

UNITED STATES DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

**In the Matter of:**

**JOSH W. CHURCHMAN (F/V PALO), and  
EDWARD T. PAASCH (F/V HAZEL A),**

**Respondents.**

**Docket Number:**

**SW0703629**

**INITIAL DECISION AND ORDER**

**Issued:**

**February 18, 2011**

**Issued By:**

Hon. Parlen L. McKenna  
Presiding

**APPEARANCES:**

**FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

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## I. Statement of the Case

This case involves alleged illegal fishing by two separate and distinct Respondents within the Nontrawl Rockfish Conservation Area (RCA) established by the Pacific Coast Groundfish Fishery (PCGF).<sup>1</sup> The National Oceanic and Atmospheric Administration (NOAA or Agency) alleged that Respondent Churchman (owner and operator of the F/V PALO) violated the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act), 16 U.S.C. §§ 1801-1883, on four occasions by unlawfully fishing in the RCA. In a separate Notice of Violation and Assessment (NOVA), NOAA charged Respondent Paasch (owner and operator of the F/V HAZEL A) with violating the Magnuson Act on two occasions by unlawfully fishing in the RCA.

Both Respondents admitted the alleged violations through stipulation prior to the hearing but contested the amount of monetary sanction the Agency sought for the violations. Respondents argued that NOAA should have issued a verbal or written warning to both Respondents rather than seek monetary sanctions for the violations pursuant to NOAA's policies and practices. The Agency argued that penalties in the amounts of \$35,786.00 against Respondent Churchman and \$13,754.00 against Respondent Paasch were appropriate.

With respect to the sanction amount, the fair market value of Respondents' illegal catch must be accounted for and recouped by the sanction (i.e., \$5,786.00 for Respondent Churchman and \$3,754.00 for Respondent Paasch). Additionally, some additional amounts are appropriate to

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<sup>1</sup> NOAA filed two separate Notices of Violations and Assessment (NOVA). Respondents were represented by the same counsel and requested in their Preliminary Position on Issues and Procedures (PPIPs) that the two cases (Churchman – Docket No. SW0703629 and Paasch – Docket No. SW0800616) be consolidated as the legal issues and circumstances were essentially the same. The Agency did not oppose the consolidation request, and the undersigned ordered consolidation of the cases in the interests of judicial economy. See Order and Notice of Consolidation and Notice of Hearing (May 28, 2010).

deter future violations by Respondents and other members of the fishing community. However, the additional amounts \$5,000.00 per charge for Respondent Paasch and \$7,500.00 per charge for Respondent Churchman proposed by the Agency represent amounts excessive to accomplish such goals given the facts and circumstances of each Respondent's violations discussed below. The undersigned therefore imposes a monetary penalty of \$2,500.00 per violation (i.e., \$5,000.00) plus the \$3,754.00 value of the illegal catch for a total of \$8,754.00 against Respondent Paasch and \$4,000 per violation (i.e., \$16,000.00) plus the \$5,786.00 value of the illegal catch for a total of \$21,786.00 against Respondent Churchman.

## **II. Procedural History**

On July 29, 2009, NOAA issued a NOVA to Respondent Paasch that alleged he violated the Magnuson Act on two separate occasions (March 7 and April 1, 2008) by operating a vessel registered to a limited entry permit with a longline gear endorsement in a nontrawl RCA. The NOVA alleged that Respondent Paasch had violated 16 U.S.C. § 1857(1)(A) and Agency regulations at 50 C.F.R. § 660.306(h)(2) by such activities. The Agency sought a total assessed civil penalty of \$13,754.00 (\$6,372.00 for Count 1 and \$7,382.00 for Count 2). On August 8, 2009, Respondent Paasch timely requested a hearing.

On July 29, 2009, NOAA issued a NOVA to Respondent Churchman that alleged he violated the Magnuson Act on four separate occasions (March 16, 26, 28 and July 13, 2008) by operating a vessel registered to a limited entry permit with a longline gear endorsement in a nontrawl RCA. The NOVA alleged that Respondent Churchman had violated 16 U.S.C. § 1857(1)(A) and Agency regulations at 50 C.F.R. § 660.306(h)(2) by such activities. The Agency sought a total assessed civil penalty of \$35,786.00 (\$9,604.00 for Count 1, \$9,029 for Count 2,

\$9,078.00 for Count 3, and \$8,075.00 for Count 4). On August 7, 2009, Respondent Churchman timely requested a hearing.

On August 20, 2009, the United States Coast Guard Chief Administrative Law Judge Joseph N. Ingolia issued a Notice of Transfer and Assignment of the undersigned judge and Order Requesting Preliminary Positions on Issues and Procedures (PPIP) for each case, which assigned Respondents' cases to the undersigned for disposition pursuant to the Agency regulations found at 15 C.F.R. Part 904, Subpart C.

Given settlement discussions and implementation of new Agency procedures for the review of settlements in administrative penalty cases, the parties filed five joint requests (dated September 17 and November 18, 2009 and January 20, February 17, and March 22, 2010) for extensions of time to file PPIPs in these cases, all of which the undersigned granted. On May 24, 2010, the Agency filed two separate PPIPs: one for Respondent Churchman's case and the other for Respondent Paasch's case. On May 24, 2010, counsel for Respondents filed two separate PPIPs, which included a request for consolidation of the two cases and in which the PPIP for Respondent Paasch's case incorporated by reference the contents of Respondent Churchman's PPIP. On May 28, 2010, the undersigned ordered the consolidation of these cases into the docket number above and ordered that the hearing take place on Coast Guard Island in Alameda, California beginning on July 13, 2010.

On June 4, 2010, Respondents requested additional discovery from the Agency, which the undersigned granted in part and deferred in part. See Order Granting In Part And Deferring In Part Respondents' Motion For Additional Discovery (June 14, 2010). As stated in that discovery order, the undersigned found Respondents' requested discovery overly broad and of questionable relevance but deferred ruling on specific interrogatories and document requests to allow

Respondents to review documents and information produced by the Agency in response to the discovery order. That Order allowed Respondents to renew any deferred requests upon reviewing the Agency's discovery responses, but Respondents made no such requests.

On July 13, 2010, the hearing commenced as scheduled. Respondents filed a Hearing Brief just before the hearing began. The parties also filed a Joint Stipulation to Facts, Admission of Evidence, and Application of Regulations (Stipulation). At the hearing, the Agency offered two witnesses and 48 exhibits in support of its case. Respondents offered two witnesses (both Respondents) and 32 exhibits in support of their case. Pursuant to an order made during the course of the hearing, the Agency submitted three additional exhibits for inclusion in the record after the hearing concluded.<sup>2</sup> The parties' witnesses and exhibits entered into evidence are identified in **Attachment A**.

On September 3, 2010, Respondents submitted their Post Hearing Brief and Proposed Findings of Fact and Conclusions of Law.<sup>3</sup> On September 10, 2010, the Agency filed its Post Hearing Brief and Proposed Findings of Fact and Conclusions of Law. Rulings on the parties' Proposed Findings of Fact and Conclusions of Law are found in **Attachment B**. On October 14, 2010, Respondents filed their Post Hearing Reply Brief. On October 15, 2010, the Agency filed its Post-Hearing Reply Brief.

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<sup>2</sup> The undersigned requested during the hearing that the Agency provide a graphic depiction of the history of the 150 Fathom Line of the Nontrawl Rockfish Conservation Area, which the Agency supplied as Exh. 49. The Agency also requested that two additional exhibits (Nos. 50-51) be added to the record. Respondents' counsel did not object to the inclusion of these two additional exhibits and the undersigned ordered the inclusion of all three post-hearing exhibits into the record. See Order Granting Agency's Motion to Supplement the Record with Additional Exhibits and Post-Hearing Briefing Scheduling Order (August 10, 2010).

<sup>3</sup> On September 7, 2010, the Agency proposed corrections to the hearing transcript. On September 23, 2010, Respondents' counsel agreed with the proposed corrections, which are hereby accepted as reflected in **Attachment C**.

On October 18, 2010, the Agency filed a press release indicating that NOAA was seeking public comments on a new draft penalty policy. Respondents requested that the undersigned allow additional post-hearing briefing on the impact such a proposed policy change might have on this case. The undersigned allowed the opportunity for such briefing. Agency counsel subsequently made it clear via an email to the Court and Respondents that a new Agency penalty policy would not be implemented until sometime in April 2011 at the earliest. The undersigned therefore held a post-hearing telephonic conference with the parties on December 7, 2010 to discuss how to proceed. The parties agreed during that conference that no additional post-hearing briefing was necessary and the case was ready for decision.

The record of this proceeding, including the transcript, evidence, pleadings and other submissions, has now been reviewed by the undersigned and the case is ripe for decision. The findings of fact and conclusions of law that follow are prepared upon my analysis of the entire record, and applicable regulations, statutes, and case law. Each exhibit entered, although perhaps not specifically mentioned in this decision, has been carefully reviewed and given thoughtful consideration.

### **III. Findings of Fact<sup>4</sup>**

#### **A. Findings of Fact Regarding Respondent Churchman**

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

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<sup>4</sup> References to the July 13 hearing transcript are abbreviated as “Tr. [page number]:[line number]”; references to Agency Exhibits as “Agency Exh. [numeric]”; and Respondents’ Exhibits as “Resp. Exh. [alphabetic]”.

2. At all relevant times, Respondent Churchman was the owner and operator of the F/V PALO (CA Registration #CF5511FZ). Stipulation ¶ 2.
3. At all relevant times, Pacific Coast Groundfish Fishery Limited Entry Permit Number GF0056 was held by Respondent Churchman and was registered to the F/V PALO. Stipulation ¶ 3.
4. Pacific Coast Groundfish Limited Entry Permit GF0056 includes a longline gear endorsement. Stipulation ¶ 4.
5. Respondent Churchman began fishing for Chilipeppers out of Bodega in the early 1980s. Tr. 198:19-22.
6. When the RCA boundaries were first imposed in 2003, Respondent Churchman plotted the published coordinates on his nautical chart and believed that he could still fish for Chilipeppers in two spots outside of the RCA. Tr. 200:1-9; 218:4-219:23.
7. Respondent Churchman eventually put the RCA coordinates into his electronic plotter, but relied on the lines he had plotted on his nautical chart to determine his fishing spots. Tr. 200:19-201:8.
8. Respondent Churchman uses two specific fishing spots to target Chilipepper rockfish (Chilipeppers). Tr. 200:12-18. These fishing spots have been within the RCA since the inception of the RCA program in 2003. Agency Exh. 49, 51.
9. On or about May 16, 2008, in the Exclusive Economic Zone of the United States at approximately 38° 27.4190N, 123° 35.4025W, Respondent Churchman operated the F/V PALO in a Nontrawl Rockfish Conservation Area (RCA) by fishing with nontrawl fishing gear in violation of 50 C.F.R. § 660.306(h)(2). These coordinates are

- approximately .87 miles inside the western boundary of the Nontrawl RCA. Stipulation ¶ 5.
10. As a result of the fishing operations on May 16, 2008, Respondent Churchman landed approximately \$2,104.00 worth of groundfish and other fish species. Stipulation ¶ 6.
11. On or about May 26, 2008, in the Exclusive Economic Zone of the United States at approximately 38° 27.1462N, 123° 35.2990W, Respondent Churchman operated the F/V PALO in a Nontrawl RCA by fishing with nontrawl fishing gear in violation of 50 C.F.R. § 660.306(h)(2). These coordinates are approximately .84 miles inside the western boundary of the Nontrawl RCA. Stipulation ¶ 7.
12. As a result of the fishing operations on May 26, 2008, Respondent Churchman landed approximately \$1,529.00 worth of groundfish and other fish species. Stipulation ¶ 8.
13. On or about May 28, 2008, in the Exclusive Economic Zone of the United States at approximately 38° 26.1373N, 123° 34.1253W, Respondent Churchman operated the F/V PALO in a Nontrawl RCA by fishing with nontrawl fishing gear in violation of 50 C.F.R. § 660.306(h)(2). These coordinates are approximately 1.44 miles inside the western boundary of the Nontrawl RCA. Stipulation ¶ 9.
14. As a result of the fishing operations on May 28, 2008, Respondent Churchman landed approximately \$1,578.00 worth of groundfish and other fish species. Stipulation ¶ 10.
15. On or about July 13, 2008, in the Exclusive Economic Zone of the United States at approximately 38° 25.4058N, 123° 34.7772W, Respondent Churchman operated the F/V PALO in a Nontrawl RCA by fishing with nontrawl fishing gear in violation of 50 C.F.R. § 660.306(h)(2). These coordinates are approximately .5 miles inside the western boundary of the Nontrawl RCA. Stipulation ¶ 11.

16. As a result of the fishing operations on July 13, 2008, Respondent Churchman landed approximately \$575.00 worth of groundfish and other fish species. Stipulation ¶ 12.
17. The relevant fishing operations by the F/V PALO were all conducted with set/fixed longline gear. Agency Exhs. 15, 18, 21, 24.
18. On April 18, 2008, Respondent Paasch was interviewed by Special Agent Derek Roy and Special Agent Nicholas Call regarding possible violations of the Magnuson Act. Stipulation ¶ 40.
19. Approximately one to two weeks after the interview of Respondent Paasch, his brother Kenny Paasch contacted Respondent Churchman and informed him that Special Agents from the NOAA Office for Law Enforcement had interviewed Respondent Paasch regarding Magnuson Act violations. Tr. 228:12.
20. Kenny Paasch told Respondent Churchman that Respondent Paasch had been contacted by NOAA enforcement personnel regarding illegal fishing inside the RCA. Tr. 228:14-15; 229:14-18; see also Agency Exh. 6 at p. 3 (Respondent Churchman's statement ("After five fishing trips Ed was contacted by NOAA informing him he was in violation of VMS-RCA, regulations").
21. Respondent Churchman recalled speaking with Kenny Paasch about the meeting NOAA's Special Agents had with Respondent Paasch and that the information Kenny provided was that the RCA coordinates had been changed or were going to be changed. Tr. 205:10-19. Respondent Churchman's recollection of this conversation on the point of the RCA coordinates having been changed or that they were going to be changed in the future is more likely than not mistaken or simply not credible.

22. Respondent Churchman admitted that Kenny Paasch at least implied that the fishing coordinates Respondent Paasch was using was not a “good spot” but still believed that he was not fishing within the RCA. Tr. 205:20-206:15.
23. Respondent Churchman also heard from Kenny Paasch that Respondent Paasch’s meeting with Special Agents Roy and Call “wasn’t pretty” and that Respondent Paasch was “scared” and was “moving his boat.” Tr. 228:12-16.
24. Respondent Churchman claimed that he never saw the coordinates for the RCA Special Agent Roy provided Respondent Paasch and had no knowledge of what Special Agent Roy had provided Respondent Paasch and could not recall calling Respondent Paasch to discuss the matter with him. Tr. 209:9-19; 228:17-25.
25. Respondent Churchman continued to fish in the same spot even after learning from Kenny Paasch about NOAA’s interview with Respondent Paasch. Tr. 210:19-21.
26. On May 20, 2008, Respondent Churchman initiated an e-mail communication with Joanna Grebel, an employee of the California Department of Fish & Game, requesting changes in the Nontrawl RCA coordinates. Stipulation ¶ 14; Agency Exh. 28.
27. Respondent Churchman claimed that he sent Ms. Grebel the email on May 20, 2008 that was directed at changing RCA coordinates in the future to open up more areas in which to fish. Tr. 206:16-18; 209:1-8; Agency Exh. 28. This testimony is rejected as not credible to the extent it was offered to demonstrate that Respondent Churchman as of May 20, 2008 did not know, or reasonably should not have known, that his fishing spots were within the RCA. See also Agency Exh. 6 at p. 3 (Respondent Churchman statement) (“Because of [Respondent Paasch being contacted by NOAA] I contacted Joanna Greble

[sic] . . . to request co-ordinate changes that would allow us to continue fishig [sic] for chillie Pepper.”).

28. Three of Respondent Churchman’s violations occurred after he had sent emails to Ms. Grebel concerning the RCA coordinates. Tr. 44:12-48:15.

29. Respondent Churchman was interviewed by Special Agent Derek Roy and Special Agent Nicholas Call regarding possible violations of the Magnuson Act on July 18, 2008. Stipulation ¶ 18; Tr. 155:11-14.

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

31. During the interview, Respondent Churchman stated that he did not check the RCA boundaries after hearing from Kenny Paasch because he did not want anything to change his fishing spots. Agency Exh. 5 at p. 3; Tr. 39:11-22; 157:20-25; 165:23-166:11. Respondent Churchman’s denial (see Tr. 217:4-10) of having told the Special Agents this is rejected as not credible. Special Agent Call’s report of the interview with Respondent Churchman was not meant to be a verbatim recording of what each party said during that interview, but is instead was a summary of what was said. Tr. at 162:21-163:24.

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

33. Respondent Churchman believed that fishery observers who went on his boat (including on two of the violation dates, i.e., July 9 and July 13, 2008) wrote down the coordinates

where he fished. Tr. 202:1-9; see also Resp. Exh. E (indicating dates observers were on Respondent Churchman's vessel).

34. Respondent Churchman uses the same plotter for both of his fishing vessels, the F/V OSPREY and the F/V PALO. During the interview with Respondent Churchman, the NOAA Special Agents examined the plotter on the F/V OSPREY. Tr. 40:19-41:11.
35. At the time of that interview, Respondent Churchman had the RCA boundary coordinates correctly entered into his plotter, and the fishing spots on his plotter indicated areas within the RCA. Tr. 42:22-43:12; 136:1-137:3.
36. Special Agent Roy received information about Respondent Churchman's possible RCA violations from the VMS staff on April 7, 2008. However, before he had an opportunity to call Respondent Churchman to set up an interview, Special Agent Roy was contacted by Respondent Churchman July 2008. This contact occurred as a result of Respondent Churchman learning that Special Agent Roy had been investigating his fish landings. Tr. 112:18-114:21.
37. Special Agent Roy did not interview Respondent Churchman until approximately three months after interviewing Respondent Paasch because he was gathering more information on some issues he had noticed, i.e., Respondent Churchman's vessel, F/V PALO, had some VMS outages (i.e., was out fishing but was not documented by the VMS staff) and Special Agent Roy had some questions about a landing receipt with no apparent fishing trip associated with that receipt. Tr. 32:1-33:8.
38. Special Agent Roy eventually concluded that Respondent Churchman's VMS unit had not been tampered with and no violation had occurred related to the fish ticket about which he had a question. Tr. 36:12-37:1.

39. Special Agents Roy and Call testified that Respondent Churchman was surprised/shocked when he was informed that he had been fishing within the RCA. Tr. 127:19-25; 167:7-14.
40. Respondent Churchman called Respondent Paasch in early 2008 to invite him to return to fishing for Chilipeppers. This invitation was motivated by a change in the fishery that allowed fisherman to catch 2000 pounds of Chilipeppers and 500 pounds of combined Widow and Boccaccio fish instead of just 100 pounds of Boccaccio. Tr. 203:16-205:2.
41. Respondent Churchman admitted that he knew he was fishing right next to the boundary of the RCA but “just thought that [he] was outside the line”. Tr. 236:10-13.
42. Respondent Churchman characterized the causes of his possible incursions into RCA as a result of drifting. In this regard, he noted that when he reeled in his line, he “no longer can manipulate [his] boat” and the drift was determined by wind and current. Tr. 243:10-21; 244:14-25.
43. Respondent Churchman believed that his two fishing spots allowed him to have “that quarter mile of wiggle room” so that he could drift while he retrieved his fishing lines. Tr. 243:22-25.
44. When shown the VMS schematics by Special Agent Roy, Respondent Churchman stated that he realized he was within the nontrawl RCA and that he had been fishing in that same area for around 20 years and mentioned that if he had been told that he was fishing in the RCA, he would have stopped. Tr. 37:21-38:2.
45. During the relevant dates, Respondent Churchman knew, or should have known, that his specific fishing spots for Chilipepper rockfish were within the RCA, particularly after

learning of Respondent Paasch's interview with the NOAA Special Agents. See generally Agency Exhs. 5 at p. 3, 28; Tr. 39:19; 157:23; 243:21; 244:14.

46. Respondent Churchman was cooperative during Special Agent Roy's interview. Tr. 39:23-25.

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

48. Respondent Churchman has been actively involved in various fishery management and conservation efforts and was nominated as a NOAA volunteer of the year. Tr. 195:12-19; 197:22-24; Resp. Exhs. H, J, K, M.

#### **B. Findings of Fact Regarding Respondent Paasch**

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

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

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

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

53. Before the imposition of the restrictions in the RCA in January 2003, Respondent Paasch stopped fishing in that area for Chilipeppers and fished in other areas due in part to his lack of skill in plotting lines and the fact that he did not trust himself to fish all along a plotted line. Tr. 171:6-20; 183:10-16.

54. Before returning to fish near the RCA, Respondent Paasch received a call from Respondent Churchman telling him that he had been fishing outside the RCA in a couple of spots for Chilipeppers and invited Respondent Paasch to join him in that fishing. Tr. 173:18-174:10; see also Agency Exh. 6 at p. 3.
55. Respondent Paasch then moved his boat from a berth in Richmond, California to Bodega, California and changed his fishing designation from trawl Halibut to Rock Cod fishing so that he could begin fishing for Chilipeppers. Tr. 174:15-20; 175:19-25.
56. Respondent Paasch did not input the coordinates of the RCA into his plotter and relied upon the coordinates given him by Respondent Churchman to conduct his fishing for the Chilipeppers, which Respondent Paasch believed were outside the RCA. Tr. 176:5-177:5; 179:19-20; 183:23-184:6; 188:24-189:14.
57. The coordinates Respondent Churchman gave Respondent Paasch for his fishing spots were just inside the RCA. Tr. 184:17-21.
58. Prior to returning to the fishery, Respondent Paasch did not review the groundfish regulations to determine the boundaries of the RCA. Tr. 184:22-185:12.
59. Respondent Paasch used two specific fishing spots to target Chilipepper rockfish. Stipulation ¶ 41; Tr. 200:12-18. These fishing spots have been within the RCA since the inception of the RCA program in 2003. Agency Exh. 49, 51 (chartlet #2).
60. On or about March 7, 2008, in the Exclusive Economic Zone of the United States at approximately 38° 25.4882N, 123° 34.6124W, Respondent Paasch operated the F/V HAZEL A in a Nontrawl Rockfish Conservation Area (RCA) by fishing with nontrawl fishing gear in violation of 50 C.F.R. 660.306(h)(2). These coordinates are

- approximately .7 miles inside the western boundary of the Nontrawl RCA. Stipulation ¶ 34.
61. As a result of the fishing operations on March 7, 2008, Respondent Paasch landed approximately \$1,372.00 worth of groundfish and other fish species. Stipulation ¶ 35.
62. On or about April 1, 2008, in the Exclusive Economic Zone of the United States at approximately 38° 25.3802N, 123° 34.2425W, Respondent Paasch operated the F/V HAZEL A in a Nontrawl RCA by fishing with nontrawl fishing gear in violation of 50 C.F.R. 660.306(h)(2). These coordinates are approximately .99 miles inside the western boundary of the Nontrawl RCA. Stipulation ¶ 36.
63. As a result of the fishing operations on May 26, 2008, Respondent Paasch landed approximately \$2,382.00 worth of groundfish and other fish species. Stipulation ¶ 37.
64. The relevant fishing operations by the F/V HAZEL A were all conducted with set/fixed longline gear. Agency Exhs. 39, 42.
65. Prior to conducting the relevant fishing operations at issue in this case, Respondent Paasch did not research the RCA boundary coordinates. Tr. 184:25; 186:13.
66. Respondent Paasch was interviewed by Special Agent Derek Roy and Special Agent Nicholas Call regarding possible violations of the Magnuson Act on April 18, 2008. Stipulation ¶ 40.
67. Special Agent Roy prepared a memorandum of his interview with Respondent Paasch, which occurred on April 18, 2008. Tr. 30:4-15; Agency Exh. 35.
68. During the interview, Respondent Paasch acknowledged that he had been fishing in the same area on a number of occasions adjacent to Respondent Churchman. Stipulation ¶ 41.

69. After being shown copies of the applicable regulations and the VMS Schematics showing the location of where Respondent Paasch had been fishing on the dates in question, Respondent Paasch acknowledged that he appears to have been in violation of the regulations. Stipulation ¶ 45.
70. Respondent Paasch admitted to not being very capable with plotting lines and coordinates and relied upon his brother, Kenny Paasch, to input the coordinates in his plotter. Tr. 171:22-172:16.
71. Upon being told that he had been fishing within the RCA by Special Agent Roy, Respondent Paasch shortly thereafter stopped fishing in the Bodega Bay area and moved his boat to Richmond, California. Tr. 177:16-23; 180:2-12.
72. During the interview, Special Agent Roy gave Respondent Paasch the coordinates for the RCA. Tr. 179:4-7.
73. Respondent Paasch then had his brother Kenny input the RCA coordinates into his plotter and they made one trip to fish outside the RCA but caught nothing. Tr. 179:25-180:6.
74. Respondent Paasch would like to return to fish for Red Chilipeppers if the coordinates for the RCA boundaries change. Tr. 181:7-11.
75. Respondent Paasch admitted to receiving public notices from NOAA containing information about the RCA. However he admitted that he only reviewed the trip limit information – and not the coordinate information for the RCA. Tr. 185:22-186:16; see also Agency Exh. 31 (Pacific Coast Groundfish Public Notice dated December 28, 2006).
76. Respondent Paasch did not specifically recall talking with Respondent Churchman after being interviewed by the NOAA Special Agents but assumed that he must have called him. Tr. 190:11-15; 191:18-192:4.

77. Respondent Paasch specifically recalled talking to his brother Kenny about what Special Agent Roy had told him (i.e., the coordinates Respondent Churchman provided were within the RCA) and Respondent Paasch understood that Kenny Paasch had talked to Respondent Churchman. Tr. 190:16-20.

78. Respondent Paasch was cooperative during Special Agent Roy's interview. Tr. 31:16-18.

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

### **C. Findings of Fact Applicable to Both Respondents**

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

Stipulation ¶ 23.

81. The Nontrawl RCA is a Groundfish Conservation Area for purposes of 50 C.F.R. 660.306(h)(2). 50 C.F.R. §660.302 (2008).
82. Special Agent Roy has investigated between 15-20 complaints about illegal operations in the RCA. Tr. 25:6-9.
83. Some of the cases Special Agent Roy investigated resulted in issuance of a verbal or written warning. Tr. 25:14-17.
84. Factors Special Agent Roy considers in evaluating whether such cases merit a verbal or written warning include: distance of the incursion into the RCA (as depicted from the VMS schematic); duration of the incursion; past violations by the same vessel for similar violations or other Magnuson violations; and determining whether fishing activities actually took place in the closed area or if incursions was due to drift or efforts to retrieve fishing gear. Tr. 25: 18-26:9; 56:15-26.
85. Special Agent Roy initiated his investigation into Respondents' possible violations after receiving a referral from the Agency's Vessel Monitoring staff in Seattle, Washington. Special Agent Roy examined the VMS information; obtained information about landings associated with Respondents' respective vessels and had NOAA staff create another schematic of the VMS data to zoom in on the area in which the incursion took place. Tr. 27:4-21.
86. Special Agent Roy interviewed Respondent Paasch first because the Agency had all the position reports for the F/V HAZEL A, the landing receipts obtained from California's fish and game agency matched the trips associated with the VMS data, and the only portion of the investigation to complete at that time was interviewing Respondent Paasch. Tr. 28:5-29:18.

87. Special Agent Roy did not issue Respondents a verbal or written warning for Respondents' violations given the nature of the violations, i.e., actively fishing in the RCA. Tr. 49:12-51:1; 131:13-20.
88. The Agency does not have anything in writing to direct its special agents when to issue a verbal or written warning rather than proceed with enforcement actions, but agents are trained in the use of their discretion and to discuss investigations with the General Counsel's office. Tr. 52:10-20; 54:15-55:8.
89. With his supervisor's approval, Special Agent Roy could have issued a written warning to Respondents rather than refer the case to the Agency's General Counsel's office for enforcement proceedings. Tr. 76:14-77:18.
90. Another individual, Mr. John Mellor, had four separate possible violations of the RCA and Agency regulations and no formal enforcement actions were brought against that individual. Tr. 89:9-94:24; see also Resp. Exh. D (statement of John Mellor).
91. Special Agent Roy distinguished Mr. Mellor's violations from Respondent Paasch by explaining that Mr. Mellor had entered the RCA to obtain a lost crab pot and was not actively fishing and on another occasion by having a nonfunctioning VMS unit while he was in port. Tr. 109:14-110:12; see also Resp. Exhs. V, W, X.
92. The other incidents involving Mr. Mellor were investigated by another Agency Special Agent. Tr. 110:14-22.

#### **IV. Principles of Law**

##### **A. Agency's Burden of Proof**

In order to prevail on the charges instituted against a respondent, the Agency must prove the violations alleged by a preponderance of the evidence. 5 U.S.C. § 556(d); In re Cuong Vo,

2001 WL 1085351 (NOAA 2001). Preponderance of the evidence means the Agency must show it is more likely than not a respondent committed the charged violation. Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983). The Agency may rely on either direct or circumstantial evidence to establish the violation and satisfy the burden of proof. See generally, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764-765 (1984). The burden of producing evidence to rebut or discredit the Agency's evidence will only shift to a respondent after the Agency proves the allegations contained in the NOVA by a preponderance of reliable, probative, substantial, and credible evidence. Steadman v. S.E.C., 450 U.S. 91, 101 (1981).

In this case, Respondents admitted their respective violations. The hearing therefore was limited to determining the appropriate sanction, if any, according to the applicable statutory and regulatory factors. As provided in the recent change to the Agency's regulations, the Agency must justify "that its proposed penalty or permit sanction is appropriate, taking into account all the factors required by applicable law" and no presumption of correctness attaches to NOAA's proposed penalty amount. See 75 Fed. Reg. 3563, 2010 WL 2505213 (June 23, 2010) (amending 15 C.F.R. § 904.204(m) and providing that the undersigned is empowered to assess a sanction de novo in light of applicable law). The Agency designated this change as merely "procedural" and not substantive in nature, which means that it could be applied to pending cases. Pursuant to a stipulation by the parties, the new rule will be applied to this case. See Stipulation ¶ 50.

#### **B. The Charges against Respondents**

The Agency charged Respondents with violating the Magnuson Act and the Agency's implementing regulations by operating a vessel registered to a limited entry permit with a

longline gear endorsement in a nontrawl RCA contrary to 16 U.S.C. § 1857(1)(A) and 50 C.F.R. § 660.306(h)(2).<sup>5</sup>

The Magnuson Act provides that it is unlawful for any person “to violate any provision of this chapter or any regulation or permit issued pursuant to this chapter[.]” 16 U.S.C. § 1857(1)(A). While scienter is not a required element to find a violation of the Magnuson Act (see Northern Wind, Inc. v. Daley, 200 F.3d 13, 19 (1st Cir. 1999)), a respondent’s intent/culpability is a relevant factor to determine an appropriate sanction. See 16 U.S.C. § 1858(a) (“In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require.”); 15 C.F.R. § 904.108(a) (listing factors to be considered in assessing an appropriate civil penalty, including a respondent’s culpability).

At the time of Respondents’ violations, Agency regulations for the (PCGF) were codified at 50 C.F.R. Part 660, Subpart G. The regulations at issue in 2008 made it unlawful to:

Operate any vessel registered to a limited entry permit with a longline or trap (pot) endorsement and longline and/or trap gear onboard in an applicable GCA (as defined at § 660.382(c)), except for purposes of continuous transiting, with all groundfish longline and/or trap gear stowed in accordance with § 660.382(c) or except as authorized in the groundfish management measures at § 660.382.

50 C.F.R. § 660.306(h)(2) (2008).

## V. Analysis of the Violations

By stipulation, both Respondents admitted the fact of violation. Specifically, Respondent

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<sup>5</sup> On October 1, 2010, the Agency restructured the entire Pacific Coast Groundfish Fishery (PCGF) regulations at 50 C.F.R. Part 660 from one subpart (i.e., Subpart G) to five subparts (Subparts C-G). See 75 Fed. Reg. 60868, 2010 WL 3811432 (October 1, 2010).

Churchman admitted that he violated 50 C.F.R. §660.306(h)(2) by unlawfully fishing within the RCA on four separate occasions. See Stipulation at ¶¶ 5, 7, 9, 11, and 13. Respondent Paasch admitted that he violated that regulation on two separate occasions. Id. at ¶¶ 34, 36, and 38.

The hearing thus concerned discussion and presentation of evidence concerning the facts of these violations, with Respondents arguing that the violations were inadvertent and did not merit the imposition of a monetary sanction. Indeed, Respondents contention throughout the hearing was that Agency policy and practice called for the Agency to issue a warning to Respondents rather than bring enforcement actions. Agency counsel argued that given the facts of the violations, significant monetary sanctions were warranted, particularly against Respondent Churchman, whom the Agency argued was more culpable. Respondents' various arguments will be addressed in the analysis of the proper sanction amount for the admitted violations.

## **VI. Ultimate Findings of Fact and Conclusions of Law**

1. Both Respondent Churchman and Respondent Paasch are persons subject to the jurisdiction of the Magnuson Act. Stipulation ¶¶ 1, 30.
2. It is unlawful under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act) for any person to violate "any regulation or permit issued pursuant to this Act." 16 U.S.C. §1857(1)(A).
3. The regulations for the Pacific Coast Groundfish Fishery make it unlawful for any person to operate any vessel registered to a limited entry permit with a longline or trap (pot) endorsement and longline and/or trap gear onboard in an applicable Groundfish Conservation Area, except for purposes of continuous transiting, . . . or except as authorized in the annual or biennial groundfish management measures at §660.382. 50 C.F.R. 660.306(h)(2) (2008).

4. On May 16, 2008, Respondent Churchman violated the Magnuson Act (16 U.S.C. § 1857(1)(A)) and regulations there under (50 C.F.R. § 660.(h)(2)) by operating a vessel registered to a limited entry permit with a longline or trap(pot) endorsement and longline and/or trap gear on board in an applicable Groundfish Conservation Area.
5. On May 26, 2008, Respondent Churchman violated the Magnuson Act (16 U.S.C. § 1857(1)(A)) and regulations there under (50 C.F.R. § 660.(h)(2)) by operating a vessel registered to a limited entry permit with a longline or trap(pot) endorsement and longline and/or trap gear on board in an applicable Groundfish Conservation Area.
6. On May 28, 2008, Respondent Churchman violated the Magnuson Act (16 U.S.C. § 1857(1)(A)) and regulations there under (50 C.F.R. § 660.(h)(2)) by operating a vessel registered to a limited entry permit with a longline or trap(pot) endorsement and longline and/or trap gear on board in an applicable Groundfish Conservation Area.
7. On July 13, 2008, Respondent Churchman violated the Magnuson Act (16 U.S.C. § 1857(1)(A)) and regulations there under (50 C.F.R. § 660.(h)(2)) by operating a vessel registered to a limited entry permit with a longline or trap(pot) endorsement and longline and/or trap gear on board in an applicable Groundfish Conservation Area.
8. On March 7, 2008, Respondent Paasch violated the Magnuson Act (16 U.S.C. § 1857(1)(A)) and regulations there under (50 C.F.R. § 660.(h)(2)) by operating a vessel registered to a limited entry permit with a longline or trap(pot) endorsement and longline and/or trap gear on board in an applicable Groundfish Conservation Area.
9. On April 1, 2008, Respondent Paasch violated the Magnuson Act (16 U.S.C. § 1857(1)(A)) and regulations there under (50 C.F.R. § 660.(h)(2)) by operating a vessel registered to a limited entry permit with a longline or trap(pot) endorsement and longline

and/or trap gear on board in an applicable Groundfish Conservation Area.

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

## VII. Consideration of Penalty Assessment

In assessing a penalty, the undersigned considered each of the factors required by law.

“Factors to be taken into account in assessing a penalty . . . may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent’s degree of culpability, any history of prior violations . . . and such other matters as justice may require.” 15 C.F.R. § 904.108(a). See also 16 U.S.C. § 1858(a) (same factors to be considered).

In the respective NOVAs, the Agency assessed penalties in the amounts of \$35,786.00 against Respondent Churchman and \$13,754.00 against Respondent Paasch. NOAA based these proposed penalties on the fair market value of Respondents’ illegal catch (i.e., \$5,786.00 for Respondent Churchman and \$3,754.00 for Respondent Paasch). Additionally, the Agency assessed additional amounts of \$5,000.00 per charge for Respondent Paasch (i.e., an additional \$10,000.00 total) and \$7,500.00 per charge for Respondent Churchman (i.e., an additional \$30,000.00 total).

The Agency’s published penalty schedule recommends a monetary sanction of \$5,000-\$20,000 for each violation, plus the forfeiture or the fair market value of the fish. See Agency Exh. 47.<sup>6</sup> As the Agency acknowledged in its PPIPs and briefing, a sanction on the lower end of

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<sup>6</sup> Part of the rationale for the Agency’s proposed penalty in its NOVAs being presumed correct under the prior version of Section 904.204(m) was in no small part due to the Agency’s expertise in generating such penalty schedules. See In re Verna, 4 O.R.W. 64, 64-65 (NOAA App. 1985). Given this background, the undersigned will look to the Agency’s published penalty schedules to understand what the Agency believes are appropriate sanctions for various violations but will not presume such amounts are correct or appropriate under the particular circumstances of a given case and will impose a sanction based upon the applicable statute, regulations and law as revised Section 904.204(m) directs.

the scale is warranted in this case. The Agency nevertheless sought a sanction 3.8 times the gross value of the illegal catch in Respondent Paasch's case and 7.5 times the gross value of the illegal catch in Respondent Churchman's case. See Agency Post Hearing Brief at p. 33, n. 8. The Agency argued that the more substantial sanction against Respondent Churchman was warranted given certain alleged aggravating factors of his case.

As fully discussed in the following sections, the undersigned finds that a sanction lower than what the Agency sought against each Respondent is proper. These reductions are based on balancing several aggravating and mitigating factors relative to each Respondent. Aggravating factors applicable to Respondent Churchman's violations include: (1) his less than credible explanations for his behavior, especially his attempted dismissal of the emails to Ms. Grebel; (2) his continued fishing in the RCA without ensuring he was in compliance after hearing of Respondent Paasch's encounters with NOAA Special Agents; and (3) his fishing close to the RCA line when he knew that uncontrolled drift could very well carry him into the RCA. Mitigating factors applicable to Respondent Churchman's violations include: (1) an extensive and commendable history in marine fishery conservation efforts; (2) the fact that neither the NOAA-contracted observers nor the Agency informed him about his fishing locations within the RCA despite the fact that such information was readily available;<sup>7</sup> (3) his cooperation during the investigation; (4) lack of any prior violations; and (5) relatively small scale of his fishing operations as a independent longline fisherman.

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<sup>7</sup> This is a minor mitigating factor and in no way excuses his violations. To be clear, neither the government nor its employees/observers are under any obligation to inform fishermen of facts that they are duty-bound to determine for themselves.

The aggravating factor applicable to Respondent Paasch's violations is his failure to independently check the relevant regulations concerning the RCA boundaries prior to returning to the fishery. Mitigating factors applicable to Respondent Paasch's violations include: (1) his misguided reliance upon Respondent Churchman's fishing history and coordinates for fishing spots, which reflects no intention to violate the RCA regulations; (2) his cooperation during the investigation; (3) lack of any prior violations; and (4) relatively small scale of his fishing operations as a independent longline fisherman.

#### **A. The Nature, Circumstances, Extent and Gravity of the Violations**

Respondents' violations involve multiple acts of actual fishing within a closed area. Such actions represent serious violations with respect to the Agency's fishery management plans and conservation efforts. Respondents were unlawfully taking advantage of a marine resource within an area that the Agency had lawfully determined should be closed to any such activity. As Special Agent Roy explained, the Agency generally considers actual fishing within a closed area a much more serious infraction than some other less harmful actions that might be taken in a closed area. See, e.g., Tr. 26:5-9; 49:25-50:14.<sup>8</sup>

##### **1. Respondent Churchman's Violations**

On four separate occasions, Respondent Churchman violated 50 C.F.R. §660.306(h)(2) by unlawfully fishing within the RCA with incursions of approximately .87, .84, 1.44, and .5 miles inside the RCA. Stipulation ¶¶ 5, 7, 9, 11. These incursions resulted in Respondent Churchman unlawfully taking a total of \$5,786.00 fish from the RCA. Id. at ¶¶ 6, 8, 10, 12.

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<sup>8</sup> See also Agency PPIP (Churchman) at p. 3 ("Because RCAs protect overfished species and are a key component in the Agency's efforts to prevent overfishing and rebuild overfished stocks, violations within RCAs area are a top priority for NOAA").

Respondent Churchman argued that his incursions were inadvertent in that he believed that he was not within the RCA on the dates he violated the Magnuson Act. See Respondents' Post Hearing Brief at 2. Respondent Churchman also contended that immediately upon being contacted by NOAA representatives and shown the VMS data that established the incursions had occurred, he stopped fishing in the RCA. Id.

Respondent Churchman argued that his determination that he was not within the RCA was reasonable based on the following:

- He had been fishing in the same spots since 2003, when the boundaries of the RCA were established, and although his locations were constantly reported to NOAA through the VMS system, he had never been notified by NOAA that he was within the RCA until July 18, 2008. See Tr. at 206:7-14; 210:24-211:13; Stipulation ¶¶ 19, 24, 29; Agency Exh. 6.
- On four separate occasions between July 20, 2006 and July 13, 2008, Respondent Churchman had observers on his vessel from the NOAA Groundfish Observer Program. Stipulation, ¶¶ 26, 27. Respondent Churchman claimed that although the observers noted each spot that he fished in, no one from the Observer Program or from NOAA informed him that he was within the RCA, which led him reasonably to conclude that he was not in violation of the applicable regulations. See Tr. 201:13-202:9, 237:17-238:6; Stipulation, ¶¶ 28, 29.
- Respondent Churchman was aware that other fishermen who had been in violation of the same regulations had received verbal warnings of their violations, and he reasonably concluded that he would have received the same warning if he had been in such violation. Tr. 241:15-242:1; 254:14-255:23.

Respondent Churchman's contentions concerning the reasonableness of his actions cannot, as a matter of law, excuse his violations. Nevertheless, these facts do serve as modest mitigating factors as they do tend to explain why Respondent Churchman may not have ensured his compliance with the applicable RCA regulations. However, when considering all of the record evidence, these mitigating factors cannot rise to a level justifying a major reduction in the proposed sanction.

Indeed, the record evidence clearly demonstrates at best a willful disregard for complying with the lawful boundaries of the RCA. For example, Respondent Churchman did not use anything but his hand-plotted nautical chart to inform him whether his two fishing spots were either inside or outside the RCA boundaries, despite the availability of the coordinates on his electronic GPS/plotter unit. See Tr. 42:22-43:12; 136:1-137:3; 200:1-9; 200:19-201:8; 218:4-219:23; Agency Exhs. 8, 10, 12. Furthermore, even crediting Respondent Churchman's belief that he thought his two fishing spots were outside the RCA boundaries based upon his initial plotting of the boundaries in 2003 (which they were not – see Agency Exhs. 49, 51), he admitted that he fished right along the line of the RCA boundary. Tr. 235:10-13. This fishing along the RCA line with the gear deployed was reckless in that he knew that drift could very easily take him across the RCA boundary line while he was reeling in his fishing lines. Tr. 243:10-21; 244:14-25; 243:22-25. Nevertheless, Respondent Churchman failed to confirm that he actually was not fishing outside the RCA even in the face of this admitted fact that he knew drift could take him over the RCA line.

Furthermore, three of the four admitted violations occurred after Respondent Paasch had been interviewed by NOAA Special Agent and told that he had been fishing within the RCA. Tr. 44:12-48:15. It is inconceivable that this information did not get passed on to Respondent

Churchman either directly from Respondent Paasch himself or Kenny Paasch. See Tr. 228:12; 228:14-15; 229:16. Respondent Churchman’s recollection that Kenny Paasch told him that the RCA lines had been changed (which they had not) or were in the process of changing is more likely than not mistaken or simply not credible (see Tr. 205: 10-19).

Respondent Churchman admitted that he talked to Kenny Paasch and knew that Respondent Paasch had been interviewed, was “scared” and had taken his boat back to Richmond and that the fishing spots, which Respondent Churchman had provided, were “not good” – i.e., inside the RCA. Tr. 205:20-206:5; 228:12-16. Given that Respondent Paasch was: (1) invited to return to the fishery by Respondent Churchman (see Tr. 173:18-174:10); (2) provided fishing coordinates by Respondent Churchman (see Tr. 176:5-177:5; 179:19-20; 188:24-189:14); and (3) told by NOAA that he had been fishing illegally, it is at best foolhardy –if not a willful act of maintaining one’s ignorance – for Respondent Churchman to have failed to take it upon himself to ensure that he was not fishing inside the RCA boundaries.

Instead of checking to make sure he was fishing legally, Respondent Churchman engaged in an email exchange with Ms. Grebel of California Department of Fish and Game. Stipulation ¶ 14; Agency Exh. 28. While Respondent Churchman claimed these emails were directed toward making future changes to the RCA boundaries (see Tr. 206:16-18; 209:1-8), this email exchange evinces an awareness that there is at least a potential – if not a very real – likelihood that he too was facing an “enforcement nightmare” if he continued to fish in his traditional fishing spots. The language of the emails lends itself to this interpretation rather than Respondent’s Churchman’s ex post facto attempts to explain what he meant. See Agency Exh. 28 (admitting that he and Respondent Paasch were “fishing side by side” and asking if there is a way to change the lines “to ease these enforcement concerns” with the incidental effect of reducing the take of

Boccacio); see also Agency Exh. 6 at p. 3 (Respondent Churchman statement) (“Because of [Respondent Paasch being contacted by NOAA] I contacted Joanna Greble [sic] . . . to request co-ordinate changes that would allow us to continue fishig [sic] for chillie Pepper”).

Not checking the boundaries of the RCA to ensure his own compliance at this point is inexplicable and reflects at minimum a willful maintenance of ignorance in the face of an unwelcome reality. Indeed, the undersigned finds it more likely than not that Respondent Churchman, in effect, admitted the maintenance of such willful ignorance during the course of the interview with the NOAA Special Agents by stating that he did not want to actually check the RCA coordinates for fear of it changing his fishing spots. See Agency Exh. 5 at p. 3; Tr. 39:11-22; 157:23; 165:23-166:11.

While the undersigned is not willing, based on the record evidence, to find that Respondent Churchman affirmatively knew at all times he was illegally fishing in the RCA, it is clearly more likely than not that he knew, or at the very least should have known, that he was fishing illegally, particularly after hearing about Respondent Paasch’s interview with NOAA Special Agents.

## **2. Respondent Paasch’s Violations**

On two separate occasions, Respondent Paasch violated 50 C.F.R. §660.306(h)(2) by unlawfully fishing within the RCA with incursions of approximately .7 and .99 miles inside the RCA. Stipulation ¶¶ 34, 36. These incursions resulted in Respondent Paasch unlawfully taking a total of \$3,754.00 fish from the RCA. Id. at ¶¶ 35, 37.

Respondent Paasch also argued that his incursions into the RCA were inadvertent in that he had returned to the fishery at the invitation of Respondent Churchman and had relied upon coordinates for fishing Churchman had given him. See Tr. 176:5-177:5; 179:19-20; 183:22-

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

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

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

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

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

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

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

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

**a) NOAA Enforcement Selection**

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

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

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

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

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

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

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

**b) Issuance of Verbal or Written Warnings**

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

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

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

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

**c) Alleged Detrimental Delay in Bringing Charges against Respondent Churchman**

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

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

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

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

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

**B. Respondents' Degree of Culpability**

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

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

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

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

### **C. Respondents' Prior Offenses**

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

### **D. Other Matters As Justice Requires**

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

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

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

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

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

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

#### **E. The Appropriate Monetary Sanction Amount**

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

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

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

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

#### **VIII. Order**

##### **WHEREFORE:**

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

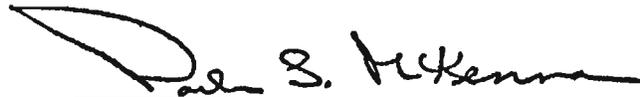
**PLEASE BE ADVISED** that a failure to pay the penalty within thirty (30) days from the date on which this decision becomes final Agency action will result in interest being charged at the rate specified by the United States Treasury regulations and an assessment of charges to cover the cost of processing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

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

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

**IT IS SO ORDERED.**

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



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

## ATTACHMENT A: LIST OF WITNESSES AND EXHIBITS<sup>12</sup>

### **Agency Witnesses**

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

### **Respondents' Witnesses**

1. Josh Churchman
2. Edward Paasch

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

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

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

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

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

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

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

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

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

A) Proposed Findings of Facts For Josh W. Churchman

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

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

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

**RULING: Accepted and Incorporated.**

B) Proposed Conclusions of Law for Josh W. Churchman

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

C) Proposed Findings of Facts For Edward T. Paasch

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

D) Proposed Conclusions of Law for Edward T. Paasch

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

***Respondents’ Proposed Findings of Fact and Conclusions of Law:***

A. Findings of Fact.

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

**RULING: Accepted and Incorporated.**

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

**RULING: Accepted and Incorporated.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**RULING: Accepted and Incorporated.**

B. Conclusions of Law

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

**RULING: Accepted and Incorporated.**

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

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

3. Respondents' violations were not egregious.

**RULING: Rejected.**

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

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

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

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

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

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

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

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

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

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

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

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

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

**ATTACHMENT C: CORRECTIONS TO THE HEARING TRANSCRIPT**

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

**ATTACHMENT D: PROCEDURES GOVERNING ADMINISTRATIVE REVIEW**

49 C.F.R. § 904.273

Administrative review of decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective date 150 days after the petition is served.

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

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

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review;

except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

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

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

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

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

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

Certificate of Service

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

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

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