested that if the ALJ has authority akin to the model rules of Civil Procedure such authority should include dismissal and/or summary judgment upon motion of either party without requiring approval of the non-moving party.

Response: The Agency has the authority to establish the rules of procedure for its administrative enforcement program. In some ways, NOAA's regulations do mirror the Federal Rules of Civil Procedure (FRCP), but in many ways they do not. Many of the more elaborate procedures found in the FRCP are not conducive to the objectives of the Agency's administrative enforcement program. The Agency believes that the proposals made by this commenter will decrease the effectiveness and efficiency of NOAA's administrative process and have therefore elected not to make the suggested changes.

Section 904.213—Settlements

Comment 28: One commenter suggested that the Agency clarify

§ 904.213 to better describe how the amount of a settlement against one joint and several respondent will be communicated to the ALJ. See also § 904.107 (b) and (c).

Response: As discussed above, the Agency has decided not to make its proposed changes to § 904.107, and instead is reverting back to the existing language. However, the Agency has added a clarification to § 904.107 (a) to better describe how a settlement with one joint and several respondents affects any other joint and several respondents.

Section 904.215—Consolidation

Comment 29: One commenter suggested revising § 904.215 to authorize the Chief Administrative Law Judge, rather than individual Administrative Law Judges, to consolidate cases.

Response: The Agency concurs. NOAA uses the Administrative Law Judge Docketing Center of the U.S. Coast Guard to assign administrative law judges to hear the Agency's administrative penalty cases. Therefore, using case consolidation procedures that coincide with USCG administrative practice and that the U.S. Coast Guard Administrative Law Judges are already accustomed to using will result in a more efficient administration of the Agency's cases. Moreover, this change will create no additional procedural burdens for the Agency or the respondents.

Section 904.216—Prehearing Conferences

Comment 30: One commenter suggested that § 904.216 needs to be clarified and raises two specific questions. First, the commenter questions whether the ALJ is required to use a court reporter to record a pre-hearing conference, and second, whether the ALJ should always order transcripts of the pre-hearing conference even when the parties have not requested such transcripts.

Response: The Agency agrees that § 904.216 needs to be modified to provide that any certified court reporter, including stenographers, are an alternative to the ALJ creating his own audio recording. Section 904.216 (a) as proposed states that the ALJ "shall record such conference by audio recording or stenographer". How the ALJ causes such recording to be made is subject to the discretion of the ALJ. However, the Agency anticipates that, if practicable, the ALJ would exercise that discretion after determining the preferences and concerns of the parties. In certain cases, the ALJ may decide that a simple audio recording taken by the

ALJ or the ALJ's assistant is sufficient. In other cases, circumstances (such as the quality of the ALJ's recording equipment, the complexity of the issues or the number of conference participants) may warrant the hiring of a court reporter to record the conference.

Although many court reporters use stenographic equipment, the Agency does not intend to limit the equipment or recording media that can be used by a court reporter. Accordingly, the Agency has deleted the word "stenographer" and inserted the phrase "court reporter". Use of "reporter" or "court reporter" is consistent with the rules governing U.S. District Courts, including 28 U.S.C. 753. Moreover, with regard to whether a transcript is provided, if the ALJ or any party to the proceeding desires to have a transcript of all or a portion of the prehearing conference, then the ALJ has the responsibility to order and arrange for a prompt transcription of the record.

Section 904.240—Discovery Generally

Comment 31: One commenter suggested that the deadline for discovery be changed to thirty days before the hearing instead of twenty days.

Response: The commenter's suggested revision is outside of the scope of the proposed rule, therefore, it is not addressed here.

Section 904.254—Interlocutory Review

Comment 32: One commenter suggested that § 904.254 be revised to eliminate interlocutory review and if the Agency elects not to eliminate interlocutory review, the commenter suggests clarifying judicial authority.

Response: The Agency does not wish to eliminate interlocutory review at this point. Although infrequently utilized, it provides an important tool to all parties during the administrative process. The proposed and final rule expands this section and clarifies the appropriate circumstances for interlocutory review.

Section 904.255—Ex Parte Communication

Comment 33: One commenter raised the question of whether denial of a party's claim based on ex parte communication under § 904.255 is subject to interlocutory review.

Response: Section 904.255 does not explicitly make denials of a party's claim based on ex parte communications subject to interlocutory review. Therefore, whether or not interlocutory review is appropriate for review of such a denial is governed by the language of section 904.254 and

would need to meet the requirements of that section.

Comment 34: One commenter suggested that § 904.255(d)(2) be revised to clarify how classified information should be presented to the ALJ, how the ALJ should identify classified information, and whether or not the ALJs need security clearance to review classified evidence.

Response: There are guidelines that cover the transfer and release of classified information to judicial organizations. This is covered in Chapter 21 of the Department of Commerce Manual of Security Policies and Procedures. This policy will apply to the Administrative Law Judges who hear NOAA's civil administrative enforcement cases. The policy also clarifies how to identify classified information. Security clearances are required to review classified evidence, however the security clearances possessed by the Administrative Law Judges who hear NOAA's administrative cases is appropriate.

Section 904.273—Administrative Review of Decision

Comment 35: One commenter thought that direct appeal to U.S. District Court leaves too much control over civil penalty assessments in the hands of Agency enforcement attorneys.

Response: The Agency, in large part in response to comments received on its proposed rule, has decided not to eliminate administrative appeals, therefore this comment is now moot. However, neither the suggestion to eliminate administrative appeals nor the decision to keep them affects civil penalty assessments.

Comment 36: One commenter thought that it is unclear whether or not the revisions create a right for the Agency to appeal to U.S. District Court. If they do, the commenter suggests that such a right is not authorized by the Magnuson-Stevens Fishery Conservation and Management Act.

Response: The Agency, in large part in response to comments received on its proposed rule, has decided not to eliminate administrative appeals, therefore this comment is now moot.

Comment 37: One commenter suggested that direct appeal to U.S. District Court creates a disincentive for respondents to seek due process because it is cost prohibitive.

Response: The Agency, in large part in response to comments received on its proposed rule, has decided not to eliminate administrative appeals, therefore this comment is now moot. However, concern over issues raised by commenters, such as costs to

respondents, played an important role in the Agency's determination not to eliminate the administrative appeals process.

Comment 38: One commenter recommended that the Agency reconsider its decision to eliminate the administrative appeals process because such a decision presents numerous issues for the Agency. The commenter highlighted several benefits that are derived from administrative review. First, requiring parties to pursue all administrative solutions prior to seeking judicial relief preserves judicial economy. Second, it protects the Agency's interests by giving the Agency an opportunity to develop a factual record and apply its expertise. Third, agency autonomy is preserved and judicial resources are conserved, because the agency is given an opportunity to discover and correct its mistakes before the matter is ever subject to judicial review and possibly resolve conflicts without judicial intervention. Fourth, the agency is able to establish policy through adjudication.

In addition, the commenter noted several disadvantages to eliminating administrative appeals because it may lead to inconsistent adjudication among ALJs; difficulty identifying precedent; negative impact on the Agency's ability to articulate its policies; and negative impact on respondents.

Overall, commenters representing a wide range of interests stressed the importance of administrative review and the benefits to both the Agency and parties from having the administrative process occur between the ALJ decision and any judicial review in Federal court.

Response: After consideration of these and the other comments listed above advocating retention of the administrative appeals process as well as the Agency's further analysis of the potential impacts of eliminating administrative appeals, the Agency has decided not to eliminate the administrative appeals process. In fact, the comments on this point convinced the Agency that the administrative process should be mandatory for any party who wants to obtain review of the ALJ decision. Accordingly, § 904.273 has been retained, with some modifications as described above.

IV. Administrative Requirements

A. The Regulatory Flexibility Act

When this rule was proposed, the Administrator certified, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601–612, that it would not have a significant economic impact on a substantial

number of small entities. No comments were received on the certification to lead the Agency to change that determination.

B. Executive Order 12866

Under Executive Order 12866 (58 FR 51,735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. It was determined when this rule was proposed that it is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

C. Paperwork Reduction Act

At the proposed rule stage, it was determined that this regulatory action contains no information collection activities and, therefore, no information collection request (ICR) was submitted to the Office of Management and Budget (OMB) for review in compliance with the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*

List of Subjects in 15 CFR Part 904

Administrative practice and procedure, fisheries, fishing, fishing vessels, penalties, seizures and forfeitures.

Dated: March 2, 2006.

James R. Walpole,

General Counsel, National Oceanic and Atmospheric Administration.

■ For the reasons set forth in the preamble, the NOAA Office of General Counsel for Enforcement and Litigation revises 15 CFR part 904 as follows:

■ 1. Part 904 is revised to read as follows:

PART 904—CIVIL PROCEDURES

Subpart A—General

Sec.

- 904.1 Purpose and scope.
- 904.2 Definitions and acronyms.
- 904.3 Filing and service of notices, documents, and other papers.
- 904.4 Computation of time periods.
- 904.5 Appearances.

Subpart B—Civil Penalties

- 904.100 General.
- 904.101 Notice of violation and assessment (NOVA).
- 904.102 Procedures upon receipt of a NOVA.
- 904.103 Hearing.
- 904.104 Final administrative decision.
- 904.105 Payment of final civil penalty.
- 904.106 Compromise of civil penalty.
- 904.107 Joint and several respondents.
- 904.108 Factors considered in assessing civil penalties.

Subpart C—Hearing and Appeal Procedures**General**

- 904.200 Scope and applicability.
- 904.201 Hearing requests and case docketing.
- 904.202 Filing of documents.
- 904.203 [Reserved]
- 904.204 Duties and powers of Judge.
- 904.205 Disqualification of Judge.
- 904.206 Pleadings, motions, and service.
- 904.207 Amendment of pleading or record.
- 904.208 Extensions of time.
- 904.209 Expedited administrative proceedings.
- 904.210 Summary decision.
- 904.211 Failure to appear.
- 904.212 Failure to prosecute or defend.
- 904.213 Settlements.
- 904.214 Stipulations.
- 904.215 Consolidation.
- 904.216 Prehearing conferences.

Discovery

- 904.240 Discovery generally.
- 904.241 Depositions.
- 904.242 Interrogatories.
- 904.243 Admissions.
- 904.244 Production of documents and inspection.
- 904.245 Subpoenas.

Hearings

- 904.250 Notice of time and place of hearing.
- 904.251 Evidence.
- 904.252 Witnesses.
- 904.253 Closing of record.
- 904.254 Interlocutory review.
- 904.255 *Ex parte* communications.

Post-Hearing

- 904.260 Recordation of hearing.
- 904.261 Post-hearing briefs.

Decision

- 904.270 Record of decision.
- 904.271 Initial decision.
- 904.272 Petition for reconsideration.
- 904.273 Administrative review of decision.

Subpart D—Permit Sanctions and Denials**General**

- 904.300 Scope and applicability.
- 904.301 Bases for permit sanctions or denials.
- 904.302 Notice of permit sanction (NOPS).
- 904.303 Notice of intent to deny permit (NIDP).
- 904.304 Opportunity for hearing.
- 904.305 Final administrative decision.

Permit Sanctions for Noncompliance

- 904.310 Nature of permit sanctions.
- 904.311 Compliance.

Permit Sanctions for Violations

- 904.320 Nature of permit sanctions.
- 904.321 Reinstatement of permit.
- 904.322 Interim action.

Subpart E—Written Warnings

- 904.400 Purpose and scope.
- 904.401 Written warning as a prior violation.
- 904.402 Procedures.
- 904.403 Review and appeal of a written warning.

Subpart F—Seizure and Forfeiture Procedures

- 904.500 Purpose and scope.
- 904.501 Notice of seizure.
- 904.502 Bonded release of seized property.
- 904.503 Appraisalment.
- 904.504 Administrative forfeiture proceedings.
- 904.505 Summary sale.
- 904.506 Remission of forfeiture and restoration of proceeds of sale.
- 904.507 Recovery of certain storage costs.
- 904.508 Voluntary forfeiture by abandonment.
- 904.509 Disposal of forfeited property.
- 904.510 Return of seized property.

Authority: 16 U.S.C. 1301–1332; 16 U.S.C. 1531–1543; 16 U.S.C. 1361–1407; 16 U.S.C. 3371–3378; 16 U.S.C. 1431–1439; 16 U.S.C. 773–773k; 16 U.S.C. 951–961; 16 U.S.C. 5001–5012; 16 U.S.C. 3631–3644; 42 U.S.C. 9101 *et seq.*; 30 U.S.C. 1401 *et seq.*; 16 U.S.C. 971–971k; 16 U.S.C. 781 *et seq.*; 16 U.S.C. 2401–2413; 16 U.S.C. 2431–2444; 16 U.S.C. 972–972h; 16 U.S.C. 916–916k; 16 U.S.C. 1151–1175; 16 U.S.C. 3601–3608; 16 U.S.C. 1351 *note*; 15 U.S.C. 5601 *et seq.*; Pub. L. 105–277; 16 U.S.C. 1822 *note*, Section 801(f); 16 U.S.C. 2465(a); 16 U.S.C. 5103(b); 16 U.S.C. 1385 *et seq.*; 16 U.S.C. 1822 *note* (Section 4006); 16 U.S.C. 4001–4017; 22 U.S.C. 1980(g); 16 U.S.C. 5506(a); 16 U.S.C. 5601–5612; 16 U.S.C. 1822; 16 U.S.C. 973–973(r); 15 U.S.C. 330–330(e).

Subpart A—General**§ 904.1 Purpose and scope.**

(a) This part sets forth the procedures governing NOAA's administrative proceedings for assessment of civil penalties, suspension, revocation, modification, or denial of permits, issuance and use of written warnings, and release or forfeiture of seized property.

(b) This subpart defines terms appearing in this part and sets forth rules for the filing and service of documents in administrative proceedings covered by this part.

(c) The following statutes authorize NOAA to assess civil penalties, impose permit sanctions, issue written warnings, and/or seize and forfeit property in response to violations of those statutes:

- (1) American Fisheries Act of 1998, Public Law 105–277;
- (2) Anadromous Fish Products Act, 16 U.S.C. 1822 *note*, Section 801(f);
- (3) Antarctic Conservation Act of 1978, 16 U.S.C. 2401–2413;
- (4) Antarctic Marine Living Resources Convention Act of 1984, 16 U.S.C. 2431–2444;
- (5) Antarctic Protection Act of 1990, 16 U.S.C. 2465(a);
- (6) Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. 5103(b);
- (7) Atlantic Salmon Convention Act of 1982, 16 U.S.C. 3601–3608;

(8) Atlantic Striped Bass Conservation Act, 16 U.S.C. 1851 *note*;

(9) Atlantic Tunas Convention Act of 1975, 16 U.S.C. 971–971k;

(10) Deep Seabed Hard Mineral Resources Act, 30 U.S.C. 1401 *et seq.*;

(11) Dolphin Protection Consumer Information Act, 16 U.S.C. 1385 *et seq.*;

(12) Driftnet Impact Monitoring, Assessment, and Control Act, 16 U.S.C. 1822 *note* (Section 4006);

(13) Eastern Pacific Tuna Licensing Act of 1984, 16 U.S.C. 972–972h;

(14) Endangered Species Act of 1973, 16 U.S.C. 1531–1543;

(15) Fish and Seafood Promotion Act of 1986, 16 U.S.C. 4001–4017;

(16) Fisherman's Protective Act of 1967, 22 U.S.C. 1930(g);

(17) Fur Seal Act Amendments of 1983, 16 U.S.C. 1151–1175;

(18) High Seas Fishing Compliance Act, 16 U.S.C. 5506(a);

(19) Lacey Act Amendments of 1981, 16 U.S.C. 3371–3378;

(20) Land Remote-Sensing Policy Act of 1992, 15 U.S.C. 5601 *et seq.*;

(21) Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801–1832;

(22) Marine Mammal Protection Act of 1972, 16 U.S.C. 1361–1407;

(23) National Marine Sanctuaries Act, 16 U.S.C. 1431–1439;

(24) North Pacific Anadromous Stocks Convention Act of 1992, 16 U.S.C. 5001–5012;

(25) Northern Pacific Halibut Act of 1982, 16 U.S.C. 773–773k;

(26) Northwest Atlantic Fisheries Convention Act of 1995, 16 U.S.C. 5601–5612;

(27) Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. 9101 *et seq.*;

(28) Pacific Salmon Treaty Act of 1985, 16 U.S.C. 3631–3644;

(29) Shark Finning Prohibition Act, 16 U.S.C. 1822;

(30) South Pacific Tuna Act of 1988, 16 U.S.C. 973–973(r);

(31) Sponge Act, 16 U.S.C. 781 *et seq.*;

(32) Tuna Conventions Act of 1950, 16 U.S.C. 951–961;

(33) Weather Modification Reporting Act, 15 U.S.C. 330–330e; and

(34) Whaling Convention Act of 1949, 16 U.S.C. 916–916l.

(d) The procedures set forth in this part are intended to apply to administrative proceedings under these and any other statutes or authorities administered by NOAA.

§ 904.2 Definitions and acronyms.

Unless the context otherwise requires, or as otherwise noted, terms in this Part have the meanings prescribed in the applicable statute or regulation. In