NMA REPORT #R-459

DATE: April 2011

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UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE

# REPORT AND RECOMMENDATION OF THE SPECIAL MASTER CONCERNING NOAA ENFORCEMENT ACTION OF CERTAIN DESIGNATED CASES
## April 2011

**Hon. Charles B. Swartwood, III (ret.)**
**Special_Master**
**JAMS**
**One_Beacon Street**
**Boston, Massachusetts 02108**

**And**
**Petia I. Loukova Iannicelli, Esq.**
**Tony K.Lu, Esq.**
**Assistants**

CONFIDENTIAL

UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE

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## SCOPE OF THE INVESTIGATION

In June 2009, the Under Secretary of Commerce for Oceans and Atmosphere and National Oceanic and Atmospheric Administration ("NOAA") requested that the Commerce Department's Office of Inspector General ("OIG") conduct an investigation of complaints from various individuals in the fishing industry that NOAA's Office of Law Enforcement ("OLE") and Office of General Counsel for Enforcement and Litigation (GCEL) were engaged in prosecutorial misconduct. The OIG conducted an extensive investigation which resulted in its September 2010 Report that identified numerous cases which it concluded were appropriate for further review.

On September 23, 2010, Secretary Locke issued a Secretarial Decision Memorandum appointing me as Special Master to review the cases previously identified by the OIG to determine whether any of them involved conduct by NOAA personnel that had unfairly affected the outcome of a particular case. EX1, Secretarial Decision Memorandum (Sept. 23, 2010). The standard of review in determining misconduct by NOAA personnel was to be by clear and convincing evidence. Following a review and evaluation of each case, I have been instructed to make a recommendation to Secretary Locke as to whether any penalties should be modified or remitted. Secretary Locke reserved for himself the ultimate authority and discretion to make a determination based on my recommendations. Pursuant to Section 308(e) of the Magnuson-Stevens Fishery Conservation and Management Act, the Secretary has the authority to "compromise, modify, or remit, with or without conditions, any civil penalty which is subject to imposition or which has been imposed under this section." 16 U.S.C. §1858 (2007) ("Magnuson-Stevens Act")

In his September 23, 2010 Memorandum, Secretary Locke provided guidance by way of examples of inappropriate conduct by NOAA employees:

a. Abuses of process, including vindictive prosecution or other prosecution in bad faith, and unreasonable delay that prejudices the defense of the case;

b. Abusive conduct that amounts to coercion, intimidation, or outrageous behavior; and

c. Presenting false evidence or misleading evidence or other conduct that impacts the truth of the case presented.

Supra, EX1.

These examples are not the only types of conduct to be reviewed. As a result of my investigation, I have found conduct that does not exactly fit the examples above but which amounted to overzealous, abusive or arbitrary conduct by NOAA personnel which unfairly impacted the outcome of several of the reviewed cases. Some of the inappropriate conduct which I have uncovered during my investigation was not known to the OIG when it concluded its investigation.

In determining whether to recommend modification or remission of any penalty, I have been instructed by the Secretary to consider the following facts:

1. Seriousness of the conduct engaged in by any NOAA personnel;

2. The impact of that conduct on the outcome of the case;

3. The type and amount of the assessed penalty;

4. The factors enumerated in Section 308(a) of the Magnuson-Stevens Act and the regulations promulgated thereunder for determining assessed penalties; and

5. Other factors that the Special Master deems appropriate for determining the amount of the assessed penalty.

Id.

Of the original nineteen (19) complaints identified by the OIG for further review, only eighteen (18) of those cases (case nos. 1-4, 6-9, 15-17, 19-22, 24, 26-27) were actually sent to me for review. The principals involved in one of the nineteen (19) cases elected not to have their case reviewed by me as Special Master. These original eighteen (18) cases are generally described by the OIG in its September 2010 Report. There were an additional one hundred four (104) cases which were preliminarily reviewed by the OIG but not discussed in its September 2010 Report. On January 25, 2011, Secretary Locke issued a second Secretarial Decision Memorandum concerning these one hundred and four (104) cases. EX2, Secretarial Decision Memorandum (Jan. 25, 2011). Secretary Locke stated in that Memorandum that the OIG had provided him with the identities of all one hundred and four (104) complainants and that seventy-eight (78) complainants had not agreed to waive confidentiality in order to have their cases reviewed. Id. Of the remaining twenty-six (26) cases, Secretary Locke determined that thirteen (13) cases were appropriate for further review. On or about January 25, 2011, I received these thirteen (13) cases for a total of thirty-one (31) cases for me to review.

**THE INVESTIGATION**

First, my assistants and I reviewed the OIG investigative files for the original eighteen (18) cases. These case files were contained in nine (9), four inch (4'') file folders. The OIG investigative files for the second thirteen (13) cases were contained in two (2) two inch (2'') files. In addition to reviewing these case files, we reviewed transcripts of deposed witnesses in cases filed with an Administrative Law Judge (ALJ) or the United States District Court and of OIG witness interviews. Many of these deposition or witness transcripts were of NOAA personnel.

Second, we reviewed NOAA case files for all thirty-one (31) cases. Some of these case files contained multiple boxes of documents. From these files, we created duplicate case files of relevant NOAA documents not previously found in the OIG files. Third, we reviewed documents provided by complainants. I estimate that my assistants and I have reviewed in excess of one hundred thousand (100,000) documents. Any documents referred to in this report will be included as an exhibit in a separate binder. After the document review, I interviewed the following seventy-five (75) individuals, which included complainants, NOAA personnel and witnesses with relevant information:

| **NOAA EMPLOYEES** | **TITLE** | **DATE INTERVIEWED** |
|---|---|---|
| 1. Kenneth A. Crossman, Jr. | Retired OLE Special Agent | November 15, 2010 |
| 2. Lois Schiffer | NOAA General Counsel | December 6, 2010 |
| 3. Daniel D'Ambruoso | OLE Special Agent | February 28, 2011 |
| 4. Michael Robert Henry | OLE Special Agent | February 28, 2011 |
| 5. Mark Micele | OLE Deputy Special Agent in Charge | February 28, 2011 |
| 6. Susan Williams | OLE Assistant Special Agent in Charge | February 28, 2011 |
| 7. Guido (Gino) Moro | OLE Special Agent | February 28, 2011, March 21, 2011 |
| 8. Joseph Green | Coast Guard Agent, former OLE Special Agent | March 7, 2011 |
| 9. Joseph D'Amato | OLE Special Agent | March 7, 2011 |
| 10. Christopher McCarron | OLE Special Agent | March 7, 2011 |
| 11. Shawn Eusebio | OLE Special Agent | March 7, 2011 |
| 12. Kevin Flanagan | OLE Special Agent | March 7, 2011 |
| 13. Carol Bleszinski | VMS Technician | March 9, 2011 |
| 14. J. Mitchell MacDonald | NOAA Enforcement Attorney | March 14, 2011 |
| 15. Deirdre L. Casey | NOAA Enforcement Attorney | March 14, 2011 |
| 16. Charles R. Juliand | NOAA Enforcement Attorney | March 14, 2011 |
| 17. Alexa Cole | NOAA Enforcement Attorney | March 16, 2011 |
| 18. Neil B. Moeller | NOAA Enforcement Attorney | March 17, 2011 |
| 19. Douglas Christel | NOAA Policy Analyst | March 21, 2011 |
| 20. R. Logan Gregory | OLE Special Agent | March 22, 2011 |
| 21. Mitchel Fong | OLE Special Agent | March 22, 2011 |

| | | |
|---|---|---|
| 22. Todd Dubois | OLE Assistant Director for Operations | March 22, 2011 |
| 23. John Barylsky | OLE Assistant Special Agent in Charge, NOAA Pacific Region, Honolulu, HI | March 22, 2011 |
| 24. Patricia Kurkul | NOAA Northeast Regional Administrator | March 22, 2011 |
| | | |
| **FISHING INDUSTRY** | **TITLE** | **DATE INTERVIEWED** |
| 25. [redacted] | Witness | December 2, 2010 |
| 26. [redacted] | Owner, Intershell International Corporation (Dealer) | December 2, 2010 |
| 27. Augustus (Gus) Ciulla | Owner, Gloucester Seafood Display Auction (Dealer) | December 2, 2010 |
| 28. Rosemarie Cranston | Owner, Gloucester Seafood Display Auction (Dealer) | December 2, 2010 |
| 29. Rose Ciulla | Owner, Gloucester Seafood Display Auction (Dealer) | December 2, 2010 |
| 30. [redacted] | GSDA Tunnel Manager | December 2, 2010 |
| 31. [redacted] | GSDA Book Keeper | December 2, 2010 |
| 32. Billie Lee | Retired fisherman | December 7, 2010 |
| 33. [redacted] | Fisherman | December 7, 2010 |
| 34. Edward Boynton | Retired fisherman | December 7, 2010 |
| 35. Edward Smith | Fisherman | December 7, 2010 |
| 36. Mark Carroll | Fisherman | December 7, 2010 |
| 37. Paul Theriault | Fisherman | December 7, 2010 |
| 38. Richard Burgess | Fisherman | December 7, 2010 |
| 39. Lawrence (Larry) Ciulla | Owner, Gloucester Seafood Display Auction (Dealer) | December 8, 2010 |
| 40. [redacted] | President & CEO, Ocean Crest Seafood, Inc. (Dealer) | December 8, 2010 |
| 41. Lawrence (Larry) Yacubian | Retired Fisherman | December 14, 2010 |
| 42. Michael Joseph Anderson | Fisherman | December 16, 2010 |
| 43. Allyson Jordan | Fisherman | December 20, 2010 |
| 44. [redacted] | President, Whaling City Seafood Display Auction (Dealer) | January 17, 2011 |
| 45. [redacted] | Vice President, Whaling City Seafood Display Auction (Dealer) | January 17, 2011 |

| | | |
|---|---|---|
| 46. Thomas Morrison | Fisherman | January 26, 2011 |
| 47. William Callaway | Fisherman | January 26, 2011 |
| 48. [redacted] | Fisherman | February 10, 2011 |
| 49. Scott Swicker | Fisherman | February 10, 2011 |
| 50. Authur Sawyer | Fisherman | February 10, 2011 |
| 51. James Kendall | Retired Fisherman | February 14, 2011 |
| 52. Rodney Avila | Fisherman | February 14, 2011 |
| 53. James Ruhle | Fisherman | February 15, 2011 |
| 54. Sherrill Styron | Owner, Garland Seafood Co. (Dealer) | February 22, 2011 |
| 55. James Fletcher | Fisherman Representative | February 23, 2011 |
| 56. James Ansara | Part-time Fisherman | February 24, 2011 |
| 57. James Davis Gillikin | Fisherman/Dealer | February 24, 2011 |
| 58. Bruce Stiller | Fisherman | February 25, 2011 |
| 59. Marc Gonsalves | Fisherman | March 7, 2011 |
| 60. Jeffrey Aiken | Owner, Janet W. Whitbeck, Inc., d/b/a Jeffrey's Seafood (Dealer) | March 9, 2011 |
| 61. Thomas Kokell | Fisherman | March 9, 2011 |
| 62. Mark Agger | Owner, Agger Fish Corp. (Dealer) | March 10, 2011 |
| 63. Victor J. Lubiejewski | Fisherman | March 16, 2011 |
| 64. [redacted] | GSDA Employee | March 21, 2011 |
| 65. David Fyrberg | Fisherman/Dealer | March 21, 2011 |
| | | |
| **Massachusetts Environmental Police** | **Title** | **Date Interviewed** |
| 66. Peter Hanlon | Former Captain, Massachusetts Environmental Police | November 20, 2010 |
| 67. [redacted] | Retired Major, Massachusetts Environmental Police | March 24, 2011 |
| | | |
| **LAWYERS** | **AFFILIATION** | **DATE INTERVIEWED** |
| 68. Ann-Margaret Ferrante | Partner, Kiely & Ferrante/MA State Representative | December 2, 2010 |
| 69. Stephen Ouellette | Ouellette & Smith | December 7, 2010 |
| 70. Pamela LaFreniere | Attorney and Counselor at Law | December 14, 2010 |
| 71. [redacted] | Assistant United States Attorney, Department of Justice, (D. Mass) | January 14, 2011 |

| | | |
|---|---|---|
| 72. Paul Muniz* | Partner, Burns & Levinson LLP | March 24, 2011 |
| 73. Eldon Greenberg | Garvey Schubert Barer | April 6, 2011 |
| **UNAVAILABLE WITNESS** | **TITLE** | |
| 74. Patrick Flynn | OLE Special Agent | |
| 75. Andrew Cohen | Former Special Agent in Charge | |

Every interview was under oath and recorded. The original recorded interviews have been transferred to USB drives and will be returned to the Commerce Department with the OIG files and my individual case files. I have made summaries of these interviews and any summary that has been referred to in the Report, has been included as an exhibit.

In order for anyone not familiar with the acronyms commonly known and used in the fishing industry to be able to understand this Report, s(he) will need to know the meaning of each acronym referred to and not specifically identified in the text of this Report. Those acronyms are as follows:

AIW – Administrative Inspection Warrant

ALJ – Administrative Law Judge, assigned to the United States Coast Guard

ASAC – Assistant Special Agent in Charge

DAS – Days at Sea

DSAC – Deputy Special Agent in Charge

EA – Enforcement Attorney

EAR – Enforcement Action Report

ET – Enforcement Technician

FMC – Fisheries Management Council

FV – Fishing Vessel

FVTR – Fishing Vessel Trip Report

GCEL – General Counsel for Enforcement and Litigation

GOM – Gulf of Maine

GSDA – Gloucester Seafood Display Auction

LOA – Letter of Authorization

MSA – Magnuson-Stevens Act

NMFS – National Marine Fisheries Service

NOAA – National Oceanic and Atmospheric Administration

NOVA – Notice of Violation and Assessment

NOPS – Notice of Permit Sanction

OIG – Office of Inspector General

OIR – Offense Investigation Report

OLE – Office of Law Enforcement

SA – Special Agent

SAC – Special Agent in Charge

VMS – Vessel Monitoring System

YTF – Yellow Tail Flounder

**FINDINGS OF FACT, CONCLUSION AND RECOMMENDATION**

I have divided the discussion of each case reviewed into three sections: Findings of Fact, a Conclusion, and a Recommendation. In the Findings of Fact section, I discuss the facts relevant to the complaint reported and discussed by the OIG. In the Conclusion section, I summarize the findings as they relate to the complaint and finally, based on the findings and

conclusions, I have made a Recommendation to the Secretary as to whether relief should be granted and if so, the amount or form of such relief.

**CREDIBILITY**

This investigation is not an adversarial proceeding. Although I may have prodded some interviewees for answers to specific questions, I treated these interviews as a quest for information in which I allowed each person interviewed to confirm and deny allegations of fact made by others. Since this was not an adversarial proceeding in the classic sense, where each of the witnesses would be subject to direct and cross-examination before a finder of fact, there were many instances where I could not conclusively verify which version of certain conversations or events were more likely true than not true. However, in some cases, because of other corroborating testimonial or documentary evidence, I was able to make determinations of credibility. In those cases, I have made specific reference to the corroborating evidence that assisted me in making determinations of a witness' credibility.

**FORMAT OF REPORT**

Each case is discussed in the order assigned by the OIG, except in one or two instances, where the claimants are the same in more than one of the cases and the findings of fact are capable of resolving both cases. In those instances, I have combined them into one consecutive discussion of each case even though the case numbers may be out of sequence. For example, Edward E. Smith has made two separate complaints (case Nos. 6 and 16). I have discussed his first complaint (case No. 6) in sequence followed by a discussion of his second complaint (case No. 16) out of sequence.

In Appendix A to the OIG's September 2010 Final report, there is a description of each case that the OIG has recommended as appropriate for further review. I have italicized and incorporated those descriptions as a prologue to each case discussed by me in this Report. For those cases not included in the OIG's September 2010 Final report, I have authored and italicized the prologues to those cases.

**CASE 1: AFFIDAVIT IN SUPPORT OF ADMINISTRATIVE SEARCH WARRANT**

*In its report, the OIG confirmed an allegation that an OLE agent's affidavit for issuance of an Administrative Inspection Warrant for a fish dealer's records contained false information. (The warrant was executed in December 2006). While we did not find evidence of willful falsification by the agent, the affidavit nonetheless was relied upon by a Federal Magistrate to issue an Administrative Inspection Warrant, which was subsequently executed by NOAA Office for Law Enforcement (OLE). During execution of the warrant documents were seized, which led to charges against the dealer and fishermen who used the facility. We concluded the inaccurate information resulted from a flawed database used by NOAA. We further found that the agent had intended to use a demand letter for records, which is consistent with a civil regulatory enforcement approach, and did not believe an inspection warrant was necessary, which is generally more consistent with a law enforcement approach. OLE management and/or NOAA's Office of General Counsel for Enforcement Litigation (GCEL) did not agree with the agent, instead directing that a warrant be obtained.* (OIG Description of Case, September 2010 Report).

**I. Findings of Fact**

Michael Robert Henry is an NMFS OLE Special Agent headquartered in Chelsea, MA. He joined OLE in 2002 starting in New Jersey and transferring to the Chelsea office in 2005. SA Henry's law enforcement experience prior to joining OLE includes four (4) years as a US Border Patrol Agent stationed in El Centro, California.

In early 2006, both DSAC Mark Micele and SA Gino Moro received an anonymous tip concerning the fishing vessel Sea Witch. It was alleged that the Sea Witch was landing illegal

fish at GSDA. SA Moro later boarded the Sea Witch and questioned the captain, who informed him that he was confused about the landing limits because he possessed both a state and a federal permit. SA Moro also reviewed the landing reports and FVTRs from the Sea Witch, and determined that the Sea Witch had made twenty one (21) illegal landings at GSDA. At the time, SA Moro considered charging GSDA for the Sea Witch violations, but he was unsure whether GSDA was aware of the Sea Witch's permit issue. EX1, Special Master Interview with Gino Moro, Special Agent, NOAA (Feb. 28, 2011).

On September 7, 2006, SA Patrick Flynn and SA Henry visited GSDA and requested one year's worth of information concerning the fishing vessel Grace Marie from the GSDA bookkeeper, [redacted]. [redacted] informed the OLE Special Agents that it would take her a couple of hours to produce the requested information because GSDA had recently transitioned to a new computer system. After a couple of hours, the agents returned and found the requested documents. EX2, Affidavit of Patrick Flynn, Special Agent, NOAA.

[redacted]

[redacted]

Between September and late November 2006, OLE, in conjunction with GCEL, increased enforcement activity at GSDA. EX4, Email from Andrew Cohen, Special Agent in Charge, NOAA, to Sue Williams, Assistant Special Agent in Charge, NOAA (Nov. 1, 2006). Meanwhile, OLE ET Nicholas Call proceeded with a large-scale data analysis of all vessel landings at GSDA, with particular emphasis on cod landings. EX5, Email from Sue Williams, Assistant Special Agent in Charge, NOAA, to Andy Cohen, Special Agent in Charge, NOAA (November 1, 2006). Throughout this time, OLE had planned to issue a demand letter to request documents from GSDA. However, GCEL cautioned against employing the demand letter until ET Call's analysis was complete. Id. By November 27, 2006, ET Call had identified approximately thirty (30) vessels suspected of landing overages at GSDA. Based on this analysis, SA Henry then drafted the demand letter to be served on GSDA for records pertaining to the thirty (30) vessels. EX6, Michael Henry draft of demand letter (Nov. 27, 2006).

Shortly after SA Henry completed a draft of the GSDA demand letter, EA Deirdre Casey and SAC Andy Cohen held a meeting, most likely on November 28, 2006, and decided against using a demand letter. Instead, a decision was made to execute an AIW. According to an email from Assistant Special Agent in Charge, Sue Williams, "[The AIW] situation arose rather quickly, and it appeared to be more of direction by Andy [Cohen] than anything else." EX7, Email from Sue Williams, Assistant Special Agent in Charge, NOAA, to Todd Dubois, Deputy Special Agent in

Charge, NOAA (Nov. 28, 2006). EA Casey believed that because of the political sensitivity surrounding this case, it would be the most prudent course of action to have a neutral Magistrate Judge comb through the evidence, and then issue an AIW. EX8, Special Master Interview with Deirdre Casey, Enforcement Attorney, NOAA (Mar. 14, 2011). Furthermore, EA Casey justified the need for the AIW because she believed that the volume of documents to be requested by the demand letter exceeded what was practical. She suggested that it would have required someone to work full-time at the GSDA for weeks to get that information. EX9, OIG interview of Deirdre Casey, Enforcement Attorney, NOAA, p. 66 (Aug. 31, 2010).

SA Henry stated that NOAA was afraid that GSDA would have destroyed incriminating documents if it were provided with a demand letter. EX10, OIG Interview with Michael Henry, Special Agent, NOAA, p. 80 (Aug. 19, 2010). Therefore, NOAA utilized an AIW to preserve the integrity of the evidence at GSDA. However, SA Henry admitted that GSDA has never been known to destroy records, and that GSDA would have been charged with destruction of records had they actually done so. Id. at 85. SA Henry also admitted that as recently as August 31, 2006, he had "never requested paperwork or inspected paperwork from the GSDA in the past year." EX11, Email from Michael Henry, Special Agent, NOAA, to Sue Williams, Assistant Special Agent in Charge, NOAA (Aug. 31, 2006). However, SA Henry testified, and the evidence corroborates, that he did not participate in the decision-making process to proceed with the AIW.

Nonetheless, SA Henry was in charge of writing an affidavit in support of the AIW. SA Patrick Flynn wrote a supplemental affidavit in support of the AIW. It was SA Henry's first AIW in connection with an investigation. EX12, Deposition of Michael Henry, Special Agent, NOAA,

p. 133 (Aug. 24, 2009). Various agents in the office also provided comments and suggestions for the affidavit, but SA Henry was the primary author. EA Casey worked directly with SA Henry to edit the affidavit, which resulted in multiple drafts. However, she did not review the underlying database documents relied on by SA Henry. EX13, OIG interview with Deirdre Casey, Enforcement Attorney, NOAA, p. 46-7 (Aug. 31, 2010). Additionally, [redacted] Assistant United States Attorney (AUSA), Civil Division, reviewed the affidavit for form and substance only, and did not review the underlying documents referred to in SA Henry's affidavit. EX14, Special Master Interview with [redacted] Assistant U.S. Attorney, DOJ (Jan. 14, 2011). AUSA [redacted] communicated exclusively with EA Casey on this matter, and did not have any direct communication with SA Henry. Id. The affidavit served as the basis for obtaining an AIW from Magistrate Judge Timothy Hillman of the United States District Court (D. Mass) on December 6, 2006. NOAA agents then executed the AIW at the GSDA facility on December 7, 2006. See infra, Discussion Case 3.

Out of the thirty (30) vessels identified through ET Call's extensive analysis for possible cod overages, SA Henry chose seven (7) vessels to establish probable cause in his affidavit: Sea Witch, Foxy Lady, Razor's Edge, Anna B, Aaron & Alexa, Partner, and Catherine F. He used the Sea Witch, not to establish probable cause, but to illustrate that the vessel caused OLE to suspect widespread overages at GSDA. The remaining six (6) vessels were purported to have landed overages at GSDA. SA Henry does not recall why exactly he chose to include these six (6) vessels specifically to establish probable cause in support of the AIW. However, he alluded to the fact that he chose those specific vessels based on "egregiousness." EX15, Deposition of Michael Henry, Special Agent, NOAA, p. 62 (Aug. 24, 2009). Furthermore, he was trained to

include whatever is pertinent in the affidavit. EX16, OIG Interview of Michael Henry, Special Agent, NOAA, p. 54-55 (Aug. 19, 2010).

It should be noted that according to SA Henry's affidavit, the Catherine F (paragraph 32) landed 829 lbs of cod at the GSDA on February 4, 2006. This is a 29 lbs overage amounting to 4% of the total catch.[1] The captain of the Anna B is a part-time fisherman and retired former CEO of a multi-million dollar construction company headquartered in Massachusetts. EX17, Declaration of James S. Ansara. Within the affidavit, SA Henry cited the Anna B for two instances (paragraph 29 and 31) of landing overages at GSDA on December 6, 2004 and November 28, 2005, which totaled 164 lbs. The Anna B captain was confused about the landing limits because he had both a state and federal fishing permit, which yielded different landing limits. However, he only landed codfish at GSDA to offset the cost of fuel. Id.

It was later discovered that the AIW affidavit drafted by SA Henry contained several inaccurate statements. At issue are three (3) out of the seven (7) paragraphs in the affidavit used to establish probable cause: paragraphs #28, #33, and #34. Paragraph #27 noted that "A review of databases maintained by NOAA Fisheries including; possession limits by permit category, FVTRs and dealer reports submitted by the Gloucester Fish Exchange, Inc. revealed the following:"

> #28: On October 11, 2004, the F/V Foxy Lady…caught 1399 pounds of Atlantic cod and sold it to the Gloucester Fish Exchange Inc. As a multispecies permit holder, this vessel's permit category limited it to possessing 800 pounds of

[1] In a prior reported case between GSDA and NOAA, NMFS OLE Agents testified that for enforcement purposes, NOAA allows a 10% industry error margin for cod landings prior to charging violations. See In the Matter of: Louis Mitchell and Gloucester Fish Exchange, 2008 NOAA Lexis 11, *12.

> Atlantic cod for each day it fished. This exceeded the vessels daily possession limit by 599 pounds (75%).
>
> #33: On March 13, 2006, the F/V Aaron and Alexa…possessed and sold 1574 pounds of cod to the Gloucester Fish Exchange Inc. As a multispecies permit holder, this vessel's permit category limited it to landing 800 pounds of Atlantic cod for each day it fished. This exceeded the vessel's cod daily possession limit by 774 pounds (97%).
>
> #34: On March 13, 2006, the F/V Partner…possessed and sold 1549 pounds of cod to the Gloucester Fish Exchange Inc. As a multispecies permit holder, this vessel's permit category limited it to landing 800 pounds of Atlantic cod for each day it fished. This exceeded the vessel's cod daily possession limit by 749 pounds (94%).
>
> EX18, Affidavit of Special Agent Michael Henry in Support of Application for an Administrative Inspection Warrant (Dec. 6, 2006).

A review of NOAA documents obtained by OIG, the same documents SA Henry relied upon to draft his affidavit, substantiated that the above three (3) paragraphs were inaccurate. EX19, Dealer Reports and FVTRs for Foxy Lady, Aaron & Alexa, and Partner. As to paragraph #28, two fishing vessels, both named Foxy Lady, reported landing catch at GSDA on October 11, 2004. On the dealer report, the Foxy Lady bearing the vessel permit number "148668" appeared to have landed twice. However, the handwritten FVTRs clearly indicate that both Foxy Lady vessels had different permit numbers, and were in fact two separate vessels. The dealer report containing information on the Partner and the Aaron and Alexa revealed that both vessels landed twice on March 13, 2006. However, the FVTR numbers are different for both vessels, and the handwritten FVTRs for the Aaron & Alexa and the Partner recorded the correct dates and amounts landed. The OIG had previously determined that the root cause of the dealer report issues with regard to the Aaron & Alexa and Partner stemmed from a database glitch that caused weekend landings to be reported on the following Monday.

SA Henry reviewed both the handwritten FVTRs and the GSDA dealer reports during the course of drafting the affidavit in support of the AIW. Based on his analysis, he became aware that a discrepancy existed between the FVTRs and the dealer reports with respect to the Aaron & Alexa and Partner, but does not recall telling anyone specifically. EX20, Special Master Interview with Michael Henry, Special Agent, NOAA (Feb. 28, 2011). His training and experience taught him that fishermen routinely falsify FVTRs in an attempt to hide overages. As a result, he credited GSDA's dealer report as an admission against its own interest, and he accepted that as fact until he could prove otherwise. EX21, OIG Interview with Michael Henry, Special Agent, NOAA, p. 46 (Aug. 19, 2010). In order to clarify the discrepancies between the FVTRs and dealer reports, he needed the money documents, including checks, invoices, and tallies, to reconcile the disparities. EX22, Id. at p. 49.

SA Henry also worked closely with EA Casey to develop multiple drafts of the affidavit in support of the AIW. EA Casey did not review the underlying NOAA database documents, and she only proofread the document for form. EX23, OIG Interview with Deirdre Casey, Enforcement Attorney, NOAA, p. 19-20 (Aug. 31, 2010). EA Casey insisted that it is not her responsibility to review the underlying documents because the agent attests to its truthfulness when he/she signs the affidavit before the Magistrate Judge. EX24, Id. at p. 46-7. However, Ms. Casey admitted, and her handwritten notes corroborated, that she was at least told about the discrepancy prior to submitting the affidavit to the Magistrate Judge. EX25, Handwritten Notes by Deirdre Casey, Enforcement Attorney, NOAA.

## II. Conclusion

Despite the inaccurate paragraphs in the affidavit, SA Henry contends that even if one were to remove the questionable paragraphs, there would still be sufficient evidence to establish probable cause to secure an AIW. Supra, EX20. I disagree.

NOAA agents expected to find widespread violations at GSDA ranging from cod and YTF overages to reporting errors based on the September 19, 2006 meeting minutes I obtained. SA Henry drafted the affidavit with this in mind. Out of the thirty (30) boats identified by ET Call during his extensive analysis of cod landings at GSDA, SA Henry deliberately chose six (6) vessels to establish probable cause. Out of the seven (7) paragraphs in the affidavit devoted to establishing probable cause, paragraphs #28, #33, and #34 proved to contain egregious misstatement of facts; paragraph #32 included one vessel that landed only 29 lbs over the limit; and paragraphs #29 and #31 pertained to a vessel that landed small overages on two (2) occasions because the captain was a part-time fisherman who was confused about the landing limits. This leaves only paragraph #30, Razor's Edge[2], to establish probable cause that GSDA was landing widespread illegally landed fish. I do not concur that the single remaining vessel would have been sufficient to warrant probable cause for the wide-spread violations alleged in this case.

However, I recognize that as a federally permitted dealer, GSDA is required to adhere to strict reporting requirements, 50 C.F.R. §648.7(a), and NOAA has statutory access to all of the documents obtained during the execution of the AIW on December 7, 2006. 50 C.F.R.

[2] See infra, Discussion Case 4: Razor's Edge.

§648.7(d). Simply stated, NOAA could have issued the demand letter to request the specific documents from GSDA. Instead, NOAA decided upon an AIW, and used an affidavit containing inaccurate information to justify the AIW. I am in no position to determine whether an AIW would have been issued in this case had the questionable paragraphs supporting probable cause been accurate. But I am very certain, from my prior twelve (12) years of experience as a United States Magistrate Judge, that I would not have allowed an AIW application if it contained any inaccurate information.

SA Henry insisted that he knew about the discrepancies between the FVTRs and dealer reports. He needed to verify the discrepancies by obtaining the money documents, including the checks, tallies, and invoices. However, this discrepancy should have been a "red flag" to SA Henry that he should make further investigation before submitting an affidavit in support of an application of a warrant with inaccurate information. SAC Cohen and EA Casey had already made the decision to proceed with an AIW. SA Henry did not make that decision, but his superiors assigned to him the task of drafting the affidavit. I find that SA Henry had every incentive to draft an affidavit that would support probable cause for the AIW, even if it entailed overlooking certain discrepancies in order to establish the probable cause. SA Henry stated that the goal of the affidavit was to establish probable cause that GSDA had violated the MSA. Supra, EX20.

I do not find that SA Henry deliberately omitted specific information for the affidavit in a willful attempt to mislead the Magistrate Judge. However, as a senior level federal law enforcement officer, with approximately eight (8) years of experience at the time he drafted the affidavit, I would expect substantially better due diligence on his part to ensure that the

affidavit was accurate. I would also expect more due diligence on the part of EA Casey, who was informed of the discrepancies, yet took no action to ensure that the affidavit passed on to the AUSA for submission to the Magistrate Judge was accurate.

## III. Recommendation

This case involves an employment and/or training issue, which is beyond the scope of my authority in this investigation, and for that reason, I make no recommendation in this case.

**CASE 2: GINO MORO ENTRY**

*In its report, the OIG confirmed an allegation that an OLE agent gained unauthorized access to a dealer facility. (The incident occurred in November 2006.) Upon arrival at the facility, the agent found the front doors locked so he went around the side of the building where he found a door unlocked, which he used to access the facility at approximately 8:30 p.m., and in entering found no workers or activity. He proceeded to the front door and opened it to let officers accompanying him into the facility. This group of officers was there to relieve other officers taking part in a joint enforcement operation at the facility, which had been conducted earlier in the day, but which now appeared to have concluded. The agent next located an employee still at the facility who advised him they were closed for the night. The agent requested of this employee permission to give "my team a quick tour." The employee did not give permission, yet the agent still proceeded to initiate a "tour." OLE's statutory authority permits its agents to conduct bona fide inspections at such locations, but nowhere are OLE agents authorized to access fishing business premises for non-official, improper purposes such as tours.* (OIG Description of Case, September 2010 Report).

**I. Findings of Fact**

Guido "Gino" B. Moro has been an NMFS OLE Special Agent for approximately thirty (30) years. He is assigned to the Chelsea, MA office. As an OLE Special Agent, SA Moro's primary role is to conduct factual investigations and document potential MSA violations, among other responsibilities. Prior to December 7, 2006, SA Moro was in Gloucester approximately once a week to conduct patrol and surveillance at area fish dealers, including at GSDA. OLE Special Agents are permitted under the MSA to conduct "inspections" of dealers that possess federal

dealer permits. The regulations provide that agents have the authority to conduct inspections and seize illegal fish wherever found. 16 USC §1861(b)(A)(iv).

On November 2, 2006, approximately ten (10) to fifteen (15) agencies, including NOAA, Coast Guard, Homeland Security, and the Massachusetts Environmental Police (MEP), conducted a joint port operation called "Operation Blitz" in Gloucester, MA. The purpose of the operation was to saturate a port area and to have various agencies enforce their own laws and regulations. EX1, Special Master Interview with Sue Williams, Assistant Special Agent in Charge, NOAA (Feb. 28, 2011). Multi-agency teams staffed strategic locations in Gloucester, including at GSDA. During the operation, SA Moro was a team leader assigned to a roving team that included members from the State Police, State Department, Immigration and Customs Enforcement (ICE), and the Coast Guard. The roving team was assigned to relieve other teams in the area in need of assistance. Throughout the day, agents from the various agencies went through GSDA's facility. However, none of the agencies went through the Zeus Ice Packing, Co. ("Zeus"), a separate independent company that leases space from GSDA. Id.

OLE Special Agent Patrick Flynn and his team were staffed at the GSDA facility during Operation Blitz. Around 7:00-8:00pm that evening, SA Flynn requested that SA Moro's team relieve his team's position at GSDA. That same evening, GSDA employee [redacted] was in the GSDA office finishing some paperwork because another employee, [redacted] was out sick that day. [redacted] asked GSDA part owner Rosemarie Cranston (then Rosemarie Foster) to lock the front doors prior to her leaving for the night, which she did.

When SA Moro arrived with his team, he tried to open the front doors. They were locked. There was cold precipitation that evening, so SA Moro informed his team that he would

check the back to see if there was any vessel activity at GSDA. In fact, SA Flynn had told SA Moro earlier that there was little vessel activity at GSDA because of the stormy weather. EX2, Special Master Interview with Gino Moro, Special Agent, NOAA (Feb. 28, 2011).

SA Moro then went around the Captain Carlo's Restaurant adjacent to the main GSDA facility to the offloading docks in the back. He noticed that all the bay doors he could see from his location were closed, which indicated that there was no vessel activity at GSDA. However, there is a separate set of bay doors on the other side of the GSDA facility that was not visible from where SA Moro was located. As such, he decided to enter the facility to observe those other bay doors.

There are three (3) doors along the back of the GSDA facility facing the water. In successive order, the first door leads to the Captain Carlo's Restaurant, the second door leads to the Zeus leased space, and the last door leads to the GSDA employee break room. The Captain Carlo's door is readily identifiable, and SA Moro was adamant that he did not enter through that door. Instead, he tried the first door that he found to be unlocked, and entered the building. This area, though not clearly marked, is leased to Zeus. Zeus is not a fish dealer and as such, NOAA does not have inspection authority of its premises. SA Moro remembered seeing a set of red doors on the left as he entered the building. He also remembered going through plastic strips prior to entering the GSDA tunnel. EX3, Special Master Supplemental Interview of Gino Moro, Special Agent, NOAA (Mar. 21, 2011). There is a door in that area that leads through Zeus' employee locker room and into the GSDA main lobby. SA Moro "swears it until the day [he] dies" that he did not go through that door. Supra, EX2. At this time of night, there were no Zeus employees in the building.

As SA Moro entered, he called out once or twice to see if GSDA workers were present. He then proceeded from Zeus' leased premises through the plastic strips into the GSDA tunnel, turned left, walked through the tunnel to the cold storage area where fish are displayed for inspection, through a set of doors and down the steps leading to the main lobby. The main office could be seen through a plate-glass window inside the lobby, where [redacted] was working late that night.

GSDA has a multi-location video system that surveys the inside and outside of its facility. However, there is no surveillance camera where SA Moro entered the building. A video recording was preserved from that night. In the recording, several GSDA employees, including [redacted] could be seen conducting various closing tasks in the tunnel, including washing down the floors. If [redacted] was not working in the tunnel, he would have been either in the cold storage room, or in the employee break room signing out the employees. If SA Moro had proceeded through the tunnel, he would have most likely encountered [redacted] [redacted] neither heard nor saw SA Moro enter the building or go through the tunnel that night. EX4, Special Master Interview of [redacted], Employee, GSDA (Mar. 21, 2011). The issue of what path SA Moro actually took through the GSDA facility to reach the main lobby cannot be conclusively resolved.

Nevertheless, [redacted] first noticed SA Moro in the lobby area when she heard a door slam. EX5, Special Master Interview of [redacted], Employee, GSDA (Dec. 2, 2010). SA Moro then proceeded to open the locked GSDA front doors for his team before he spoke to [redacted] at the front window. [redacted] was on the telephone with [redacted] at the time, and she informed him that agents had entered the building. Id. She told SA Moro that GSDA was

closed, and she asked him how he got into the building because it was locked. SA Moro replied that he entered through an unlocked back door. SA Moro then told [redacted] that he was going to conduct a quick tour of the facility. Hearing no response from [redacted] SA Moro and his team proceeded to join his team in the cold storage display area. Supra, EX2. [redacted] testified that the agents intimidated her and she was afraid to refuse their tour. Supra, EX5.

The preserved security tape showed the officers scattered throughout the cold storage display area examining the few fish remaining on the floor. It is unclear whether [redacted] or [redacted] called [redacted] to inform him that agents had entered the facility. [redacted] can be seen in the security video fumbling for his telephone in the tunnel area. After receiving notification of the agents' presence, [redacted] met the agents in the cold storage display area. Meanwhile, [redacted] called Rosemarie Cranston to inform her of what had transpired immediately after her brief conversation with SA Moro. It is unclear where Ms. Cranston was at the time, but she returned to GSDA shortly and entered the cold storage room where the agents were located. Ms. Cranston can be seen in the surveillance tape walking directly towards [redacted]. It is unclear what she said to [redacted] or SA Moro because of conflicting testimony. What is clear, though, is that the surveillance tape shows the agents leaving very shortly after Ms. Cranston appeared in the cold storage display area.

After the agents left the premises, [redacted] continued to perform the necessary tasks to close the GSDA facility. Upon checking the doors by the docks in the back, he noticed that the door leading to the GSDA employee break room was secured. When he checked the door that led into the Zeus leased area, he testified that the door was closed, but not fully latched,

which prompted him to secure the door. [redacted] also noticed wet footprints in that area, which confirmed his suspicion that SA Moro entered through the Zeus door. Supra, EX4.

GSDA did not file a police report immediately after the incident. One week later on November 9, 2006, Detective Kenneth Ryan of the Gloucester Police Department documented a complaint of a possible trespass by a federal agent. EX6, Gloucester Police Department Report (Nov. 9, 2006). Earlier that same morning, SA Moro had conducted an inspection at the GSDA facility. The inspection resulted in SA Moro discovering thirteen (13) undersized dabs (9.45 lbs total) landed from the Lily Jean that morning. The legal limit for the dab size was 14'' at the time, and twelve (12) dabs measured between 13''and 13.5''. One (1) dab measured 12.5''.[3] EX7, Offense Investigation Report by Gino Moro, Special Agent, NOAA (Nov. 14, 2006). I am unable to determine if there was a causal link between SA Moro's dab inspection, and the subsequent GSDA report to police about SA Moro's prior entry into the Zeus and GSDA premises on November 2, 2006.

**II. Conclusion**

It is undisputed that SA Moro entered the GSDA facility through the Zeus premises, and that he had no statutory authority to do so. However, SA Moro would not have known that the area belonged to a tenant since the area is not clearly marked as belonging to Zeus. After SA Moro entered the building and discovered that there was no vessel activity at GSDA that night, he still proceeded through the Zeus and GSDA facility to open the door for his team to conduct a "tour". Even after [redacted] informed SA Moro that GSDA was closed for the evening, he

[3] This violation was one of two violations that resulted in a $10,000 assessed penalty in the final GSDA NOVA issued on February 13, 2009 (Count 59). See Infra, Case 3 Discussion.

proceeded to conduct an unauthorized tour of GSDA's cold storage display area without permission from [redacted]. There is no statutory authority for agents to enter for the purposes of a "tour". In fact, the surveillance video demonstrates that SA Moro's team had no clear purpose in GSDA's cold storage room, particularly because it could be seen that there was very little fish left in this area, and [redacted] had already informed SA Moro that there was no more offloading that night. I find that this incident is a clear demonstration of SA Moro's over-broad exercise of his enforcement powers, and that SA Moro incorrectly believed that he possessed unlimited authority to conduct inspections at GSDA whenever he pleased.

## III. Recommendation

This is an employment and/or training issue, which is beyond the scope of my authority in this investigation, and for that reason, I make no recommendation in this matter.

## CASE 3: GLOUCESTER SEAFOOD DISPLAY AUCTION

*In its report, the OIG determined that an Administrative Law Judge (ALJ) ruled that GCEL's assessed penalty of $120,000 and 90-day suspension of a fish dealer for improper record keeping was excessive. (The Notice of Violation and Assessment (NOVA) was issued in March 2005 and a settlement agreement was reached in March 2010.) GCEL advised that this penalty was levied because the dealer was on probation from a previous violation which involved 24 individual counts that were charged. GCEL stated that they then treated this previous case as 24 prior violations rather than as a single prior offense. The ALJ rejected GCEL's "aggravating factor" rationale of 24 prior violations, treating the prior case as a single violation, and significantly reducing the fish dealer's penalty to a $10,000 fine and a 20-day suspension. The ALJ noted that GCEL's assessed penalty would have been "contrary to the interest of justice," and would essentially put the dealer out of business. Given the ALJ's ruling on this case we believe the GCEL attorney's charging rationale deserves further review.* (OIG Description of Case, September 2010 Report).

### I. Findings of Fact

*Ciulla Family and GSDA Business*

GSDA is an independent, family owned fish display auction business located in Gloucester, MA. The Ciulla family owns and operates GSDA: Augustus ("Gus") Ciulla, Rose Ciulla ("Rose"), and their children, Rosemarie Cranston ("Rosemarie") and Larry Ciulla ("Larry"). The Ciulla family also owns two other businesses located at or near the GSDA facility: Star Fisheries, a fuel service company, and Captain Carlo's, an adjacent restaurant. Rose is responsible for running Star Fisheries, payroll, and permitting matters, Rosemarie is responsible for running

Captain Carlo's Restaurant, and Larry supervises the Auction. GSDA also employs two people who have significant responsibilities: [redacted] the tunnel manager who is related to the Ciulla family, and [redacted] the bookkeeper, who handles office administrative duties and is also responsible for reporting information to NOAA. However, as a family-run business, there are no assigned roles or titles. In addition, GSDA employs approximately fifteen (15) full-time employees to assist in the offloading of fish, as well as various other contractors on an as-needed basis. EX1, Deposition of Larry Ciulla, Owner, GSDA, p. 20 (Jan. 7, 2010).

The Ciulla family started GSDA in 1997 after having operated a successful fish dealer business under the name of Star Fisheries, Inc. GSDA handles the majority of fish landed in Gloucester. Larry noted that he started the Auction primarily to attract independent vessels to the Gloucester Community. EX2, Special Master Interview with Larry Ciulla, Owner, GSDA (Dec. 8, 2010). As a live display auction, GSDA allows fishermen to sell their product directly to their customers. Landings occur at any time during the day/night. The chart below lists the approximate amount of fish GSDA offloaded annually in pounds from 2004 to 2010:

| ***Year*** | ***Pounds of Ground Fish Landed*** |
|---|---|
| 2004 | 17-22,000,000[4] |
| 2005 | 17-22,000,000[5] |
| 2006 | 13,282,373 |
| 2007 | 13,132,364 |

[4] Finding of Fact, In Re Louis Mitchell and Gloucester Fish Exchange, Inc., 2008 NOAA Lexis 11, *7.

[5] Id.

| | |
|---|---|
| 2008 | 15,618,578 |
| 2009 | 13,723,188 |
| 2010 | 13,990,000 |

EX3, Email from Paul Muniz, Partner, Burns & Levinson LLP, to Charles B. Swartwood III (Mar. 25, 2011).

*GSDA Offloading Procedures and Reporting*

At the beginning of each year, GSDA personnel request copies of state and federal fishing permits from all vessels that intend to offload at GSDA. If a new vessel offloads at GSDA, GSDA employees would request and make copies of its state and federal permits prior to offloading any fish. EX4, Deposition of Larry Ciulla, Owner, GSDA, p. 55-6 (Jan. 7, 2010). Copies of the permits are on file at GSDA.

Additionally, GSDA employees require offloading vessels to provide them with copies of FVTRs prior to offloading. NMFS issues each federally permitted vessel with a packet of FVTRs specific to that particular fishing vessel. Fishermen are required by regulation to fill out the FVTRs for each fishing trip prior to landing their catch. However, because FVTRs are printed on carbon paper, GSDA and other dealers only receive a carbon copy of the FVTR. EX5, Copy of typical Vessel Trip Report. The only information available to GSDA and other dealers on the carbon copy is the FVTR number and the date of the fishing trip. The FVTR numbers are manually entered into the computer system prior to offloading. GSDA personnel rely on the fishing vessels to provide them with accurate information concerning the landing limits on their trips because the FVTRs do not provide that information, the regulations frequently change,

and GSDA employees would have no feasible way to verify where the fishermen have been fishing and the possession limits associated with those particular areas.

Offloading vessels usually place the fish inside totes while still on board, and the fish in each tote is estimated to weigh 100 lbs. Since the fishing vessels are in constant motion while at sea, it is difficult to ascertain the exact weight of a vessel's catch even if it has a scale on board. GSDA employees then offload and weigh the totes of fish on one of the scales available in front of every bay door in the tunnel. Any fish exceeding the allowable limit is returned to the fishermen. Also, it is the industry standard for the dealer to deduct 13 lbs from the weight of the totes to account for ice, slime, and water. In Re Louis Mitchell and Gloucester Fish Exchange, Inc., 2008 NOAA Lexis 11, *11-2. After GSDA employees offload and weigh the catch, each fish is culled, measured, and placed into totes and arranged by species on a pallet. Since GSDA often processes large volumes of fish, the employees are trained to rely on sight to determine the legal size of fish. GSDA employees return fish to vessels that appear to be short of the legal size. The MSA require GSDA, as a permitted dealer, to report all pertinent information to NOAA, including date, permit number, species, weight, price, and FVTR number of all landings. 50 CFR 648.7(a)(1).

The pallets are then placed into the cold storage display area, where buyers inspect the product to determine quality and freshness. A live auction is held six days a week at 6:00 am, and customers from around the world can bid on the product via the Internet through an electronic bidding system. The system is designed to ensure that fishermen receive a fair price for their catch because the system maximizes competition and transparency. In fact, numerous fishermen have indicated through various interviews that they enjoy doing business at GSDA

because they believe GSDA provides them with the best price for their product. The highest bidder purchases a specific pallet, and the pallet is then delivered to the buyer's location by truck.

*Phantom Ships Case*

On November 6, 2002, enforcement attorneys Mitch MacDonald and Deirdre Casey issued GSDA a twenty-four (24) count NOVA to GSDA, assessing a penalty of $125,000 and a thirty (30) day NOPS for a first offense violation. NOAA alleged that GSDA and its employee, [redacted] along with Larry, falsified dealer reports in an attempt to hide overages on various dates in July, August, and September 2000, as well as on March 28, 2002. Rosemarie also received a citation for interfering with an investigation by inserting herself between an agent and an employee during questioning, for which she was assessed a penalty of $10,000. EX6: Notice of Violation Assessment (Nov. 6, 2002).

Larry testified during my investigation that 2000 was a very busy year for GSDA because the business was still relatively new. Supra, EX2. As a result, his family and he worked practically seven (7) days a week. This arduous schedule prompted Larry to entrust [redacted] among others, to manage the GSDA offloading process. Id. However, [redacted] was allocating cod landings from the Gloria Jean to different boats in an attempt to spread the catches and to conceal overages from the Gloria Jean. Larry denies, and no credible evidence exists, to prove that he had any direct or indirect knowledge concerning the unlawful landings committed by [redacted]. Id. In fact, NOAA cited [redacted] for the unlawful landings and GSDA for misreporting catches.

GSDA and NOAA ultimately settled this case on September 11, 2003, for $80,000, a fifteen (15) day permit sanction partially suspended, as well as a thirty (30) day suspension for Larry, who acknowledged that he made a business decision to settle this case rather than challenge it in court. Id. GSDA served a five (5) day permit sanction, with ten (10) days suspended. GSDA agreed to serve a one (1) year probationary period commencing on September 11, 2003. If GSDA committed a "substantial violation" based on a "final administrative decision" within that 12-month period, then the violation would trigger a 10-day dealer sanction. EX7, Settlement Agreement (Sept. 11, 2003). Notably, GSDA acknowledged fault for all the charges in the NOVA with the exception of Rosemarie's interference charge. More importantly, Larry denied having any knowledge of [redacted] actions, but he admitted that he had supervisory responsibility over him during the violation period. [redacted]

Five (5) months after the parties signed the settlement agreement on February 11, 2004, Massachusetts Environmental Police (MEP) agents conducted a routine investigation at GSDA and observed five (5) overflowing totes of fish being offloaded. A yellow tag affixed to the totes indicated that the fish weighed 500 lbs and belonged to the fishing vessels Ambjorg & Julie, and the Karoline Marie. The MEP agents subsequently contacted NOAA Special Agent Daniel D'Ambruoso, who arrived on the scene to question GSDA employee, [redacted]. [redacted] had previously weighed the fish, so SA D'Ambruoso directed [redacted] to reweigh the totes in his presence.

With the assistance of the Karoline Marie captain, [redacted] reweighed the totes, which required a sixth tote to fit all the fish properly. The total weight of the second weighing

amounted to 578 lbs, and SA D'Ambruoso rounded the weight to 575 lbs. The weighing took into consideration industry standards, which included a 13 lbs deduction per tote to account for ice, slime, and the weight of the tote. Even though the codfish trip limit at the time was 500 lbs, NOAA generally allows a 10% industry margin of error, or 50 lbs over 500 lbs. [redacted] did not write down the weight calculations during the weighing process. EX8, Complaint Action Report of Daniel D'Ambruoso, Special Agent, NOAA (Aug. 20, 2004).

On February 23, 2004, [redacted] submitted a sworn statement to NOAA at the urging of GSDA attorney, Ann-Margaret Ferrante. [redacted] wrote:

- I remember Tom's fish being large cod. They were separated into five totes.
- I remember the first tote weighing 113 pounds minus 13 pounds totaling 100 pounds.
- I remember the second tote weighing 114 pounds minus 13 pounds totaling 101 pounds.
- I remember the third tote weighing 113 pounds minus 13 pounds totaling 100 pounds.
- I remember the fourth tote weighing 123 pounds minus 13 pounds totaling 110 pounds.
- I remember the fifth tote weighing 126 pounds minus 13 pounds totaling 113 pounds.

On March 7, 2005, NOAA enforcement attorney Charles Juliand issued a NOVA to GSDA for this case, alleging that GSDA had unlawfully created and maintained false records based on the tote tag and weigh out slip, which indicated that the totes in question weighed 500 lbs instead of 575 lbs. EA Juliand assessed a $120,000 penalty and a ninety (90) day NOPS. EX9, Notice of Violation Assessment (Mar. 7, 2005). EA Juliand justified the amount of the fine, in large part, because NOAA previously issued GSDA a twenty-four (24) count NOVA. As such, EA Juliand contended that this violation constituted the 25$^{th}$ violation, and justified the $120,000 fine as a deterrent to the fishing industry from landing overages at GSDA. EX10, Agency's Supplemental Brief (Aug. 15, 2008). [redacted]

[redacted] NOAA also issued a concurrent NOVA to GSDA employee [redacted] on April 6, 2005, for making a false statement under oath based on his sworn statement. EA Juliand imposed a $22,500 penalty on [redacted] for this alleged false statement. [redacted]

It is noteworthy that [redacted] suffered significant personal hardship during this ordeal, including near fatal injuries, the unexpected death of his wife, and the heavy burden of supporting his six (6) minor children as a single parent. It is also evident that [redacted] attorney communicated these circumstances to EA Juliand prior to trial in an attempt to dismiss the charges against his client. EX12, Letter from Kevin Kiely, Attorney, Kiely, Visnick & Ferrante, to Charles Juliand, Enforcement Attorney, NOAA (Sept. 26, 2005). Despite [redacted] personal circumstances, EA Juliand was not inclined to settle the case with him absent certain conditions. Specifically, EA Juliand's handwritten notes on the proposed settlement letter revealed that, "While the agency believes that a pattern of regulatory violations regarding excess cod landings at GSDA has taken place, we are willing to accept a new, and accurate, written statement from [redacted] which is limited to the events which took place at GSDA on 2-11-2004." Id. EA Juliand never received a separate statement from [redacted] nor did he dismiss any charges against him. However, EA Juliand noted during my interview of him that he

normally would take these personal factors into consideration when arriving at a settlement. EX13, Special Master Interview with Charles R. Juliand, Enforcement Attorney, NOAA (Mar. 14, 2011).

GSDA hired Paul Muniz from Burns & Levinson LLP to challenge this NOVA and NOPS before an ALJ. GSDA no longer employed [redacted] at that point and [redacted] retained his own counsel during the legal proceedings. On October 4, 2005, ALJ Peter A. Fitzpatrick held a hearing, and he issued a decision on March 3, 2006. Contrary to EA Juliand's confidence that an ALJ would agree with his penalty assessment, ALJ Fitzpatrick held that NOAA failed to establish that GSDA maintained false information and that NOAA failed to establish that Louis Mitchell made any false statement concerning the landing report. He based his holding on the fact that the tote tags and tally sheets are not records required to be maintained under 50 CFR 648.14(a)(4) and 50 CFR 648.14(a)(3). See generally [redacted]).

NOAA appealed the ruling to the NOAA Administrator, Admiral Conrad C. Lautenbacher, Jr., who issued an order on May 7, 2008 reversing in part and modifying in part ALJ Fitzpatrick's decision. Importantly, Adm. Lautenbacher ruled that even though the tally sheets used by GSDA contained inaccurate information because they were incomplete records within a larger verification process, those tally sheets still violated 50 CFR §648.14(a)(4) because GSDA relied on those records to complete the dealer reports. With regard to [redacted], Adm. Lautenbacher ruled that his sworn written statement and the use of "I remember" constituted factual assertions in contrast with Lobsters Inc. v. Evans, 346 F.Supp. 2d 340 (D. Mass 2004). Adm. Lautenbacher reinstated the charges and penalties against GSDA and [redacted], and

remanded the case to an ALJ to determine the appropriate amount of the penalties, and to consider further legal issues arising from the charges against [redacted]. See generally [redacted].

ALJ Fitzpatrick had retired by the time the case was remanded, and the case was assigned to ALJ Michael J. Devine, who reviewed the record and evidence on remand, and issued a supplemental decision on November 14, 2008 (as corrected November 24, 2008). ALJ Devine found that "such a large penalty as proposed in this case appears to exceed the level of violation within the limits of the facts and circumstances of this matter and it would be contrary to the interest of justice to impose a penalty that would essentially put a company out of business in a situation such as this." [redacted] Furthermore, ALJ Devine considered the $120,000 penalty excessive, noting that GSDA's prior violation should not be considered as twenty-four (24) separate violations and that the violation "should not be magnified beyond its actual significance." Id. at *45. ALJ Devine also reduced [redacted] penalty based on the insignificance of his violation, and based on his unfortunate personal circumstances. Id. at *49. Accordingly, ALJ Devine reduced GSDA's fine from $120,000 to $10,000, and [redacted] fine from $22,500 to $500. He also reduced GSDA's permit sanction from ninety (90) days to twenty (20) days. Id.

GSDA appealed this second ALJ decision to the new NOAA Administrator, Jane Lubchenco, who denied the appeal on April 1, 2009. EX14, Order Denying Discretionary Review (Apr. 1, 2009). Thereafter, GSDA filed a timely appeal to the United States District Court, and the case was referred to U.S. District Judge Douglas P. Woodlock (D. Mass).

*Cod Overage Investigation at GSDA*

In early 2006 around the time when ALJ Fitzpatrick issued the first decision against NOAA on [redacted] both DSAC Mark Micele and SA Gino Moro received an anonymous tip concerning the fishing vessel Sea Witch. It was alleged that the Sea Witch was landing illegal codfish at GSDA. SA Moro later boarded the Sea Witch and questioned the captain, who informed him that he was confused about the landing limits because he possessed both a state and a federal permit. SA Moro also reviewed the landing reports and FVTRs from the Sea Witch, and determined that the Sea Witch had made twenty-one (21) illegal landings at GSDA. At the time, SA Moro considered charging GSDA for the Sea Witch violations, but he was unsure whether GSDA was aware of the Sea Witch's permit issue. EX15, Special Master Interview with Gino Moro, Special Agent, NOAA (Feb. 28, 2011). SA Moro later discovered that [redacted] had actually inquired about the permit status for the Sea Witch, and evidence substantiates that NOAA informed [redacted] that the Sea Witch had a valid federal permit. EX16, Email from [redacted], Employee, GSDA, to Alison Very, Employee, NOAA (May 2, 2005). Yet, GSDA has testified repeatedly that because the regulations change frequently, they are forced to rely on the fishermen to verify their landing limits at any point in time. EX17, Special Master Interview with [redacted] Employee, GSDA (Dec. 2, 2010).

On August 17, 2006, SA Moro was involved in an incident at the GSDA, where he spent several hours measuring scrod from the Krista Marie and Padre Pio. In all, he discovered eleven (11) undersized fish ranging from 20.25'' to 21.5'' totaling 35 lbs that he attributed to the Krista Marie. The minimum size was 22'', but while measuring the fish, SA Moro thought that the minimum size was 24''. SA Moro ultimately issued an EAR to GSDA for this incident because the

35lbs of scrod amounted to 13.6% of the 258 lbs total that he sampled. EX18, Offense Investigation Report by Gino Moro, Special Agent, NOAA (Aug. 23, 2006). SA Henry photographed the undersized fish during the incident, and he described the environment as "contentious" because GSDA employees were standing around watching the measuring process. EX19, Special Master Interview with Michael Henry, Special Agent, NOAA (Feb. 28, 2011).

Furthermore, emails substantiated that NOAA was conducting an investigation into alleged dogfish overages landed at GSDA. Special Agent Patrick Flynn[6] wrote in an email, dated August 25, 2006, that the "[dogfish overage investigation] could be a very long and complex investigation and we will need to be very organized and hopefully get a search warrant for the GSDA." EX20, Email from Patrick Flynn, Special Agent, NOAA, to Michael Henry et al., Special Agent, NOAA (Aug. 25, 2006). However, NOAA officials later determined that GSDA was not responsible for the alleged dogfish overages based on a system error, which was not GSDA's fault. EX21, Email from Jim St. Cyr, Employee, NOAA, to Patrick Flynn et al., Special Agent, NOAA (Sept. 8, 2006).

On September 7, 2006, SA Patrick Flynn and SA Henry visited GSDA and requested one year's worth of information concerning the fishing vessel Grace Marie from the GSDA bookkeeper, [redacted] informed the OLE Special Agents that it would take her a couple of hours to produce the requested information because the Auction had recently transitioned to a new computer system, and that some older records could potentially be

[6] I did not interview Special Agent Flynn during the course of this investigation because of medical reasons.

stored off-site. The Special Agents did not inform [redacted] that the regulations required GSDA to have the records stored on-site. After a couple of hours, the agents returned and received the requested documents. EX22, Affidavit of Special Agent Patrick Flynn in Support of Application for an Administrative Inspection Warrant.

[redacted] However, SA Moro has asserted that he has never experienced "resistance" when requesting paperwork from GSDA. EX24, OIG Interview Notes of Gino Moro, Special Agent, NOAA (May 11, 2010). SA Henry stated that GSDA would have provided him with information upon request, although it might take one or two requests. EX25, OIG Interview of Michael Henry, Special Agent, NOAA, p. 25 (Aug. 19, 2010). As recently as August 31, 2006, SA Henry had not requested any paperwork from GSDA in 2006. EX26, Email from Michael Henry, Special Agent, NOAA, to Sue Williams, Assistant Special Agent in Charge, NOAA (Aug. 31, 2006). [redacted]

[redacted]

Between September and late November 2006, OLE, in conjunction with GCEL, increased enforcement activity at GSDA. EX27, Email from Andy Cohen, Special Agent in Charge, NOAA, to Sue Williams, Assistant Special Agent in Charge, NOAA (Nov. 1, 2006). On November 9, 2006, SA Moro conducted another inspection at GSDA, which resulted in the discovery of thirteen (13) undersized dabs (9.45 lbs total) landed from the Lily Jean. The legal limit for the dab size was 14'' at the time, and twelve (12) dabs measured between 13''and 13.5''. One (1) dab measured 12.5''.[7] EX28, Offense Investigation Report by Daniel D'Ambruoso, Special Agent, NOAA (Nov. 14, 2006). This incident prompted DSAC Todd Dubois to send an office-wide email that same day to OLE Special Agents requesting that they receive prior approval before conducting any further inspections at GSDA so as not to compromise the pending investigation. EX29, Email from Todd Dubois, Deputy Special Agent in Charge, NOAA, to Sue Williams et al., Assistant Special Agent in Charge, NOAA (Nov. 9, 2006).

Meanwhile, OLE ET Nicholas Call proceeded with a large-scale data analysis of all vessel landings at GSDA. EX30, Email from Sue Williams, Assistant Special Agent in Charge, NOAA, to Andy Cohen, Special Agent in Charge, NOAA (Nov. 1, 2006). Throughout this time, OLE had planned to issue a demand letter to request documents from GSDA. However, GCEL cautioned against employing the demand letter until ET Call's analysis was complete. Id. By November

[7] This violation was one of two violations that resulted in a $10,000 assessed penalty in the final GSDA NOVA issued on February 13, 2009 (Count 59). See infra, 2009 NOVA Discussion.

27, 2006, ET Call had identified approximately thirty (30) vessels suspected of landing overages at GSDA. Based on this analysis, SA Henry then drafted the demand letter to GSDA for records pertaining to the thirty (30) vessels. EX31, Michael Henry Draft of Demand Letter (Nov. 27, 2006).

Shortly after SA Henry completed a draft of the GSDA demand letter, EA Casey and SAC Andy Cohen held a meeting, most likely on November 28, 2006, and decided against using a demand letter. Instead, a decision was made to execute an AIW. According to an email from Assistant Special Agent in Charge, Sue Williams, "[The AIW] situation arose rather quickly, and it appeared to be more of direction by Andy [Cohen] than anything else." EX32, Email from Sue Williams, Assistant Special Agent in Charge, NOAA, to Todd Dubois, Deputy Special Agent in Charge, NOAA (Nov. 28, 2006). EA Casey believed that because of the political sensitivity surrounding this case, it would be the most prudent course of action to have a neutral Magistrate Judge comb through the evidence, and then issue an AIW. EX33, Special Master Interview with Deirdre Casey, Enforcement Attorney, NOAA (March 14, 2011). Furthermore, EA Casey justified the need for the AIW because she believed that the volume of documents to be requested by the demand letter exceeded what was practical. She suggested that it would have required someone to work full-time at the Auction for weeks to get that information. EX34, OIG Interview with Deirdre Casey, Enforcement Attorney, NOAA, p. 66 (Aug. 31, 2010).

SA Henry was in charge of preparing an affidavit in support of the AIW. SA Flynn prepared a supplemental affidavit in support of the AIW concerning the records request incident with [redacted] on September 7, 2006. The affidavit served as the basis for obtaining

an AIW from Magistrate Judge Timothy Hillman of the United States District Court (D. Mass) on December 6, 2006.

NOAA agents executed the AIW on December 7, 2006. On that day, sixteen (16) NOAA special agents, five (5) MEP agents, and one (1) ICE agent converged on the GSDA facility pursuant to the AIW. EX35, NOAA Office of Law Enforcement Operational Plan. [redacted] GSDA employee, described the scene as if "holy hell broke loose" because agents were running everywhere. He also stated that agents, at first, would not allow him to go to the bathroom. Supra, EX17.

During the course of the AIW execution, ASAC Williams and DSAC Dubois were charged with serving the warrant. SA Moro and SA Henry were assigned to conduct interviews with the GSDA bookkeepers: [redacted] and [redacted] During the conversation inside of the front office, [redacted] told SA Moro and SA Henry that GSDA had some records stored offsite. When SA Moro left the front office, he had a "brief, spontaneous conversation" with Rosemarie. SA Moro asked Rosemarie whether GSDA stored records offsite, to which she replied, "No." When SA Moro told her that one of the bookkeepers had already informed him of offsite records storage, Rosemarie told him that those records belonged to Captain Carlo's. Supra, EX15. Rosemarie's primary role at GSDA is to run the Captain Carlo's restaurant and she is seldom involved in record keeping pertaining to the fish auction business. EX36, Special Master Interview of Rosemarie Cranston, Owner, GSDA (Dec. 2, 2010).

Rosemarie further stated that SA Moro was indifferent at the fact that he inadvertently knocked over and broke a sentimental mug (the broken mug was documented) without apologizing for it. After knocking over the mug, SA Moro told an emotional Rosemarie that

NOAA would reimburse her. During that same conversation, he remarked that he "hoped [the mug] was not sentimental." Supra, EX15. ASAC Williams attempted to comfort Rosemarie because she began to cry during that time. Id.

Later that day, OLE Special Agents Henry, Schoppmeyer and ASAC Williams, along with GSDA attorney Ann-Margaret Ferrante, and a GSDA employee, went to the off-site storage units to conduct a records search. OLE agents discovered one hundred fifty (150) boxes of GSDA records in two (2) storage units, but only one (1) of those boxes contained Captain Carlo's records. OLE agents seized all the records pursuant to the AIW. Meanwhile, Larry provided consent for NOAA to search a third storage unit, which ended up containing only his personal property. Larry noted that all of the records retrieved from the offsite storage units were duplicate copies readily available in the GSDA computer system. Supra, EX2. Other than the incidences already described, there was no other indication that NOAA personnel acted unprofessionally during the execution of the AIW.

*Subsequent Investigation*

After seizing one hundred fifty (150) boxes of documents, as well as computer-based information, from GSDA during the AIW execution, NOAA Special Agents, in conjunction with NMFS employees, spent a considerable amount of time and resources parsing through the copious amounts of data, which included photocopying hundreds of thousands of documents, as well as finding appropriate software to organize the electronic data. In all, SA Henry, SA Flynn, and SA Moro spent approximately 75% of their time working directly on this investigation from December 2006 until May 16, 2008, when the final OIR was issued. Supra, EX19.

OLE and GCEL's strategy was to focus their investigation initially on the vessels that served as the basis of SA Henry's affidavit, including the Sea Witch, and on overages in general. EX37, Handwritten Notes by Deidre Casey, Enforcement Attorney, NOAA (December 14, 2006). Moreover, as recently as December 18, 2006, SA Flynn had discovered a number of violations at GSDA involving fishing vessels that landed without an YTF LOA.[8] EX38, Email from Patrick Flynn, Special Agent, NOAA, to Sue Williams, Assistant Special Agent in Charge, NOAA (Dec. 18, 2006). Based on a detailed analysis of all the documents obtained through the AIW, OLE identified approximately twenty eight (28) fishing vessels that either landed cod overages at GSDA, or landed YTF without an LOA between 2004 and 2006.[9] EX39, Email from Nicholas Call, Enforcement Technician, NOAA, to Michael Henry et al., Special Agent, NOAA (May 7, 2007). From this list, OLE agents conducted individual interviews with at least sixteen (16) confirmed vessels between September and October 2007.

I obtained a copy of the interview questions used by the Special Agents, which EA Casey helped prepare based on her prior experience as a Massachusetts District Attorney. Supra,

[8] See Infra, Discussion Case 4 concerning YTF LOA.

[9] NOAA required federally-permitted fishermen to obtain an YTF LOA because the Northeast Fisheries Management Plan provided different landing limits for YTF between the two geographical fishing areas near Gloucester: Cape Cod/Gulf of Maine ("CC/GOM") and Southern New England ("SNE"). The two areas are divided by latitude 42°. The LOA did not cost any money, but the fishermen needed to request the letter either in person or by telephone. With regard to the CC/GOM, the YTF possession limits were 250 lbs from April 1-May 31; and October 1-November 30. From June 1-September 30, and December 1-March 31, the possession limit was 750 lbs. Meanwhile, in SNE, the YTF possession limit was 250lbs from March 1-June 30, and 750lbs from July 1 through February 28 (or 29). When fishermen went fishing around 2004-2006, they were required to declare the areas where they would be fishing through the DAS system. If a fisherman declared that he/she would be fishing in CC/GOM, and subsequently traveled to SNE, he/she would be in violation of the regulations. The introduction of VMS superseded the YTF LOA requirement on November 22, 2006 when the possession limits between the two areas became uniform. This occurred before NOAA made the decision to execute the AIW. See infra, Discussion Case 4.

EX33. OLE contacted the captains/owners of the targeted fishing vessels for interviews at the NOAA Gloucester offices because they had either landed overages at GSDA, or they had landed YTF without the required LOA. The Special Agents informed each fisherman that OLE had discovered their particular violation in the course of the GSDA investigation, and that OLE was interviewing anyone doing business at GSDA. The interview questions focused almost exclusively on GSDA business practices, including the offloading process, permitting information, payment information, and whether GSDA ever conspired to land overages. EX40, Sample Fishermen Interview Questions.

In each of the interviews, OLE agents told the fishermen that any information they could provide with respect to GSDA's alleged illegal business practices would be considered cooperation, and would be forwarded accordingly to GCEL. Supra, EX15. Not one fisherman provided any negative information pertaining to GSDA business practices. In fact, all of the fishermen that I interviewed had only positive things to say about GSDA's business practices.

However, the captain of the Razor's Edge, one of the vessels that originally served as the basis of Michael Henry's affidavit in support of the AIW, initially told the Special Agents that GSDA did not engage in any inappropriate business dealings. EX41, Special Master Interview with Marc Gonsalves, Fisherman (Mar. 7, 2011). A few days later, Mr. Gonsalves contacted one of the Special Agents and told him about an alleged incident where Larry Ciulla offered to hide overages on behalf of Mr. Gonsalves. [redacted]

[redacted] Mr. Gonsalves later provided OLE with a sworn written statement alleging that Larry had told him that he would falsify some dealer reports to hide Mr. Gonsalves' overages. EX44, Written Statement of Marc Gonsalves (Oct. 31, 2007). SA Henry noted that Mr. Gonsalves' statements needed to be "corroborated." Supra, EX19.

During my interview of Mr. Gonsalves, he admitted that he fabricated the entire story because he thought that the OLE Special Agents would be more lenient on him for his own violations. Supra, EX41.[10] On November 8, 2007, SA Flynn and SA Henry picked up Mr. Gonsalves at his residence in Harwich, MA and drove him to Hyannis, MA, where EA Casey and EA MacDonald conducted his deposition. During the deposition, Mr. Gonsalves again recounted how Larry Ciulla had offered to hide cod overages for him by re-labeling the cod as haddock. Id. EA MacDonald, EA Casey, SA Flynn, and SA Henry were all present during the deposition. EX45, Deposition of Marc Gonsalves (Nov. 8, 2007). However, there was no indication that Mr. Gonsalves' testimony provided any credible evidence that was used by

[10] See also Case 4 Discussion on Marc Gonsalves.

NOAA to suggest that Larry Ciulla and GSDA employees in general, intentionally conspired to hide overages from NOAA.

*February 13, 2009 NOVA*

NOAA Special Agents continued to put together a case against GSDA premised primarily on YTF LOA violations, and to a lesser extent, overages, because of its inability to secure any credible evidence against GSDA for knowingly accepting codfish overages. On May 15, 2008, SA Moro submitted a completed OIR documenting two hundred and fifty nine (259) separate counts against GSDA. Count 1 documented GSDA's offsite storage of records. Count 2 documented Rosemarie Cranston's statement concerning the offsite records storage. Counts 3-39 documented overages that fishermen allegedly landed at GSDA. Counts 40-249 involved numerous landings by fishing vessels without the requisite YTF LOA. Counts 250-257 involved YTF LOA overages landed at GSDA. Count 258 documented a reporting violation. Finally, Count 259 documented thirteen (13) undersized dabs discovered at GSDA. EX46, Offense Investigation Report by Gino Moro, Special Agent, NOAA (May 15, 2008). Notably, SA Henry contemplated charging GSDA for misreporting landing information on March 13, 2006 from the Aaron & Alexa. SA Henry had previously relied on this information to support his affidavit for the AIW. EX47, Email with Attachments from Michael Henry, Special Agent, NOAA, to Gino Moro, Special Agent, NOAA (Mar. 19, 2008). Ultimately, SA Henry became aware that the alleged overage was due to a glitch in NOAA's system. This alleged overage was never charged.

On February 13, 2009, EA Casey consolidated the 259 counts in SA Moro's OIR and issued GSDA a 59 count NOVA and NOPS amounting to a $355,200 penalty and a 120-day permit sanction. EX48, Notice of Violation Assessment (Feb 13, 2009). EA Casey charged GSDA

for accepting YTF from fishing vessels that did not possess valid LOAs in forty-two (42) out of the 59 counts; thirteen (13) of the 59 NOVA counts involved fishing vessels landing cod overages at GSDA over a three (3) year period; and one (1) charge pertained to GSDA landing YTF overages. Moreover, EA Casey charged GSDA for possessing undersized fish on two occasions in August and November 2006. Id. Finally, three (3) out of the 59 counts involved a violation for failing to retain records on site, for providing a false statement concerning the existence of an offsite storage facility; and for two (2) instances of accepting short fish by .5''to 1.25''. EA Casey charged GSDA $35,000 for keeping records at an offsite location, $50,000 for Rosemarie's statement concerning the offsite storage of records, and $10,000 for accepting short fish in two (2) instances. Id.

EA Casey reasoned that GSDA had a previous case involving various false statements, which justified the $50,000 penalty levied against Rosemarie. She assessed a $35,000 penalty for the storage of off-site records because this would constitute a third violation involving records. EA Casey also assessed a $10,000 penalty for the two (2) counts of undersized fish because the two (2) cases happened within a couple months of one another. Finally, she charged for the YTF LOA violations because she claimed that the discovery of such widespread violations warranted the charges for deterrent purposes. Supra, EX33.

EA Casey issued this NOVA while litigation for [redacted] was pending before Judge Woodlock in the United States District Court. Notably, The NOVA did not include charges stemming from the fishing vessels Foxy Lady, Partner, and Aaron & Alexa, all of which served as the basis for Michael Henry's affidavit in support of the AIW.

*Permit Sanction*

GSDA, through Paul Muniz and Burns & Levinson LLP, requested an ALJ hearing in connection with the 2009 NOVA on March 3, 2009, and the case was assigned to ALJ Walter Brudzinski. Concurrently, Administrator Jane Lubchenco was considering GSDA's appeal with respect to [redacted] Predictably, she denied final review of the case on April 1, 2009 and affirmed judgment for NOAA. GSDA appealed Dr. Lubchenco's decision to the United States District Court on April 30, 2009.

While the case was pending on appeal before Judge Woodlock, NOAA sought to enforce a ten (10) day permit sanction against GSDA. On June 19, 2009, NOAA enforcement attorney Mitch MacDonald sent GSDA notice of the proposed shut down. EX49, Notice of Pending Shutdown from Mitch MacDonald, Enforcement Attorney, NOAA (June 19, 2009). The sanction arose from the settlement agreement of September 11, 2003, whereby the parties agreed that GSDA would be in violation of its probation if a "final administrative decision" determined that GSDA had a "substantial violation" with a $10,000 penalty or higher. In the agreement, GSDA agreed to a 10-day permit sanction in the event such a significant violation occurred within the 12-month probation period. Supra, EX7.

EA MacDonald sent the notice after SAC Cohen alerted a reporter from the Boston Globe about the pending shutdown of GSDA, but before GSDA received any notification of the proposed shutdown. SAC Cohen informed the reporter to hold-off on writing any story until after GSDA had been notified. EX50: Affidavit of Andrew R. Cohen. Nevertheless, reporters from the Boston Globe arrived at GSDA to inquire about the potential shutdown prior to GSDA having received any notice of the shutdown.

Upon receiving notice, GSDA immediately filed for a preliminary injunction in the U.S. District Court to prevent NOAA from shutting down its business. On July 20, 2009, Judge Woodlock (D. Mass) held a hearing and entered an order enjoining NOAA from forcing a shutdown of GSDA after balancing the plaintiff's potential harm, government interest, and the public interest. Judge Woodlock concluded that a 10-day sanction would ultimately put GSDA out of business, and that the government would not be harmed if GSDA remained open for business pending a final decision from the Court. EX51, Hearing Transcript, p. 32-7 (July 20, 2009).

A hearing date before Judge Woodlock was set for March 1, 2010 with respect to the [redacted] appeal. Meanwhile, litigation was pending in front of ALJ Brudzinski for the February 13, 2009 NOVA case. GSDA tried, on a number of occasions, to file a motion to continue the trial before ALJ Brudzinski until after a Congressional Oversight Hearing was conducted in Gloucester concerning fisheries enforcement issues. The motion was denied.

*March 1, 2010 Settlement*

On March 1, 2010, after lengthy settlement discussions between NOAA enforcement attorneys, AUSA [redacted] and GSDA counsel, the parties agreed to settle all three (3) GSDA cases for $85,000, and a 35-day permit sanction. The settlement agreement allowed GSDA to serve ten (10) days of the sanction on the weekends. The remaining twenty-five (25) days was to be served during the weekdays, and the sanctions must be served by March 1, 2013.[11] Further, GSDA neither admitted nor denied the allegations stemming from February 13, 2009

[11] This latter provision would have actually required that the GSDA shutdown for two days because it could not hold an auction, or offload fish on the first day, so that the auction could not be held on the second day.

NOVA and March 7, 2005 NOVA. Additionally, the parties agreed to file a stipulation of dismissal, with prejudice, of the September 11, 2003 settlement agreement, which was the subject of the preliminary injunction action. EX52, Settlement Agreement (Mar. 1, 2010).

**II. Conclusion**

I find that GSDA was the subject of selective enforcement by NOAA, and that there is little, if any, credible evidence to demonstrate that GSDA was engaged in any pattern of intentional illegal behavior. I base my conclusion on a number of factors.

*Cod Overages*

First, there is no question that the "Phantom Ship Case" was the action of a rogue employee, [redacted] who conspired with his accomplices to conceal overages at GSDA without Larry Ciulla's knowledge. The only contradictory evidence to this assertion came from my interview with EA MacDonald, who informed me that the conspirators in this case alleged that Larry Ciulla had knowledge about the operation. EX53, Special Master Interview with Mitch MacDonald, Enforcement Attorney, NOAA (March 14, 2011). I do not find this evidence credible, particularly because the conspirators have substantial motive to provide misleading evidence.

Regardless of the lack of credible evidence, this initial case provided NOAA with an impression that GSDA was engaged in a pattern of illegal behavior. This impression contributed to EA Juliand's $120,000 penalty assessment in [redacted] EA Juliand's handwritten notes, and his decision to charge such an excessive penalty in light of the facts of this case, underscore a perception that GSDA was engaged in a pattern of ongoing violations, despite a lack of any credible evidence to substantiate this

perception. This is particularly so because [redacted] attorney had informed EA Juliand of his client's tragic circumstances prior to the start of trial, and EA Juliand showed no leniency in this situation, despite EA Juliand's testimony that he would have normally considered [redacted] s circumstance as a mitigating factor. Supra, EX13. To quote ALJ Devine, "such a large penalty as proposed in this case appears to exceed the level of violation within the limits of the facts and circumstances of this matter and it would be contrary to the interest of justice to impose a penalty that would essentially put a company out of business in a situation such as this." 2008 NOAA Lexis 11, *44. I agree.

Furthermore, not one of the NOAA employees could articulate a strong basis for suspecting that GSDA was involved in a continuing pattern of violations. Based on the evidence presented, I find that NOAA, and SA Moro in particular, initiated the GSDA investigation based on an anonymous tip concerning the Sea Witch. SA Moro investigated the Sea Witch, and he testified that he was unsure at the time whether GSDA was even aware of the Sea Witch's landing limits. However, SA Moro had a discussion with GCEL at some point in 2006, which apparently led to widespread suspicion that GSDA was being evasive because it was constantly giving OLE the "run-around" in producing records upon request. Yet, SA Moro and SA Henry could not articulate any specific instances of GSDA's refusal to produce records. Supra, EX15. Contrary to the agents' failure to recall specific incidences of resistance, the GSDA personnel collectively testified, and evidence strongly suggests, that GSDA has experienced numerous incidences of conflict between its personnel and NOAA enforcement officials before the start of NOAA's investigation into GSDA. EX54, Letter from Ann Margaret Ferrante, Attorney, Ware & Ferrante, to Gino Moro, Special Agent, NOAA (Feb. 16, 2004). Although the specific instances of

conflict have not been substantiated, these examples underscore deep tension between the regulators and the GSDA.

Nevertheless, under the apparent suspicion that GSDA was landing cod overages, the September 19, 2006 meeting of NOAA enforcement officials prompted NOAA to conduct a large-scale analysis of cod landings at GSDA. During this analysis, NOAA identified thirty (30) vessels suspected of overages after conducting a yearlong analysis of all cod landings at GSDA. Out of the thirty (30) vessels identified in the original demand letter, SA Henry chose six (6) vessels in seven (7) landings to establish probable cause in support of the AIW. I find that out of the seven (7) paragraphs in the affidavit devoted to establishing probable cause, paragraphs #28, #33, and #34 in the affidavit proved to be an egregious misstatement of the facts; paragraph #32 included one vessel that landed only 29 lbs over the limit; and paragraphs #29 and #31 pertained to a vessel that landed small overages on two (2) occasions because the captain was a part-time fisherman, and retired CEO of a large construction company who was confused about the landing limits regulations.

After NOAA obtained all the GSDA documents from 2004-2006, after three (3) NOAA agents spent 75% of their time over almost two (2) years to conduct a detailed analysis of these records, and after NOAA Special Agents interviewed various captains that made no disparaging remarks about GSDA, EA Casey ultimately charged only three (3) vessels from the original thirty (30) suspected vessels, for landing cod overages in the 2009 NOVA: Early Times,[12] Jersey

[12] NOAA cited GSDA for accepting 58 lbs over the 800lbs limit from the Early Times – a 7.25% overage. The 7.25% overage is below the industry standard applied in In re: Louis Mitchell. During the Louis Mitchell case, NOAA testified that it allows an industry margin of error of 10% before violations are charged. In the Matter of: Louis Mitchell and Gloucester Fish Exchange, Inc., 2008 NOAA Lexis 11, *13.

Princess, and Jessica D. The fact that only three (3) vessels from the original thirty (30) were charged in the final NOVA for overages, undermines the type of intelligence and analysis that gave rise to the suspicion that GSDA was engaged in illegal behavior, and which led to the execution of the AIW.

To be fair, EA Casey charged GSDA for accepting overages from various other vessels as well, which totaled 14 of the 59 counts. However, it is of utmost importance to note that the violations that EA Casey charged were all self-reported violations, which undermines the suspicion that GSDA was engaged in hiding overages. In fact, GSDA has never been cited for inaccurate reporting. Those cited overages must be put into perspective. GSDA offloaded anywhere from 13.2-22 million pounds of fish between 2004-2006, and it is reasonable to assume that there is a small margin of error in their business as a result of handling such a large volume of fish. Precision should be expected, but GSDA should not be charged with a $355,000 penalty for every minor mistake. In short, the entire GSDA investigation was premised on misleading evidence as the result of an unsubstantiated perception that GSDA was engaged in a pattern of illegal activity.

Finally, other isolated examples collectively demonstrate animus by NOAA enforcement personnel towards GSDA. For example, one witness testified to hearing SA Moro's wife making a comment that "they [NOAA] are really going after the fish industry in Gloucester" or words to that effect, shortly before the execution of the AIW. EX55, Special Master Interview with [redacted] Witness (Dec. 2, 2010). During my interview of SA Moro, he stated that his wife denied making this comment. I told SA Moro that he could inform his wife that she could call me to refute the statement. Supra, EX15. His wife never called. Further, another witness has

testified that he heard EA Juliand say about Larry Ciulla that he was going to "get that lying piece of shit scumbag." The witness, though, was unsure whether Juliand used the word, "lying." EX56, Special Master Interview with [redacted] (Dec. 2, 2010). However, EA Juliand denies making that statement, but I have found that EA Juliand has used that exact phrase, "lying piece of shit scumbag" before in reference to another individual. Supra, EX13. Finally, the intended shutdown of GSDA's business pursuant to the September 11, 2003 settlement agreement, and while appeals were pending with respect to [redacted] case in federal district court, further suggests that GSDA was a selective target subject to aggressive scrutiny by NOAA regulators.

*YTF LOA Violations*

The majority of the charges (42 out of 59 counts) in the February 13, 2009 NOVA involved various fishermen landing YTF at GSDA without the required LOA. NMFS Special Agents and GCEL attorneys have testified, and the evidence corroborates, that the enforcement of YTF LOA was not a priority when the requirement was in place between 2002-2006. EX57, FY 2006 Enforcement Priorities for Northern Massachusetts. In fact, none of the agents that I interviewed could recall citing any fishermen for failure to maintain an LOA beyond a written warning.

However, OLE agents documented, and EA Casey charged GSDA with forty-two (42) counts of landing YTF without an LOA, despite the fact that the YTF LOA requirement had been eliminated and superseded by VMS in November 2006. EA Casey reasoned, "[W]hen confronted with hundreds of charges, albeit of a regulation that has been replaced, the Agency could not ignore it. The charges had both specific and general deterrent value and would

hopefully encourage dealers and vessels to comply in the future with LOA requirements…" EX58, Email from Deirdre Casey, Enforcement Attorney, NOAA, to Charles B. Swartwood III (Mar. 18, 2011). Furthermore, she noted that GSDA knew, or should have known, about the YTF LOA requirement based on a letter in a folder entitled, "Larry Look," that OLE agents discovered during the execution of the AIW. EX59, Email from Deirdre Casey, Enforcement Attorney, NOAA, to Charles B. Swartwood III (Mar. 16, 2011). I disagree.

All of the GSDA personnel testified that they had no knowledge of the YTF LOA requirement when it was in place. Larry Ciulla testified that he first learned of the "Larry Look" folder during his deposition in late 2009. Supra, EX2. [redacted] NOAA presented no evidence to substantiate that GSDA received notification of the YTF LOA requirement beyond a single letter found in the "Larry Look" folder. Additionally, I interviewed both [redacted] who are the owners of the Whaling City Display Auction in New Bedford, MA and the largest fish dealer in New England. They both testified that they also did not know about the YTF LOA requirement, nor were their employees trained to ask for the YTF LOAs at the unloading dock. EX61, Special Master Interview with [redacted] (January 17, 2011). This evidence clearly demonstrates that the YTF LOA requirement

was not widely known, or acknowledged, by the two largest fish dealers in New England, and indicative of selective enforcement against GSDA for a little-enforced technical regulation.

Despite this fact, the language in the MSA indicates that it is unlawful to have "possession of any fish taken or retained in violation of this Act or any regulation…" 16 U.S.C. 1857, §307(1)(H). However, evidence suggests that GSDA justifiably relied upon information provided to them by NOAA in support of its position that violations committed by fishermen should not be applied to the dealer. According to testimony from Rose Ciulla, GSDA consulted with NOAA at the inception of its business in order to create compliance procedures. EX62, Testimony of Rose Ciulla, Owner, GSDA (Dec. 2, 2010). On April 28, 1999, in a letter addressed to Rose Ciulla, ASAC Richard Livingston described procedures used by NMFS when conducting investigations. Notably, Mr. Livingston wrote:

> The Auction, as a brokerage, provides a service in transferring ownership of fish from one individual to another, without taking title to the product. Therefore, the Auction has no liability in violation committed by a fisherman, unless an auction employee commits a separate violation, or enters into a conspiracy with the violator. A "hold harmless" indemnification is therefore unnecessary during the normal course of business.
>
> EX63, Letter from Richard Livingston, Special Agent in Charge, NOAA, to Rose Ciulla, Owner, GSDA (April 28, 1999).

[redacted] I find that this reasoning puts form over substance and is a pretense to charge GSDA with something after such a long and expensive investigation.

It is important to note that EA Casey charged GSDA for the YTF LOA violations over two (2) years after NMFS eliminated the YTF LOA requirement. Furthermore, for the YTF LOA violations that occurred during the months of January, February, April, May, July, August, September, and December, the possession limits between Cape Cod/Gulf of Maine and Southern New England were the same. Therefore, a majority of violations cited by EA Casey amounted to technical violations that did not exceed the YTF possession limit and which did not impact on conservation issues. Applying this same logic during the course of litigation, EA Casey actually eliminated all post-May 1, 2006 YTF LOA counts from the February 13, 2009 NOVA because the possession and landing limits between CC/GOM and SNE had become uniform. EX65, Email from Deirdre Casey, Enforcement Attorney, NOAA, to Paul Muniz, Partner, Burns & Levinson LLP (July 21, 2009). This act is a clear demonstration that the YTF LOA violations that took place within those months did not implicate conservation matters. If the primary purpose of issuing penalties is to deter fishermen or dealers from committing future violations, then certainly penalizing GSDA for accepting YTF when fishermen did not have an LOA after NMFS eliminated the requirement serves no deterrent purpose, particularly if both GSDA and the Whaling City Display Auction, and presumably other dealers, had no knowledge of the requirement.

The charges stemming from the YTF LOA violations therefore amounted to technical violations that demonstrated an underlying motive by NOAA to target GSDA for violations. The investigation began with suspected cod overages, and despite an extensive investigation, NOAA was unable to corroborate its initial suspicion that GSDA was intentionally engaged in a pattern of illegal activity. In fact, NOAA presented no credible evidence to that effect. Barring such

evidence, NOAA turned to the more technical YTF LOA violations to justify the time and resources that it spent investigating self-reported violations by GSDA.

Additionally, EA Casey assessed a $35,000 penalty against GSDA for having a secure, off-site storage facility for records that were readily available in GSDA's computer system; a $50,000 penalty for Rosemarie Cranston's alleged false statement that SA Moro acknowledge to be nothing more but a "brief, spontaneous conversation"; and a $10,000 penalty for two incidents involving twenty four (24) undersized fish that were short by approximately 1''. These penalties were clearly excessive, and reinforce NOAA's pattern of unfairly targeting GSDA. This is particularly apparent because none of the dealers that I have spoken to, including representatives from the Whaling City Display Auction, Intershell International Corporation, and Ocean Crest Seafood, Inc., have experienced such intense scrutiny by NOAA officials. Therefore, I find that GSDA was the subject of selective targeting by both OLE and GCEL.

**III. Recommendation**

I recommend that the Secretary cancel all future monetary obligations due from GSDA in connection with the settlement agreement dated March 1, 2010 and that he reimburse GSDA for all payments made towards its $85,000 settlement amount , less the $10,000 judgment assessed by ALJ Devine from the final administrative hearing in [redacted] I recommend further that the sanction penalty be vacated from the settlement agreement dated March 1, 2010 and that the original penalty sanction imposed by ALJ Devine be reinstated as set forth in his decision less any days previously served since the date of that decision. I base my recommendations on the fact that GSDA was clearly the target of selective enforcement and subject to excessive fines based on de minimis, self-reported

violations. NOAA had no credible evidence that GSDA was willfully violating fisheries regulations. However, GSDA was subjected to lengthy proceedings to defend itself and its employees for an amount exceeding $200,000 in legal fees. GSDA and its counsel seek an award of attorney's fees in this proceeding. I do not have the authority to award such fees. Pursuant to 5 U.S.C. §504(a)(4) (Equal Access to Justice Act), such fees may be awarded, "…in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement…" However, this is not an adversary adjudication and for that reason, the request is denied.

**CASE 4: YELLOWTAIL FLOUNDER LETTERS OF AUTHORIZATION**

*In its report, OIG confirmed complaints of disparate treatment and inconsistent penalties for NOAA's enforcement of restrictions on fishing in yellowtail flounder stock areas. (The NOVA's for these individual cases were issued between March and May 2009.) During the four-year period (August 2002-November 2006) when fishermen were required to have a NOAA Letter of Authorization (LOA) to fish in yellowtail flounder stock areas in the Northeast Region, GCEL did not impose a single fine on any of the seven cases that were referred to it for enforcement action. After the LOA requirement was eliminated, in November 2006, GCEL nonetheless retroactively charged 14 LOA cases (13 of which were new, while the remaining one was merged with one of the seven cases referenced above) resulting in assessed penalties ranging from $1,600 to $58,700. All 14 cases were retroactively charged based on historical records seized during the execution of an administrative inspection warrant at a fish dealer facility (which occurred after the LOA requirement had been eliminated). All of the 14 cases were charged solely for the referenced LOA violation. This caused many fishermen to believe that GCEL was levying fines to target the facility and those who did business there, rather than enforcing statutes and regulations for the purpose of protecting the fish stock.* (OIG Description of Case, September 2010 Report).

**I. Findings of Fact**

NMFS first implemented the YTF LOA requirement in August 2002 and eliminated the requirement in November 2006. NMFS used YTF LOAs as a management tool to enforce yellowtail possession limits that were different in adjacent stock areas. [redacted]

NOAA required federally-permitted fishermen to obtain an YTF LOA because the Northeast Fisheries Management Plan provided different landing limits for YTF between the two (2) geographical fishing areas near Gloucester: Cape Cod/Gulf of Maine ("CC/GOM") and Southern New England ("SNE"). The two areas are divided by latitude 42°. It costs nothing to obtain the YTF LOA, but fishermen needed to request the letter either in person or by telephone.

In the CC/GOM, the YTF possession limits were 250 lbs from April 1-May 31; and October 1-November 30. From June 1-September 30, and December 1-March 31, the possession limit was 750 lbs. Meanwhile, in the SNE, the YTF possession limit was 250 lbs from March 1-June 30, and 750 lbs from July 1 through February 28 (or 29). When fishermen went fishing around 2004-2006, they were required to declare the areas where they would be fishing through the DAS system. If a fisherman declared that he/she would be fishing in CC/GOM, and subsequently traveled to SNE, he/she would be in violation of the regulations. The introduction of VMS superseded the YTF LOA requirement on November 22, 2006 when the possession limits between the two areas became uniform.

After NMFS eliminated the YTF LOA requirement on November 22, 2006 through the implementation of Framework 42, NMFS OLE executed the AIW on the GSDA facility and obtained all of its landing records from 2004-2006.[13] EX2, Email from Doug Christel, Policy Analyst, NOAA, to Paul Murphy, Coast Guard (Jan. 10, 2007). From these records, NOAA identified approximately fourteen (14) fishing vessels that landed YTF at GSDA without an LOA. EX3, Email from Patrick Flynn, Special Agent, NOAA, to Sue Williams, Assistant Special Agent in

[13] See supra, Discussion Case 3 on GSDA Investigation.

Charge, NOAA (Dec. 18, 2006). NOAA agents requested interviews with at least fourteen (14) fishing vessel captains based on their YTF LOA and/or overage violations. SA Moro noted in an affidavit that it is standard practice to question fishermen concerning allegations of dealer involvement in MSA violations. EX4, Gino Moro Affidavit In Response to Respondent's Counsel's Statement of Good Faith Basis for Discovery. The Special Agents informed the fishermen that OLE had discovered their particular violation in the course of the GSDA investigation, and that OLE was interviewing anyone with business at GSDA. I obtained a copy of the interview questions utilized by the Special Agents. The interview questions focused almost exclusively on GSDA business practices, including the offloading process, permitting information, payment information, and whether GSDA ever conspired to land overages. EX5, Sample Interview Questions. In each of the interviews, OLE agents told the fishermen that any information they could provide with respect to GSDA's alleged illegal business practices would be considered cooperation, and would be forwarded to GCEL accordingly when it determined penalties. EX6, Special Master Interview with Gino Moro, Special Agent, NOAA (Feb. 28, 2011). There is no record of what was said by any Special Agents during these interviews except for their own summaries. However, every fisherman I interviewed clearly had the impression that if they co-operated and provided information that GSDA was committing violations, their violations would disappear. The Special Agents denied making any statements that would lead to that conclusion. I cannot resolve what was actually said during these interviews, but I know what the fishermen interviewed thought what was said by the Special Agents. None of the fisherman had any disparaging remarks concerning GSDA's business practices, and most of the fishermen interviewed were subsequently charged with violations.

The following fishermen did not obtain an YTF LOA and at some point landed YTF at GSDA: Paul Theriault (F/V Terminator), Mark Carroll (F/V Harvest Moon), Richard Burgess (F/V Scotia Boat Too), Bill Lee (F/V Ocean Reporter), Ed Boynton (F/V Sissel B), Ed Smith (F/V Ambjorg & Julie), Joel Carreiro[14] (F/V Jersey Princess II), and Marc Gonsalves (F/V Razor's Edge).

*Paul Theriault*

Mr. Theriault has been a commercial fisherman since 1982, and has owned the fishing vessel, Terminator, since 1986. He usually trucks his fish from Rockport to GSDA for sale. SA Moro and SA Henry interviewed Mr. Theriault on October 1, 2007 concerning his YTF LOA violations. Mr. Theriault did not have a valid YTF LOA from July-September 2004. Incidentally, the possession limits between the CC/GOM and SNE for that time period were the same.[15] However, prior to, and subsequent to that period, Mr. Theriault possessed an YTF LOA. The Special Agents questioned Mr. Theriault primarily about the GSDA and whether it was engaging in illegal activity. Mr. Theriault was uncomfortable during the entire meeting because he felt like a criminal. EX7, Special Master Interview with Paul Theriault, Fishermen (Dec. 7, 2010).

Mr. Theriault ultimately received a NOVA from EA Deirdre Casey in February 2009. He retained an attorney, and the case settled for $1,050. However, Mr. Theriault said that he lost many nights of sleep over the violation, and he had to take several days off from fishing in order to meet with his attorney to resolve his case. Further, Mr. Theriault has since stopped offloading at GSDA because he said that he could not take the "harassment" anymore. He currently offloads at the Boston Auction.

[14] I did not interview Mr. Carreiro during the course of this investigation.

[15] See Supra, Case 3 Discussion.

*Mark Carroll*

Mr. Carroll of Gloucester, MA is the owner of the fishing vessel Harvest Moon. He lands fish at GSDA, and has been doing so since one year after GSDA first opened. Mr. Carroll indicated that when the YTF LOA requirement was in place, he always made sure he had an YTF LOA. In fact, he testified that when he went to NOAA's office to request an YTF LOA for the 2004 fiscal year, he received a 2003 "duplicate copy" instead. EX8, Special Master Interview with Mark Carroll, Fisherman (Dec. 7, 2010). NOAA's records show that Mr. Carroll did not have an YTF LOA for the fiscal year spanning 2004-2005. However, before and subsequent to that period, he always had an YTF LOA. Mr. Carroll made numerous fishing trips that year when he did not have a valid YTF LOA and offloaded fish at the GSDA.

On October 1, 2007, SA Patrick Flynn and SA Moro requested Mr. Carroll to meet them at NOAA headquarters in Gloucester for questioning premised on his YTF LOA violation. However, their primary focus of the interview was on GSDA business practices. Mr. Carroll brought four (4) years worth of logbooks with him to the meeting. Mr. Carroll said that he had nothing negative to say about GSDA. Furthermore, he told the agents that GSDA would not jeopardize their business for such a small amount of money. Id. In fact, Mr. Carroll admitted that he actually worked at GSDA for various periods of time, and that his dealings with GSDA employees have been fair and professional. After the meeting, Mr. Carroll received a NOVA in [2009] from EA Casey for YTF LOA violations totaling $49,703. The NOVA was Mr. Carroll's second violation. Ultimately, through counsel, Mr. Carroll settled with EA Casey for 10 DAS for the 2009 fishing year.

*Richard Burgess*

Mr. Burgess of Manchester, MA, is the owner of five (5) fishing vessels: Heidi & Heather, Scotia Boat Too, Brian Zachary, Julie Ann and Rock On. He has been in the fishing business since the early 1970's, has landed fish at GSDA since its inception, and continues to do so. Mr. Burgess asserted, and NOAA's records show, that he always had YTF LOAs for all his vessels. However, when he went to the NOAA office to request the YTF LOA for the period of time in question, the personnel there allegedly informed him that NOAA planned to eliminate the YTF LOA requirement. Therefore, he did not obtain YTF LOAs that year for his vessels. EX9, Special Master Interview of Richard Burgess, Fisherman, (Dec. 7, 2010).

On September 26, 2007, SA Moro and SA Henry contacted Mr. Burgess for an interview at NOAA's Gloucester Office. Special Agents had previously questioned Mr. Burgess' employee, [redacted] captain of the F/V Scotia Boat Too, before interviewing Mr. Burgess. During [redacted] interview, OLE Special Agents allegedly told him that his cooperation would help to alleviate his YTF LOA violations. [redacted] told the Special Agents that GSDA is the most "tightly run operation" he has ever seen and that they are "legit." EX10, Special Master Interview with [redacted] Fisherman (Dec. 7, 2010).

Mr. Burgess' prior knowledge of [redacted] interview prompted him to bring counsel to his interview, where SA Moro and SA Henry focused their inquiries on potential illegal practices at GSDA. Mr. Burgess claimed that the Special Agents questioned him about his motivation to continue landing fish at GSDA, given the heightened scrutiny by NOAA. To wit, "You know we are down there all the time. You know we are watching you there, why do you keep going back there? Don't they charge more? Couldn't you get a better deal going somewhere else?" SA

Henry testified that he did indeed ask questions about GSDA's prices in an attempt to figure out why fishermen land at GSDA if GSDA charged higher prices. EX11, Special Master Interview with Michael Henry, Special Agent, NOAA (Feb. 28, 2011). However, he denied trying to dissuade Mr. Burgess from landing at GSDA because of NOAA's presence. EX12, Michael Henry Affidavit in Response to Respondent's Counsel's Statement of Good Faith Basis for Discovery Michael Henry Affidavit. Mr. Burgess claims that OLE agents also said that they would make it easy for him if he told them what was going on at GSDA. Mr. Burgess' attorney corroborated these statements, but NOAA agents deny making this, or other similar statements. EX13, Testimony of Stephen M. Ouellette Before the Domestic Policy Subcommittee Oversight and Government Reform Committee, U.S. House of Representatives (Mar. 2010); See also EX4.

Ultimately, EA Casey issued Mr. Burgess a three (3) count NOVA on May 11, 2009 for $58,700 for YTF LOA violations committed by the Scotia Boat Too between January and March 2006. The Scotia Boat Too, captained by [redacted] had made numerous YTF landings during those dates. Mr. Burgess and EA Casey ultimately settled the case for no monetary penalty, and eighteen (18) DAS.[16]

*Billie Lee*

Mr. Lee of Rockport, MA owned the fishing vessel Ocean Reporter. He is currently retired, but was a fisherman for approximately 37 years. During that time, he always landed fish at GSDA. Mr. Lee asserted that he is well versed in federal permits based on his experience in providing his vessel for scientific research. Mr. Lee admitted that he had previously willfully

[16] For further discussions about Mr. Burgess' other cases, See infra, Discussion Case 9 and Case 20.

violated the MSA, and as a result, NOAA assessed a $54,000 penalty against him. Through counsel, Mr. Lee settled this past case for $10,000.

Sometime in November 2006, the Coast Guard boarded the Ocean Reporter and informed Mr. Lee that he required an YTF LOA. Thereafter, Mr. Lee immediately obtained an LOA. He claimed that the Coast Guard never pursued any charges against him.

On September 28, 2007, SA Flynn and SA Henry interviewed Mr. Lee because he had allegedly landed an overage, and fished without the requisite YTF LOA. Mr. Lee did not have a YTF LOA on his vessel until the Coast Guard notified him in November 2006. Similar to the other fishermen interviews, the Special Agents focused their questioning on alleged illegal business practices at GSDA concerning overages. Mr. Lee relayed to the Special Agents that GSDA had treated him well, that GSDA did not engage in illegal practices, and that GSDA was "outstanding." EX14, Special Master Interview with Billie Lee, Retired Fisherman (Dec. 7, 2010). Mr. Lee also called SA Flynn after the interview and admitted to landing overages at GSDA. Sometime in 2009, EA Casey charged Mr. Lee with a $19,588 NOVA, which he later settled, with counsel representation, for ten (10) DAS and no monetary penalty.

*Edward Boynton*

Mr. Boynton had been fishing out of Gloucester, MA for approximately 33 years, and was the owner of the fishing vessel Sissel B from 1977 to 2006. In April 2007, Mr. Boynton became paralyzed after losing his balance while rigging his schooner. Subsequent to that, Mr. Boynton lost his left leg after suffering an accident on a train. According to NOAA records, Mr. Boynton only had one YTF LOA from June 2004-April 2005, but did not obtain another YTF LOA

after April 2005. Between August and September of 2005, he landed YTF at GSDA.[17] On April 17, 2009, Mr. Boynton received a NOVA from EA Casey on YTF LOA violations in the amount of $2327, with a settlement offer for $2,100. She sent a subsequent amended NOVA on April 20, 2009. Ultimately, after Ms. Casey discovered Boynton's physical condition, she petitioned her supervisors to allow her to simply drop the case. [redacted] NOAA Agents did not interview Mr. Boynton during the GSDA investigation.

*Edward Smith*[18]

Mr. Smith of Manchester, MA is the owner of the Ambjorg & Julie and three (3) other vessels. He currently lands fish at the Boston Seafood Display Auction because he thought he could get better prices at the new fish auction. Prior to that, he landed fish at GSDA because he thought GSDA provided him with the best price and it is the cleanest operation in town. At some point in 2007, Mr. Smith had a conversation with NOAA SA Flynn concerning an YTF LOA violation dating back to 2004, and about GSDA business practices. Mr. Smith continued to believe that GSDA was a clean operation. On March 31, 2009, EA Casey sent Mr. Smith a NOVA and assessed a $3,400 penalty for landing YTF without an LOA on various occasions in June 2004. The NOVA also provided a compromise settlement amount of $3,100. Mr. Smith was relieved by the assessed amount, considering he had heard from other fishermen in the community that some fishermen, including Mark Carroll, received considerably higher

[17] EA Casey assessed a $4,900 penalty in Count 35 of the February 13, 2009 NOVA against GSDA for accepting YTF from the Sissel B on those dates without an LOA. See supra, Case 3 discussion.

[18] See also Discussion Case 6 and Case 16, infra, for other cases involving Ed Smith.

penalties. Therefore, he paid the penalty immediately. EX16, Special Master Interview with Edward Smith, Fisherman (Dec. 7, 2010).

*Marc Gonsalves*

With the sole exception of Marc Gonsalves, none of the fishermen interviewed relayed any incriminating information concerning any illegal business practices at GSDA. Mr. Gonsalves was the captain of the fishing vessel Razor's Edge. He comes from a long line of Portuguese fishermen. SA Flynn boarded the Razor's Edge on June 7, 2006 and discovered that Mr. Gonsalves did not have an YTF LOA, and that he had on board 4,000 lbs of codfish at the time of boarding. Mr. Gonsalves stated that he had returned to port early for weather-related reasons, and was going to run his DAS clock at the dock in order to meet the DAS landing limit for codfish. Mr. Gonsalves was not aware of the YTF LOA requirement, but he requested one that same day. EX17, Investigative Report by Patrick Flynn, Special Agent, NOAA (June 21, 2006).

Later that day, SA Flynn observed Mr. Gonsalves unload in excess of the 4,000 lbs trip limit at GSDA. Mr. Gonsalves admitted that he had landed a little more cod than the regulations provided because the fish were already on board, and he did not want to waste them by throwing them overboard. Moreover, he was under the impression that GSDA allowed a 10% overage, or 400 lbs over his 4,000 lbs trip limit. EX18, Special Master Interview with Marc Gonsalves, Fisherman (Mar. 7, 2011). SA Flynn then informed Mr. Gonsalves that he would seize his entire catch, worth $12,535.71. He also issued Mr. Gonsalves an EAR on June 21, 2006 after he conducted an investigation into the Razor's Edge fishing history and discovered other past violations.

On October 10, 2007, SA Flynn and SA Henry interviewed Mr. Gonsalves in connection with the GSDA investigation. The Special Agents questioned Mr. Gonsalves on the premise that he had landed overages, and that he had landed YTF without the requisite LOA. Similar to the other fishermen interviews, the questions focused on the business operations at GSDA. Mr. Gonsalves initially told the agents that GSDA would not land overages. EX19, Handwritten Notes by NOAA Agents (Oct. 10, 2007). Although the Special Agents told Mr. Gonsalves that his cooperation would be forwarded to GCEL, he interpreted the statement to mean that his cooperation would lead to the elimination of his own violations. A few days later, Mr. Gonsalves contacted one of the Special Agents and told him about an alleged incident where Larry Ciulla offered to hide overages on behalf of Mr. Gonsalves.

[redacted]

During my interview with Mr. Gonsalves, he admitted that he fabricated the written statement he provided NOAA on October 31, 2007. Supra, EX18. In the written statement, he recounted a conversation when Larry Ciulla allegedly told him he would re-label the excess cod as haddock in an attempt to hide the overage from the authorities. EX21, Written Statement of Marc Gonsalves (Oct. 31, 2007). SA Henry noted that Mr. Gonsalves' statements needed to be

"corroborated." EX22, Special Agent Interview with Michael Henry, Special Agent, NOAA (Feb. 28, 2011).

Based on this written statement, on November 8, 2007, SA Flynn and SA Henry picked up Mr. Gonsalves at his residence in Harwich, MA and drove him to Hyannis, MA, where EA Casey and EA MacDonald conducted his deposition. During the deposition, Mr. Gonsalves again recounted how Larry Ciulla had offered to hide cod overages for him by re-labeling the cod as haddock. Id.

Shortly after the deposition, Mr. Gonsalves and EA Juliand had multiple exchanges via facsimile to discuss the terms of a settlement of his violation. Mr. Gonsalves signed the settlement on November 12, 2007, in which he agreed that he would forfeit any claim to the value of his catch, would not own another commercial fishing vessel and he would voluntarily relinquish his operator's permit.

On April 16, 2009, EA Casey issued a seven (7) count NOVA with a $36,000 assessed penalty to MCG Fishing Corp. and Marc Gonsalves for landing overages, and for landing YTF without the requisite LOA on various occasions in 2005 and 2006.[19] To date, Mr. Gonsalves has ignored this NOVA because he believes it to be a duplicate penalty from his prior settlement with EA Juliand. Supra, EX18.

**II. Conclusion**

I find that NOAA, in conjunction with OLE and GCEL, targeted GSDA for an ongoing investigation involving cod overages. During the course of the investigation, agents discovered

[19] EA Casey charged GSDA for these violations in counts 9, 10, 53, and 54. See supra, Discussion Case 3.

various YTF LOA violations from vessels that landed at GSDA between 2004-2006. As noted in my Case 3 discussion, *supra*, the YTF LOA was not an OLE enforcement priority neither in Gloucester nor New Bedford. In fact, none of the Special Agents I interviewed in Gloucester, Chelsea, or New Bedford offices could recall ever imposing anything greater than a written warning for failure to possess an YTF LOA. Furthermore, OLE Special Agents discovered the YTF LOA violations after the requirement was discontinued on November 22, 2006. The cited fishermen received their NOVAs for the YTF LOA violations over two (2) years after the requirement had been eliminated.

Based on these violations, OLE Special Agents, with GCEL advice, attempted to leverage these violations to secure any information of alleged illegal business practices at GSDA. Yet, none of the fishermen provided OLE with any information that could be used to implicate GSDA. On the contrary, all except for one of the fishermen had only positive comments concerning GSDA's business practices. NOAA was quick to explore an opportunity to implicate GSDA when it attempted to secure a consensual monitor for Marc Gonsalves, who was the only fisherman to suggest any wrongdoing at GSDA. In my interview with Mr. Gonsalves, he admitted that he fabricated the story and there was no indication that NOAA attempted to use Mr. Gonsalves' testimony since his credibility had already been called into question by NOAA enforcement personnel.

EA Casey noted that, "[W]hen confronted with hundreds of charges, albeit of a regulation that has been replaced, the Agency could not ignore it. The charges had both specific and general deterrent value and would hopefully encourage dealers and vessels to comply in the future with LOA requirements…" EX22, Email from Deirdre Casey, Enforcement Attorney,

NOAA to Charles B. Swartwood, III (Mar. 18, 2011). However, the charged YTF LOA violations served no deterrent purpose because the requirement had been eliminated. Additionally, many of the fishermen had obtained YTF LOAs previous and subsequent to the period in which they did not have an YTF LOA. Many of the violations charged against these fishermen for landing YTF at GSDA were continuous landings during the period in which the vessels did not have onboard an YTF LOA. As such, the singular act of not obtaining an YTF LOA led to the numerous violations cited by EA Casey. These facts demonstrate that, for the most part, fishermen who failed to obtain the YTF LOA, did so not because they willfully chose to ignore the regulation, but because it was an inadvertent oversight of a seldom enforced regulation.

Finally, for the YTF LOA violations that occurred during the months of January, February, April, May, July, August, September, and December, the possession limits between CC/GOM and SNE were the same. Therefore, a majority of violations cited by EA Casey amounted to technical violations, and as such, did not impact conservation issues. Applying this same logic during the course of litigation, EA Casey actually eliminated all post-May 1, 2006 YTF LOA counts from the February 13, 2009 NOVA against GSDA because the possession and landing limits between CC/GOM and SNE became uniform after that date. EX23, Email from Deirdre Casey, Enforcement Attorney, NOAA, to Paul Muniz, Partner, Burns and Levinson LLP (July 21, 2009). This act is a clear demonstration that the YTF LOA violations that took place within those months did not implicate conservation matters. The YTF LOA violations therefore amounted to technical violations that were used against fishermen as a leverage to secure evidence against the GSDA, which was the target of these charges against these fishermen. It is important to note that no other dealers were ever charged with landing and possessing YTF without a LOA

and the only fishermen to be charged with a penalty other than a warning are those who offloaded at the GSDA.

**III. Recommendation**

I recommend that the Secretary remit to the fishermen any monetary penalties which they paid for YTF LOA violations originating from the GSDA investigation. During the course of this investigation, most of the fishermen I interviewed informed me that the cost of a DAS for a day boat was $200, which is a fair and reasonable price.[20] Therefore, I recommend that the following penalties should be remitted to the following fishermen:

Paul Theriault (F/V Terminator): $1,050

Mark Carroll (F/V Harvest Moon): $2,000 ($200 per DAS x 10 DAS settlement)

Richard Burgess (F/V Scotia Boat Too): $3,600 ($200 per DAS x 18 DAS settlement)

Billie Lee (F/V Ocean Reporter): $2,000 ($200 per DAS x 10 DAS settlement)

Ed Boynton (F/V Sissel B): No Remittance (Case dismissed)

Ed Smith (F/V Ambjorg & Julie): $3,100

Joel Carreiro (F/V Jersey Princess II): $900, EX25, Settlement Agreement (June 23, 2009).

Marc Gonsalves (F/V Razor's Edge): No Remittance [Never Paid Penalty for YTF LOA violations]

[20] I should note that during my interview of Enforcement Attorney Deirdre Casey, she valued a DAS to be $2000. See EX24, Special Master Interview with Deirdre Casey, Enforcement Attorney, NOAA (Mar. 14, 2011).

**CASE 6: EDWARD E. SMITH**

*In its report, the OIG confirmed a fisherman's complaint that he was assessed an excessive $150,000 fine (the maximum) and a 270-day suspension for exceeding the permissible horsepower on his boat, despite this being his first offense. (The NOVA was issued in April 2002). Eventually, one of the counts in the case was settled for $50,000 fine and a 30-day permit sanction, which was suspended as long as the fisherman committed no fisheries violations for a year, and the remaining two counts received written warnings by the assigned GCEL attorney. GCEL's attorney on this case told us that the maximum amount per count was charged in this case because he believed the fisherman intentionally violated the regulation and this was a "big scheme"; however, we found this position not supported by the evidence and we found the fisherman credible. Moreover, the former Northeast Regional Administrator, who was responsible for promulgating the regulations, provided a letter of support for the fisherman stating he believed it was an honest mistake.* (OIG Description of Case, September 2010 Report).

**I. Findings of Fact**

Edward E. Smith has had a commercial fishing license since 1976. Mr. Smith owns four vessels which are moored in Gloucester, Massachusetts: Ambjorg & Julie, Brittannika II, Claudia Marie and Special K. Mr. Smith is a full time fisherman and has captains who operate his other vessels.

In 1988, Mr. Smith had his fishing vessel Ambjorg & Julie built in Nova Scotia. The vessel was equipped with a 135 HP engine.

In March 1994, due to engine trouble, Mr. Smith re-powered the Ambjorg & Julie with a Ford 160 HP engine.

On October 6, 1995, Mr. Smith filed an Initial Vessel Application with NMFS to request an approval of change in horsepower to 250 HP for the Ambjorg & Julie. NMFS granted the request on October 11, 1995. However, because of finances, Mr. Smith was unable to install the 250 HP in 1995 but intended to install such an engine in the future.

In March 1998, Mr. Smith installed a 300 HP engine on the Ambjorg & Julie. Mr. Smith believed that because he was previously granted his request to increase the Ambjorg & Julie's horsepower to 250 HP, that under the 20% increased horsepower rule, he was entitled to install the 300 HP engine. The 20% increased horsepower rule allows a vessel owner to upgrade the horsepower of an engine by 20% without prior approval by NMFS. Since March 1998, Mr. Smith started reporting the Ambjorg & Julie horsepower to USCG and to NOAA/NMFS observers as 300 HP.

In September 1998, Mr. Smith received a letter from NMFS that the Ambjorg & Julie engine should be 135 HP, not 300 HP. Mr. Smith consulted with his lawyer, Stephen Ouellette, who informed him that since the baseline for the Ambjorg & Julie was 135 HP, he was in violation because the 20% increased horsepower rule could only apply to the 135 HP engine and not the 250 HP engine which was never installed. Mr. Smith stopped fishing and attempted to find a replacement vessel with a 300 HP engine in order to transfer that vessel's permits to the Ambjorg & Julie to continue fishing. In April 1999, Mr. Smith found a replacement vessel and filed an application with NMFS for approval of the transaction and transfer of the permits. On May 18, 1999, the NMFS regional office referred a question concerning Mr. Smith's application

to SA Joseph Green, Jr. The question concerned the horsepower of the Ambjorg & Julie's engine.

On April 10, 1999, SA Green examined a recent survey prepared for the Ambjorg & Julie describing the subject vessel as having a 300 HP engine. On May 19, 1999, SA Green contacted the surveyor who acknowledged his survey of the Ambjorg & Julie. Upon further questioning, the surveyor produced a 1994 survey of the Ambjorg & Julie with a 135 HP engine. That survey contained a note that: "Owner plans new 165 Ford within the month/Dahl Fuel filter." EX1, Offense Investigation Report by Joseph E. Green, Jr., Special Agent, NOAA, p. 5 (Oct. 31, 2002).

On May 19, 1999, SA Green contacted Mr. Smith and requested a meeting so that he could answer some questions on his transfer application. Mr. Smith directed SA Green to his lawyer, Stephen Ouellette. According to Mr. Smith, SA Green first said: "Oh, you want to play it that way," and later when SA Green pressed for a meeting alone, he commented along the lines of: "do you want to make it harder on yourself" or "you are not making it easier on yourself." EX2, Special Master Interview with Edward E. Smith, Fisherman (Dec. 7, 2010). In his statement to the OIG and me concerning this investigation, SA Green does not remember the exact conversation with Mr. Smith. However, SA Green is sure he would not say that getting a lawyer would make it harder on someone charged with a violation. SA Green acknowledged that he might have commented that he knew of Mr. Ouellette by reputation and that he may have said something to the effect that Mr. Ouellette was difficult. SA Green suggests that his comment may have been misconstrued by Mr. Smith. In any event, Special Agents Green and Bill Papoulias met with Mr. Ouellette and later on May 25, 1999 with Mr. Smith and his lawyer.

On May 25, 1999, Messers Smith and Ouellette met with Special Agents Green and Papoulias in Mr. Ouellette's office to discuss the engine upgrade to the Ambjorg & Julie. SA Green's original report of this meeting was prepared on May 19, 2000. A corrected version of this report was prepared on October 31, 2002, after the NOVA issued. I have not seen the original. In the amended report, SA Green states the following concerning the engine upgrade: "SA Green asked Smith what additions or changes to the vessel has he (Smith) made since owning the vessel. Smith stated that the changes to the decking, electronics, and an engine upgrade were the major ones Smith made to the subject vessel." Supra, EX1. Later, "SA Green asked Smith what was the engine in the vessel before the 300 horsepower John Deere was put in. Smith stated the 135 horsepower was in the vessel until the 300 horsepower was installed." Id., p. 8.

On May 19, 2000, SA Green mailed an EAR to Mr. Smith charging him with (1) increasing the horsepower of the vessel in excess of the permit limitations; (2) making a false statement to an authorized officer; (3) writing a false statement on a permit application; (4) failing to notify NMFS of an engine upgrade; and (5) failing to notify NMFS of an engine upgrade. EX3, Enforcement Action Report by Joseph E. Green, Special Agent, NOAA (May 19, 2000). On April 8, 2002, EA Juliand issued a NOVA charging Mr. Smith in Count 2 with a false statement which alleged, as follows: "Specifically, the Respondent Edward E. Smith, in response to questioning regarding the ability of the F/V Ambjorg & Julie to harvest fish, stated that he had put no more than two (2) engines in the F/V Ambjorg & Julie (a 135 horsepower engine and a 300 horsepower engine) when, in fact, he had installed a third engine in the vessel (after the 135 horsepower engine was installed, but prior to the installation of the 300 horsepower engine)."

EX4, Notice of Violation Assessment (Apr. 8, 2002). During Mr. Green's interview with the OIG, there was no mention of Mr. Smith's engine upgrade. EX5, Office of Inspector General Interview with Joseph E. Green, Jr., Special Agent, NOAA (Aug. 16, 2010). In my interview, Mr. Green recalled discussing the 300 HP engine and then asking Mr. Smith if he had installed: "any other engine," to which Mr. Smith replied: "no." EX6, Special Master Interview with Joseph E. Green, Jr., Special Agent, NOAA (Mar. 7, 2011).

When Mr. Ouellette received Mr. Smith's NOVA and learned of the allegation that Mr. Smith made a false statement during the May 25, 1999 meeting, he then withdrew as Mr. Smith's counsel, arranged for successor counsel and agreed to be a witness disputing the false statement allegation. Mr. Ouellette stated that when he read SA Green's Report, he noticed the statement referenced above at page 7 of the Report. Mr. Ouellette further stated that his recollection of the question posed by SA Green was "whether Mr. Smith had changed any other dimensions or anything on the boat other than the engines." Supra, EX2. Mr. Smith's response quoted by SA Green in his report, other than a reference to "and an engine upgrade" is consistent with Mr. Ouellette's recollection of the question asked. Mr. Smith acknowledged that he did not tell the Special Agents specifically about the 165 HP upgrade and states emphatically, that in response to a question posed by one of the SAs as to how many engines he had installed, he replied two (2), referring to the 165 HP and 300 HP engines. Id.

It is clear from all reports of this conversation that there was no discussion of the Ford 160 HP engine installed in 1994. It is also clear that Special Agents Green and Papoulias had learned earlier that day from the surveyor that in March 1994, Mr. Smith was planning to install a new 165 HP engine in the Ambjorg & Julie. In fact, Smith did install a Ford 160 HP engine in the

Ambjorg & Julie later that month, which SA Green subsequently learned on May 25, 1999. At no time did Special Agents Green or Papoulias ever directly ask Mr. Smith if he had installed a 160 HP or 165 HP engine. One other fact is relevant to this issue. At the meeting between Special Agents Green and Papoulias and Messers Smith and Ouellette, it was agreed that Mr. Smith would prepare, sign and forward to SA Green an affidavit concerning the Ambjorg & Julie's engine upgrade. Mr. Smith's affidavit does not mention installation of the 160 HP engine. However, in a letter dated September 27, 2002, to Northeast Regional Administrator Patricia Kurkul after the NOVA was issued and he was charged with a false statement, Mr. Smith acknowledged the installation of the 160HP engine. EX7, Letter from Edward E. Smith, Fisherman, to Patricia Kurkul, Regional Administrator Northeast Region, NOAA (Sept. 27, 2002). I cannot resolve the issue of whether Mr. Smith made a false statement as I have no way, under the circumstances of my investigation of this case to clearly assess the credibility of the parties as to what was said by each during the meeting of May 20, 1999 and later contained in an investigative report prepared a year later and amended three and a half years (3.5) later. However, a resolution of this issue is not significant since Count 2 (false statement) was eventually reduced to a written warning.

On April 8, 2002, EA Juliand sent Mr. Smith a NOVA containing 3 counts:

> Count 1 – unlawful upgrade - $50,000
> Count 2 – false statement - $50,000
> Count 3 – failing to inform of upgrade - $50,000
>
> _____
> Total assessed penalty - $150,000.
>
> Supra, EX4.

On that same day, a NOPS was sent to Mr. Smith for a permit sanction of 270 DAS.

A settlement proposal accompanying the NOVA and NOPS provided for a total payment of $120,000 and 180 DAS permit sanction.

The case was finally resolved on October 3, 2002 with a $50,000 penalty paid in equal installments over eighteen (18) months and a suspended 30 DAS permit sanction on Count I, with Counts II and III reduced to a written warning. EA Juliand had noted on an email dated October 4, 2002, that: "Joe Green really wants $60,000 + some days." EX8, Handwritten Notes by Charles R. Juliand, Enforcement Attorney, NOAA (Oct. 4, 2002). However, in discussing this settlement with the OIG, SA Green stated that he understood the permit sanction of 90 days but believes that "$50,000 is a lot of money." Supra, EX5.

This was Mr. Smith's first offense. Even to the casual observer, EA Juliand's proposed penalty was grossly excessive under the circumstances of this case. A 270 DAS permit sanction would have resulted in Mr. Smith being forced out of the fishing business for approximately 3.9 years because of the DAS limitation on his vessel's permit and a penalty of a $150,000 or even the $120,000 settlement offer would have forced Mr. Smith to liquidate a portion or all of his fishing business. Even a $50,000 penalty for failure to report an engine upgrade is excessive.

The obvious next question is why Mr. Smith did not appeal these penalties to an ALJ. First, Mr. Smith was clear that he had "no confidence that [pursuing] his appeal of the penalty assessment to an ALJ would be successful as, he stated, it was common knowledge that his chance of success was 'nil' and that NOAA and the ALJs work hand-in-hand." Supra, EX2. However, there was a more compelling reason for Mr. Smith to settle his case as quickly as possible and that involved the release of the Ambjorg & Julie for fishing. Upon advice of counsel, Mr. Smith stopped fishing with the Ambjorg & Julie in September 1998 because of the

engine upgrade problem. Up to that point, Mr. Smith had operated the Ambjorg & Julie for approximately five and a half (5 ½) months or 35.58 DAS of fishing with the upgraded 300 HP engine.

In February 1999, Mr. Smith located the FV Trippolina, which had a permit history and sufficient horsepower to allow the Ambjorg & Julie to qualify as a replacement vessel. Mr. Smith paid $35,000 for the Trippolina's permit, put the Ambjorg & Julie's permit in history, formed a new corporation, transferred ownership of the Ambjorg & Julie with the Trippolina's permits to that new corporation and requested that NMFS approve the transaction to allow the Ambjorg & Julie to fish. That request was denied by NMFS unless Mr. Smith agreed to relinquish the Ambjorg & Julie's permits. Mr. Smith relinquished the permits, which he valued at $50,000.

On May 19, 2000, SA Green mailed the EAR to Mr. Smith, which put the application on hold until EA Juliand issued the NOVA/NOPS on April 8, 2002. Mr. Smith needed to settle his case in order to get the Ambjorg & Julie fishing with the replacement permit. The case was settled on November 1, 2002 upon Mr. Smith's agreement to pay $50,000. EA Juliand was aware of Mr. Smith's need to get NMFS approval of the transfer of the Trippolina's permit to Ambjorg & Julie to allow her to fish.

**II. Conclusion**

The question presented in this case is whether the eventual settlement of $50,000 was coerced and excessive. This is a lot of money for upgrading an engine. The penalty range for a first offense is $5,000 to $50,000. This was Mr. Smith's first offense. Although counts 2 and 3 were resolved in the settlement agreement by written warnings, it is important to consider the

NOVA/NOPS in their entirety in determining whether this eventual, agreed settlement award was excessive and/or coerced. Although I cannot conclusively confirm whether Mr. Smith made a false statement to the agents, I can confirm that he did not reveal during his meeting with the agents, or in his subsequent affidavit sent to the agents that he had replaced the 135 HP engine with a 160 HP engine. My conclusion is simply that Mr. Smith did not volunteer the existence of the 160 HP engine to the agents. This issue presented a problem to EA Juliand if he were to try this case since Mr. Ouellette, would have contradicted SA Green's recollection of what was said during the May 25, 1998 meeting. Therefore, I conclusively find that the false statement was properly resolved with a written warning.

I reach the same conclusion with respect to count 3 which, although a separate offense under the regulations, is for all practical purposes, subsumed within the violation alleged in count 1. Under the circumstances, count 3 was also properly resolved by a written warning. That leaves count 1 with a maximum penalty of $50,000 which equals the amount of the settlement. Simply stated, this is an excessive amount especially since Mr. Smith has lost a valuable asset (the permit) and paid $35,000 for a replacement permit. I further find that Mr. Smith was coerced into paying an excessive penalty of $50,000 because as long as this case remained open, he would not be able to fish with the Ambjorg & Julie. The day before settlement was reached, Mr. Smith's successor counsel offered to resolve the case for payment of $25,000 for count 1 which would have included revocation of the original Ambjorg & Julie multispecies permit and no monetary penalty for counts 2 and 3. EX9, Letter from Pamela F. Lafreniere, Attorney and Counselor at Law, to Charles R. Juliand, Enforcement Attorney, NOAA

(Oct. 30, 2002). I find that offer to be fair and reasonable especially since Mr. Smith was less than forthcoming in his dealings with the agents concerning his engine upgrade.

**III. Recommendation**

For the reasons stated above I recommend that the Secretary reimburse Mr. Smith the sum of $25,000.

**CASE 16: EDWARD E. SMITH**

*In its report, the OIG found conclusive an allegation that a fisherman, when requesting an attorney be present during an interview with an OLE agent, the agent responded that "he just made it harder on himself." (The alleged incident occurred in May 1999.) While the OIG confirmed that the fisherman requested the OLE agent contact the fisherman's attorney for an interview, and that the agent agreed to do so, we could not reconcile differing accounts of the conversation that took place regarding this matter. The former OLE agent told us that while he may have informed the fisherman that his particular attorney is "difficult," he never would have said that having an attorney would make it harder for the fisherman and suggested that the fisherman misconstrued his comment.* (OIG Description of Case, September 2010 Report).

**I. Findings of Fact**

Mr. Smith further complained that a Special Agent made inappropriate/threatening remarks to him when he requested that the agent contact his lawyer for answers to the agent's inquiries concerning an engine upgrade of his fishing vessel. The facts concerning that conversation, previously reported at page 3, supra., are as follows:

On May 19, 1999, SA Green contacted Mr. Smith and requested a meeting so that he could answer some questions on his transfer application. Mr. Smith directed SA Green to his lawyer, Stephen Ouellette. According to Mr. Smith, SA Green first said: "Oh, you want to play it that way," and later when SA Green pressed for a meeting alone, he commented along the lines of: "do you want to make it harder on yourself" or "you are not making it easier on yourself." EX1, Special Master Interview with Edward E. Smith, Fisherman (Dec. 7, 2010). In his statement to the OIG and me concerning this investigation, SA Green doesn't remember the exact

conversation with Mr. Smith. However, SA Green is sure he would not say that getting a lawyer would make it harder on someone charged with a violation. SA Green acknowledged that he might have commented that he knew of Mr. Ouellette by reputation and that he may have said something to the effect that Mr. Ouellette was difficult. SA Green suggests that his comment may have been misconstrued by Mr. Smith. In any event, Special Agents Green and Bill Papoulias met with Mr. Ouellette and later on May 25, 1999 with Mr. Smith and his lawyer.

**II. Conclusion**

I find that SA Green called Mr. Smith and during that conversation and in response to Mr. Smith's request that SA Green contact Mr. Smith's lawyer, SA Green, referring to Mr. Ouellette by reputation, said something to the effect that Mr. Ouellette was difficult. Mr. Smith took that statement to mean that by engaging Mr. Ouellette, Mr. Smith made his case more difficult. I cannot confirm what was actually said during that conversation but can confirm that whatever was said did not deter Mr. Smith from engaging Mr. Ouellette as his lawyer.

**III. Recommendation**

I recommend that the Secretary take no action in this matter.

**CASE 7: ALLYSON JORDAN**

*In its report, the OIG confirmed that NOAA applied unduly rigid interpretation of a regulation for a situation where leniency appeared appropriate but was rejected to avoid setting a precedent. (The incident referenced below occurred in December 2009.) A fishing vessel that had set sail experienced a mechanical breakdown and returned to port, never setting its gear to capture fish. Yet the National Marine Fisheries Service (NMFS), not GCEL, charged the vessel's owner for fishing during that time because it had no policy to credit vessels for mechanical breakdowns. OLE sought policy guidance on this case form NOAA's Northeast Region, Office of Sustainable Fisheries, on behalf of the fisherman. That office advised that a day-at-sea credit for this particular situation would "lead them down a slippery slope" and should not be granted under the current regulations. This kind of regulation and interpretation contributes to the industry's belief that NOAA only exercises its regulatory discretion to its own benefit.* (OIG Description of Case, September 2010 Report).

**I. Findings of Fact**

Allyson Elizabeth Jordan is a 4th generation fisherman. Ms. Jordan now works for her mother as shore side engineer. Ms. Jordan's mother owns two (2) trip boats, sixty five (65) and seventy one (71) feet long. One of those vessels is the Theresa & Allyson. On December 12, 2009, the Theresa & Allyson left Gloucester to go fishing. Ms. Jordan was not on board but was in contact with the vessel by email. A little after midnight on December 13, 2009, Ms. Jordan's captain/crew notified her that the vessel had lost oil in the generator. This destroyed the inside of the 3-year old generator. The Theresa & Allyson crew had to return to port without use of the generator for the engine, heat or any ability to freeze fish. The vessel had to use its twelve

(12) volt battery to power the engine. Ms. Jordan instructed the captain/crew to return the vessel to Portland Harbor which was closer than returning to Gloucester. The mechanic, who had installed the generator, was located in Portland and could fix the problem. The crew on the Theresa & Allyson never set the fishing net because of the generator problem.

Before the Theresa & Allyson returned to port, Ms. Jordan called Special Agent Anthony Forestiere in Portland to let him know of the problem and at what time she expected the vessel to return to port. The Theresa & Allyson arrived in Portland around noon on December 13, 2009. Ms. Jordan was there when the vessel docked. She went on board. There were no fish on board. Special Agent Forestiere arrived some time later and looked at the vessel. At that point, Mr. Forestiere was in a position to determine that there was a problem with the generator and that there were no fish on board.

Because the Theresa & Allyson had crossed the demarcation line outside Gloucester Harbor to go fishing and crossed the line on her return to Portland the next day, she was charged with .7181 of DAS. Ms. Jordan requested a .7181 DAS credit. Special Agent Forestiere supported Ms. Jordan's request because the vessel's "fishing gear wasn't deployed and no fish were harvested or landed." EX1, Email from Anthony Forestiere, Special Agent, NOAA, to Patti Asaro, Employee, NOAA (Dec. 14, 2009). Bill Semrau, VMS Program Manager (DAS record office) with OLE disapproved Ms. Jordan's request even though Mark Micele, Deputy Special Agent in Charge of OLE (Gloucester) had recommended granting Ms. Jordan a credit of .75 DAS. EX2, Email from Mark Micele, Deputy Special Agent in Charge of OLE, NOAA, to Bill Semrau, VMS Program Manager, NOAA et al (Dec. 16, 2009). The applicable regulations provide that certain fishing vessels are required to use VMS and that once such a vessel has crossed the

demarcation line leaving port, it is deemed to be fishing. The DAS concludes when that vessel crosses the demarcation line on her return to port. 50 CFR 648.10(b); 50 CFR 648.10(e)5(i) and (iii) (May 4, 2009) (See 74 FR 20528-01; page 20530).

This is not the first time that Ms. Jordan has experienced what she describes as unfair treatment by OLE concerning her DAS. In 2004-2005, Ms. Jordan was sailing another of her mother's vessels, the Jamie & Ashley, from Gloucester to her then home port of Portland for maintenance. Ms. Jordan didn't think to check the VMS because the vessel had been on a 20 day break from fishing. After she was underway for two hours, she noticed the VMS machine and realized that it was active. She called the VMS office at OLE in Gloucester and spoke with Linda Galvin. Ms. Jordan explained to Ms. Galvin that she wasn't declared out of the fishery (DOF), that she wasn't fishing, had no ice or crew and was on her way to Portland for maintenance. Ms. Galvin instructed Ms. Jordan that she had to return to Gloucester to recross the demarcation line. Ms. Jordan declined, explaining that she was two (2) hours out at sea, that gas was $3/gallon and requested that an agent meet her at the Portland dock to confirm that she was not capable of fishing. Ms. Galvin responded in the negative with the comment that "don't worry, you have plenty of days." EX3, Special Master Interview with Allyson Jordan, Fisherman (Dec. 20, 2010). This experience convinced Ms. Jordan that it was useless for her to try to reason with OLE and that was the primary reason she didn't push harder to obtain a DAS credit for the Theresa & Allyson in 2009.

It is worth noting my interview of Kenneth A. Crossman, Jr., a retired Senior Special Agent who retired in 2003.[21] Before retirement, Mr. Crossman was in charge of the DAS program in Gloucester. I asked him specifically whether he would charge a fisherman with a DAS if the fisherman's vessel's engine failed before he/she started fishing. He stated that if the fisherman called him and he verified the fisherman's claim, he/she would not be charged with a DAS. Northeast Regional Administrator Patricia Ann Kurkul strongly disagrees pointing out that "there is no authority to grant any kind of credit in the particular situation." EX4, Special Master Interview with Patricia A. Kurkul, Northeast Regional Administration, NOAA (Mar. 22, 2011). "A vessel subject to the VMS requirement… that has crossed the VMS Demarcation Line … is deemed to be fishing under the DAS program…" 50 CFR 648.10(e)(5)(i). Ms. Jordan's vessel was subject to the VMS requirement. The regulations further provide that DAS counting begins when a vessel crosses the demarcation line when leaving port and ends when the vessel crosses the line on its return to port. 50 CFR 648.10(e)(5)(iii). There are specific exemptions to this regulation for "Good Samaritans" and vessels monitoring "distressed whales." Supra, EX4. Ms. Jordan does not qualify for relief from "fishing" under any specific exemption. However, the regulation states clearly that a vessel which has a VMS unit installed on it and which leaves port is "deemed fishing." The simple truth of the matter is that Ms. Jordan's vessel was not fishing.

Ms. Jordan has leased DAS on the open market. It is Ms. Jordan's opinion that the cost of a DAS for a trip boat in December 2009 would have been between $450 and $600. The cost variance is large because it depends on whether a friend is leasing a DAS or whether someone

[21] Mr. Crossman's interview was the first conducted interview and was not recorded. Therefore, there is no summary of this interview.

is trying to make a profit. Under the circumstances of this case, I find that $600 is the fair value of a DAS in December 2009.

**II. Conclusion**

OLE takes the position that the regulations do not specifically authorize crediting DAS. However, OLE has developed a sensible policy of crediting DAS for "good Samaritans" and "distressed whale," but rejects similar treatment for fishing vessels that break down prior to any gear being deployed or any fish being harvested or landed. OLE's justification for its position is that to adopt a breakdown credit policy is a slippery slope and would be a bad precedent. EX5, Email from Susan Murphy, Northeast Multispecies Supervisor, NOAA, to Mark Micele, Deputy Special Agent in Charge of OLE, NOAA (Dec. 16, 2009). I disagree. It would not be difficult to monitor breakdowns since Special Agents can be forewarned by fishing vessels of a breakdown and can verify if a vessel fished before or after a breakdown when the vessel returns to port. Under the circumstances of this case, I find by clear and convincing evidence that OLE's refusal in this case to credit DAS for breakdowns is unfair and is an example of rigidity in regulation enforcement.

**III. Recommendation**

I recommend that Ms. Jordan be credited with .7181 DAS at the rate of $600 a day, or $430.86. This recommended relief may appear to be insignificant but if granted, does demonstrate to fishermen a sense of fairness and flexibility.

**CASE 8: BILLIE LEE**

*In its report, OIG confirmed a fisherman's complaint that he was not timely notified of a violation, in that he was charged nearly three years after allegedly exceeding the limit for codfish on a single day, thus depriving him of ability to defend himself. (The NOVA was issued in April 2009.) OLE obtained documents from an Administrative Inspection Warrant which identified the referenced violation. Almost one year had passed between the date of violation (12/21/2005) and the execution of the Administrative Inspection Warrant (12/07/06). When OLE notified the fisherman of his over fishing (10/31/2007), almost two years had passed since the date of the alleged violation on a single day of fishing two years in the past, thus depriving him of his ability to defend himself. The charge was submitted to GCEL for enforcement action nine months after initial notification (7/31/08) and a Notice of Violation Assessment (NOVA) was subsequently issued 81/2 months (4/16/09) after that, with an assessed fine of nearly $20,000. The Magnuson Stevens Act contains no statute of limitation for citing a fisherman for violations of the Act. However, government-wide regulations place a five year limitation on bringing charges for civil violations of regulatory law. While NOAA is subject to this five year statute of limitation to notify fishermen of violations, such delay and case disposition for a regulatory violation exhibits NOAA's willingness to pursue stale claims.* (OIG Description of Case, September 2010 Report).

**I. Findings of Fact**

Billie James Lee of Rockport, MA owned the fishing vessel Ocean Reporter. He is currently retired, but was a fisherman for approximately 37 years. Mr. Lee asserted that he is well versed in federal permits based on his experience in providing his vessel for scientific

research. Mr. Lee admitted that he had previously willfully violated the MSA, and as a result, NOAA assessed a $54,000 penalty against him. Through counsel, Mr. Lee settled this past case for $10,000.

On December 7, 2006, NMFS OLE Special Agents executed an AIW on GSDA on the basis of suspected cod overages. The AIW resulted in the acquisition and review of hundreds of thousands of documents. From those documents, OLE identified approximately twenty eight (28) fishing vessels that were suspected of landing overages at GSDA, or were suspected of landing YTF without an LOA. Mr. Lee and the Ocean Reporter were among the twenty eight (28) fishing vessels identified.

In September-October 2007, after extensive analysis conducted by NOAA, OLE agents interviewed various fishermen concerning their landings at GSDA. However, the focus was not on any particular fisherman's violation. Rather, OLE's focus was to gain pertinent information to support the theory that GSDA had willfully accepted cod-overages at their facility. See supra, Discussion Case 3. On September 28, 2007, SA Flynn and SA Henry interviewed Mr. Lee and the Special Agents informed Mr. Lee that he had landed a cod overage on December 21, 2005 at GSDA and fished without the required YTF LOA on various dates in 2004, 2005, and 2006. Similar to the other fishermen interviews, the Special Agents focused their questioning on alleged illegal business practices at GSDA concerning overages. Mr. Lee relayed to the NOAA officials that GSDA had treated him well, that GSDA does not engage in illegal practices, and that GSDA is "outstanding." EX1, Special Master Interview with Billie Lee, Retired Fisherman (Dec. 7, 2010).

Several days later, Mr. Lee called SA Flynn and admitted to landing an overage at GSDA after he had an opportunity to check his DAS log book. EX2, Supplemental Investigative Report by Patrick Flynn, Special Agent, NOAA (Sept. 28, 2007). Sometime in 2009, EA Casey charged Mr. Lee with a $19,588 NOVA for the one incident of landing a cod overage and various other landings without an YTF LOA. Mr. Lee, with counsel representation, settled the case on September 18, 2009 for 10 DAS and no monetary penalty. EX3: Settlement Agreement (Sept. 18, 2009).

**II. Conclusion**

I find in Case 3, supra, that NOAA targeted GSDA for an extensive investigation into overages. As part of the investigation, NMFS OLE Special Agents devoted a considerable amount of time analyzing copious amounts of data. Based on this analysis, OLE interviewed a number of fishermen, including Mr. Lee, about GSDA's business practices premised primarily on such violations. Thereafter, the Special Agents spent additional time gathering necessary evidence and ultimately, on May 15, 2008, submitted a 127 page OIR to GCEL for prosecution. Mr. Lee's, and the Ocean Reporter's individual OIR was dated May 28, 2008, and the case was ready for administrative action on July 31, 2008. [redacted]

Since the focus of the investigation was on GSDA, GCEL and OLE held various meetings between May 2008 and February 2009 concerning the soon-to-be issued NOVA against GSDA and EA Casey committed numerous hours over that period to prepare the GSDA NOVA. She issued the final NOVA to GSDA on February 13, 2009, and Mr. Lee's NOVA was sent subsequent

to the GSDA NOVA, which documented his overage charge and various other YTF LOA charges. I find in Case 4, supra, that OLE used the YTF LOA violations against the fishermen in an attempt to gain leverage for information against GSDA. With respect to the overage charge, though, Mr. Lee actually called SA Flynn and admitted to landing an overage at GSDA on December 21, 2005. Accordingly, Mr. Lee's claim that NOAA assessed a penalty three (3) years after the violation as evidence of its willingness to pursue stale claims is without merit in light of the fact that GCEL had limited resources to pursue such a large number of violations during that period and that he admitted his violation in a recorded telephone conversation only two years after he committed the violation.

**III. Recommendation**

I recommend that the Secretary take no action in this case.

**CASE 9: RICHARD BURGESS**

*In its report, the OIG confirmed that GCEL informed a fisherman that if he challenged his fine it could be increased to $140,000 (from $10,000) for each violation. (Before a NOVA was issued in this case, a settlement agreement was reached in February 2008). According to the fisherman's attorney, the GCEL attorney handling this case advised him that if his client chose not to settle the case and it went to an Administrative Law Judge hearing, rather than face $10,000 per count as originally charged, he could be subject to the ALJ imposing fines of the statutory maximum of $140,000 per count. We found this representation consistent with GCEL NOVA language for violations under the Magnuson Stevens Act. For example, language in many NOVAs states, "The judge is not bound by the amount assessed in the NOVA, but may fix a penalty based upon his judgment of what is appropriate up to the statutory maximum of $140,000 per count." This language, coupled with NOAA regulations at that time that provided for presumption that a fine set by NOAA was appropriate, makes it understandable that fishermen believe the system to be unfair so as to pressure them into settlement. In fact, in response to our January report, NOAA has changed the presumption requirement, now properly placing the burden on NOAA to prove its fine as appropriate when brought before an ALJ.* (OIG Description of Case, September 2010 Report).

**I. Findings of Fact**

Richard Edward Burgess lives in Manchester, Massachusetts and has been in the fishing business since the early 1970's. In the mid 1970's, he purchased a lobster boat and continued buying boats and permits from the late 1980's until the present. Mr. Burgess owns five (5)

fishing vessels: Heidi & Heather, Scotia Boat Too, Brian Zachary, Julie Ann, and Rock On. Currently, Mr. Burgess has two captains and two crews.

Mr. Burgess has been offloading at the GSDA since it first opened in the mid 1990's.

On December 10, 2007, Mr. Burgess was served with an EAR concerning Scotia Boat Too, charging him with exceeding his northeast multispecies DAS. Mr. Burgess challenged this violation because he was assured by NOAA employee, Carol Bleszinski, that the Scotia Boat Too could go to sea because it had several DAS remaining. According to Mr. Burgess, he called Ms. Bleszinski on November 20, 2007 to verify the remaining DAS assigned to the Scotia Boat Too. [redacted] Mr. Burgess's cousin and captain of the Scotia Boat Too, was unsure about how many DAS were left on the permit and wanted to know when the vessel's DAS would expire. Mr. Burgess claims that Ms. Bleszinski told him that the Scotia Boat Too had 2.5 DAS remaining, that she had a lease application for additional DAS to be transferred to the Scotia Boat Too from one of Mr. Burgess' other fishing vessels on her desk and when signed by an enforcement agent, she would post additional DAS to the Scotia Boat Too. Mr. Burgess explained that since he owned a number of boats, that it was an easy matter for him to lease DAS from one permitted vessel to another permitted vessel. Once he received Ms. Bleszinski's assurance that he had 2.5 DAS remaining and Ms. Bleszinski had the signed lease application, he allowed the Scotia Boat Too to sail.

On November 29, 2007, SA D'Ambruoso notified Mr. Burgess that the Scotia Boat Too was "red-flagged" because it had exceeded its DAS. Mr. Burgess stated in response that he was told he had 2.5 DAS when the vessel left port and a lease for additional DAS to cover the trip. SA D'Ambruoso told Mr. Burgess that the leasing agreement was never approved. The catch from

the four (4) plus DAS was sold for in excess of $25,000 and the proceeds were paid to Mr. Burgess. The Scotia Boat Too remained in port until the case was resolved. Mr. Burgess later called Ms. Bleszinski to ask her what happened. According to Mr. Burgess, Ms. Bleszinski apologized and said that an agent took the leasing agreement from her desk and told her not to do anything with it, the implication being that the agent intended to let the vessel go fishing beyond its permitted DAS in order to find a violation. A review of the timeline for the Scotia Boat Too from November 20 through December 3, 2007 is reconstructed from OLE emails, investigative reports, lease applications, and DAS reports. That timeline reveals the following:

| Date/Time | From | To | Situation |
|---|---|---|---|
| 8:11 am, Nov. 20, 2007 | Mr. Burgess | Carol Bleszinski | Called requesting (Mults A) DAS balance for FV Scotia Boat Too. Carol stated that it appeared the vessel had -5.23 DAS. Mr. Burgess said he had other vessels and was in the process of leasing in DAS. |
| 13:26 pm, Nov. 20 | Mr. Burgess | NOAA/SFD | Mr. Burgess signed a DAS lease dated November 20, 2007. The DAS lease is date stamped as being delivered to NOAA on November 20, 2007 at 1:26 pm. The DAS lease, which Mr. Burgess signed, includes the following language: "Leasing DAS subsequent to a negative DAS balance will not compensate for the negative balance." |
| Nov. 20 | Mr. Burgess | Carol Bleszinski | Called back and told Carol the lease transaction would occur that day. |
| 12:17 pm, Nov. 27 | Julie Mackey, SFD | Bill Semrau | Had lease request from Mr. Burgess to process. Request was to lease in DAS from FV Bureaucracy to FV Scotia Boat Too (both owned by Mr. Burgess). Sent denial letter to Mr. Burgess due to FV Scotia Boat Too's negative DAS. |

| Date/Time | From | To | Situation |
|---|---|---|---|
| | Carol Bleszinski | Bill Semrau | FV Scotia Boat Too has negative Mults A DAS balance of 6.32 (Carol summarized her 11/20 phone calls from Mr. Burgess as provided above). |
| | Bill Semrau | Carol Bleszinski | Asked if there are any trip problems that put the vessel in the negative. |
| 11:51 am, Nov. 28 | Carol Bleszinski | Bill Semrau | DAS report looks correct. Don't see any unusual DAS charges (for Mults A DAS). There is a problem with Open Monkfish DAS but FSO working on the problem. See attached DAS report (shows -6.32 DAS as of 10:11 am, Nov. 28). |
| 14:27 pm, Nov. 28 | Carol Bleszinski | ASAC Williams | Provided information above concerning Nov 20th calls from Mr. Burgess and Nov 28th e-mail from Julie Mackey. Advised that FV Scotia Boat Too had a DAS balance of -6.32 DAS and attached the DAS report. |
| 21:50 pm, Nov. 28 | ASAC Williams | Carol Bleszinski | I will have Dan (SA D'Ambruoso) look into this. |
| Nov. 29 | SA D'Ambruoso | Mr. Burgess | SA D'Ambruoso contacted Burgess and informed Burgess the vessel had exceeded its Northeast Multispecies DAS allocation and his application to lease Northeast Multispecies DAS had been denied. Burgess stated there must have been a mistake, and that the FV Scotia Boat Too should not have already reached its DAS limit. SA D'Ambruoso informed Burgess that he would look into the matter. SA D'Ambruoso also advised Burgess he should not fish the Scotia Boat Too until the matter was resolved, since this would only cause the fishing vessel to be in further violation of exceeding its DAS balance. Burgess stated the vessel was currently out fishing and he would not fish the vessel until the matter was resolved. |

| Date/Time | From | To | Situation |
|---|---|---|---|
| Dec. 3 | Steven Ouellette | SA D'Ambruoso | SA D'Ambruoso received a call from the attorney for the FV Scotia Boat Too, Stephen Ouellette, regarding the vessel exceeding its Northeast Multispecies DAS. Ouellette informed SA D'Ambruoso that Burgess made an error with his DAS balance and Ouellette inquired about settling the matter. SA D'Ambruoso informed Ouellette that he should contact NOAA General Counsel regarding the incident and that he would complete a case package and forward it to NOAA General Counsel. |

EX1, Timeline by Carol Bleszinski, VMS Technician, NOAA, and Daniel D'Ambruoso, Special Agent, NOAA.

I interviewed Ms. Bleszinski and she confirmed that Mr. Burgess contacted her by telephone on November 20, 2007 to inquire about the Scotia Boat Too's DAS balance; that she told him that the vessel had -5.23 DAS; that he said he had other vessels and was in the process of having the Scotia Boat Too lease DAS from one of his other vessels; that Mr. Burgess called back later that day and told Ms. Bleszinski that the lease transaction would take effect that day; that Ms. Bleszinski's office is on the second floor of NOAA's Gloucester office; that SFD is on the 4th floor of that same building; that she never had or saw Mr. Burgess's lease application for the Scotia Boat Too; and that Mr. Burgess never called her back after November 20, 2007 as he claimed. EX2, Special Master Interview with Carol Bleszinski, VMS Technician, NOAA (Mar. 9, 2011). The documentary evidence confirms Ms. Bleszinski's testimony concerning these events. I find that Mr. Burgess knew on November 20, 2007 that the Scotia Boat Too had

negative DAS, that Mr. Burgess prepared and had delivered to NOAA'S SFD an application to lease additional DAS for the Scotia Boat Too, that he assumed that Scotia Boat Too's negative DAS and some additional DAS were covered and instructed Mr. Smith to go fishing with the Scotia Boat Too.

Mr. Burgess' lawyer, Stephen Ouellette, contacted the General Counsel's office to settle this case before a NOVA was issued since the Scotia Boat Too was not allowed to fish until the case was resolved because it had a negative DAS balance. Although a NOVA did not issue in this case, EA Juliand, who eventually settled this case on behalf of NOAA, informed Mr. Ouellette that if one issued, it would be $10,000 per count. Settlement discussions in this case were between Mr. Ouellette and EA Juliand. However, on one occasion, Mr. Burgess was part of a telephone conference call between Mr. Ouellette and EA Juliand. On this occasion, Mr. Burgess heard EA Juliand state that "he wanted the money and not the DAS" to settle and that the fine "would be $100,000 if the case went in front of 'his judge'." EX3, Special Master Interview with Richard Burgess, Fisherman (Dec. 7, 2010). However, Mr. Ouellette does not remember if EA Juliand made these comments. Id. One other witness has stated that EA Juliand had made a similar remark to him during settlement negotiations. See infra, Case No. 26. Most NOVAs contain a warning that if a respondent appeals to an ALJ, "[h]e is not bound by the amount assessed in the [NOVA], but may fix a penalty based upon his judgment of what is appropriate up to the statutory maximum of $110,000 (or other maximum) per count." In at least one case, an ALJ has increased the NOVA penalty. *In re* Meredith Fish Co., 4 O.R.W. 914 (1987). EA Juliand stated that he has never spoken to Mr. Burgess, that he did not know that Mr. Burgess was part of a call to Mr. Ouellette and denied the statements attributed to him by Mr. Burgess.

EA Juliand admitted that to settle this case he wanted more than only DAS as payment and that he usually wins his cases before an ALJ because he gets to choose the cases that are tried to an ALJ. EA Juliand emphatically denies that he has referred to the ALJs as "his judges." EX4, Special Master Interview with Charles R. Juliand, Enforcement Attorney, NOAA (Mar. 14, 2011).

On February 26, 2008, Mr. Burgess signed a settlement agreement with NOAA in which he agreed to pay to NOAA the sum of $25,000 which represented the proceeds from the sale of fish offloaded from the Scotia Boat Too when it returned to port on November 29, 2007. Additionally, the Scotia Boat Too had the first 10.58 DAS subtracted from its DAS allocation going forward.

**II. Conclusion**

I find that the documentary evidence establishes that at the time Mr. Burgess made his inquiry of the Scotia Boat Too's DAS balance, it was -5.23 DAS; that Mr. Burgess, or someone on his behalf, dropped the lease application off at the SFD, which is the proper office for that task; that OLE Special Agents have no authority to approve/sign lease applications; that Mr. Mackey, at SFD, denied the lease application on November 27, 2007; and that a denial letter was sent to Mr. Burgess on November 29, 2007. I further find that the payment of $25,000, which approximated the cash value of the catch offloaded by the Scotia Boat Too on or about November 29, 2007 and 10.58 DAS subtracted from the Scotia Boat Too DAS allocation going forward was fair and reasonable under the circumstances of this case.

Since Mr. Ouellette cannot confirm that EA Juliand made the comments attributed to him by Mr. Burgess and EA Juliand has denied making those comments, I conclude, in this case, that the statements were not made.

## III. Recommendation

I recommend that the Secretary take no action in connection with this complaint.

**CASE 20: RICHARD BURGESS**

*In its report, the OIG found inconclusive a complaint that a fisherman was charged for fishing without a valid permit, despite having timely corrected a paperwork error once notified of the error by NMFS and which had rendered his permit invalid. (Before a NOVA was issued in this case, a settlement agreement was reached in January 2010.) The fisherman in question stated to us that while at sea, NMFS ordered him to return to port because he had mislabeled one of his monthly Fishing Vessel Trip Reports from the previous year resulting in his not having been issued a renewal of his yearly permit. The fisherman said he returned to port, properly signed and filed a new report, and was issued a new permit, yet he was still subsequently charged for fishing without a valid permit. While we found the vessel did sail and fish without a valid permit, the record of this case indicates that all FVTRs were submitted timely to get a permit issued, but that the process for issuance was delayed because of the referenced paperwork error. The case ultimately settled for a reduction of 18 days at sea for one of the fisherman's vessels. Given the facts and circumstances in this case we believe it merits further review.* (OIG Description of Case, September 2010 Report).

**I. Findings of Fact**

Mr. Burgess further complained that he was charged with a permit violation after having timely corrected a paperwork error after being notified of the error by NMFS.

On April 13, 2003, NOAA's Gloucester office received Mr. Burgess's renewal application for a 2009 fishing permit for the Scotia Boat Too. EX1, 2009 Northeast Federal Renewal Application. The new fishing year began on May 1, 2009. In order for NOAA to issue a permit, a vessel's FVTRs from the previous fishing year must have been submitted.

Beginning on May 3 and May 7, 2009, the Scotia Boat Too and its Captain [redacted] embarked on fishing trips. The vessel landed monkfish. On May 7, 2009, SA Michael Henry received an email informing him that the Scotia Boat Too did not possess a valid 2009 federal fishing permit. On May 8, 2009, SA Henry received verbal confirmation from Jessie Leslie that the Scotia Boat Too did not possess a 2009 permit for failing to submit a November 2008 FVTR. Later that day, SA Henry learned that the Scotia Boat Too was presently on a fishing trip. SA Henry contacted Mr. Burgess to inform him that he did not have a 2009 permit. Mr. Burgess was very surprised as he had turned in his FVTRs three (3) weeks earlier. Later that day, Mr. Burgess's lawyer, Mr. Ouellette went to NOAA Fisheries Regional Office and learned that there was in fact a problem. In his interview with me, Mr. Burgess explained that the Scotia Boat Too Captain Donald Smith had erroneously turned in two (2) reports for the same month and this resulted in a missing report for November 2008. EX2, Special Master Interview with Richard Burgess, Fisherman (Dec. 7, 2010). During his investigation, SA Henry discovered that the missing November 2008 FVTR and the mislabeled October 2008 were "did not fish" reports.

On May 8, 2009, Mr. Burgess telephoned SA Henry to inform him that he had just submitted the corrected trip reports and has been issued a 2009 permit. SA Henry verified that Mr. Burgess had been issued a 2009 permit.

On May 11, 2009, SA Henry spoke with Ted Hawes, NOAA Fisheries Permit Office Supervisor. Mr. Hawes stated that he had had a conversation with Mr. Burgess on April 17, 2009 and had informed him of the missing FVTR at that time. NOAA's case file on Mr. Burgess contains a note, dated April 17, 2009, memorializing the conversation between Mr. Burgess and Mr. Hawes. EX3, Note by Ted Hawes, Fisheries Permit Office Supervisor, NOAA (Apr. 17, 2009).

In his note, Mr. Hawes alleges that when he informed Mr. Burgess about the missing trip reports, Mr. Burgess responded that he knew of the missing report and he was in the process of submitting a report. Id. However, Mr. Burgess denied having knowledge about a missing trip report prior to being contacted by SA Henry. Supra, EX2. It is worth noting that NOAA did not notify Mr. Burgess in writing that his permit renewal application was incomplete until May 7, 2009. EX4, Notice of Incomplete Application (May 7, 2009).

On June 1, 2009, SA Henry issued an EAR, charging Mr. Burgess with one (1) count of fishing without a valid 2009 fishing permit. EX5, Enforcement Action Report (June 1, 2009). The following day, SA Henry issued an EAR, charging [redacted] the vessel's Captain, with one (1) count of fishing without a valid fishing permit. EX6, Enforcement Action Report (June 2, 2009).

Enforcement Attorney Deirdre Casey did not issue a NOVA in this case. Due to a heavy case load, EA Casey rolled this case into Mr. Burgess's YTF LOA case and did not charge Mr. Burgess with fishing without a federal permit. EX7, Special Master Interview with Deirdre Casey, Enforcement Attorney, NOAA (Mar. 14, 2011). The YTF LOA case was settled for 18 DAS, as previously described in this Report, but no penalty was ever assessed for this violation. See supra, Case No. 4.

**II. Conclusion**

SA Henry's issuance of two (2) EARs in a case that involved an innocent paperwork error by Captain Smith was overly aggressive enforcement. However, since EA Casey never charged Mr. Burgess with this violation and no monetary or sanction penalty was assessed or paid for this violation, I find that the matter has been satisfactorily resolved.

## III. Recommendation

I recommend that the Secretary take no action in this matter.

**CASE 15: SCOTT SWICKER, JAMES ANSARA, AND RICHARD BURGESS**

*In its report, the OIG found inconclusive the allegations that OLE agents would cite fishermen for violations and then use the citations as leverage to build a case against another individual or entity. (The below alleged incident(s) occurred in September 2007.) Multiple fishermen advised us of this allegation. One fisherman told us that two OLE agents told him they could make a fish overage disappear if the fisherman agreed to cooperate with them on another high profile case. OLE agents swore under oath, regarding two related cases, that as a matter of basic law enforcement procedure they inform fishermen that any cooperation provided during an investigation, to include information concerning other potential violators, would be noted and conveyed to GCEL for their review and consideration as part of the fishermen's case but that they do not promise to make violations disappear. The results of our investigative efforts regarding this matter were inconclusive because of these unreconciled accounts and a lack of additional evidence. In some of the reported cases, the respondents were not charged and in others they were, meriting further review of these types of allegations.* (OIG Description of Case, September 2010 Report).

**I. Findings of Fact**

On December 7, 2006, NMFS OLE Special Agents executed an AIW at GSDA on the basis of suspected cod overages. The AIW resulted in the review of hundreds of thousands of documents. From those documents, OLE identified approximately twenty eight (28) fishing vessels that were suspected of landing overages at GSDA, or were suspected of landing YTF without an LOA. Among the vessels identified through this analysis were: Anna B, Scotia Boat Too, and Aaron & Alexa. It is standard investigative procedure to interview vessel owners for

dealer involvement in suspected violations. Based on the standard procedure, NMFS OLE Special Agents Michael Henry and Gino Moro invited James Ansara, Richard Burgess, and Scott Swicker, among others, to NOAA headquarters in Gloucester to be interviewed as part of their on-going investigation into GSDA.

*James Ansara*

James S. Ansara of Essex, MA was the founder and CEO of Shawmut Design and Construction Company from 1982 until 2006. He is currently working for Partners in Health as a volunteer to build hospitals in Haiti. Mr. Ansara was also a part-time fisherman who constructed his own fishing vessel, Anna B.[22] When he was a part-time fisherman, Mr. Ansara offloaded his fish at GSDA primarily to offset the cost of fuel and other expenses in pursuing his part-time vocation. Mr. Ansara estimated that he probably landed fish at GSDA a total of three (3) times. Sometime in September 2007, Mr. Ansara received a call from SA Henry who invited him for an interview at NOAA headquarters. Mr. Ansara complied, and on September 27, 2007, met with SA Henry and SA Moro without the presence of counsel.

During this meeting, the Special Agents questioned Mr. Ansara concerning two (2) landings he made that exceeded the possession limit. He was paid a total of $625 for these two (2) landings. Mr. Ansara possessed both a state and federal permit for the Anna B, but was under the mistaken impression that he was subject to the higher landing limit provided by state regulations. However, the Special Agents informed him that because he possessed a federal

[22] The Anna B was one of the vessels used by SA Henry to establish probable cause in his affidavit to support the AIW against GSDA. Notably, both the Anna B landings at GSDA are set forth in paragraphs #29 and #31 of the affidavit. See supra, Discussion Case 1.

permit, he was subject to the more restrictive 75 lbs limit. Mr. Ansara admitted that he was confused about the regulations and that he was clearly wrong. EX1, Special Master Interview with James Ansara, Part-time Fisherman (Feb. 24, 2011).

The focus of the questioning then shifted to the GSDA business practices. Sometime during the interview, the Special Agents stated that "if [Mr. Ansara] cooperated that it was within their authority to make this go away, or words to that effect." EX2, Declaration of James Ansara. Both SA Moro and SA Henry have denied this allegation, but acknowledged that they told Mr. Ansara, and other fishermen, that any information they provided concerning any illegal activity at GSDA would be considered cooperation and would be forward to GCEL. EX3, Gino Moro and Michael Henry Affidavits in Response to Respondent's Counsel's Declaration of James S. Ansara]. Regardless of the exact words, Mr. Ansara understood the implications of what was said to mean that if he provided any "dirt" on the GSDA, his charges would go away. The meeting ended with the agents informing Mr. Ansara that they would be in touch.

Subsequently, on March 18, 2009, Mr. Ansara received a NOVA for two (2) counts of exceeding the possession limit while as a part-time fisherman. Mr. Ansara was assessed a $1,300 penalty. After lengthy settlement negotiations occasioned by Mr. Ansara proceeding "purely on principle," he agreed to pay a compromised civil penalty of $1,250 on April 30, 2009. Supra, EX1.

*Richard Burgess*

Mr. Burgess of Manchester, MA, is the owner of five fishing vessels: Heidi & Heather, Scotia Boat Too, Brian Zachary, Julie Ann, and Rock On. He has been in the fishing business

since the early 1970's, and has landed fish at GSDA since its inception and continues to land there.

On September 26, 2007, SA Moro and SA Henry interviewed Mr. Burgess at the NOAA Gloucester Office based on YTF LOA violations by the Scotia Boat Too. Mr. Burgess brought his lawyer, Stephen Ouellette, to the interview. SA Moro and SA Henry focused their inquiries into potential illegal practices at GSDA. Mr. Burgess alleged that the Special Agents probed him on why he landed at GSDA. Supra, Discussion Case 4. Significantly, Mr. Burgess alleged that OLE Special Agents informed him that they would make it easy for him if he told them what was going on at GSDA. Mr. Ouellette corroborated these statements, but NOAA agents deny making this, or other similar statements that they could make the charges go away. EX4, Michael Henry and Gino Moro Affidavits in Response to Respondent's Counsel's Statement of Good Faith Basis for Discovery. Regardless of the exact wording, Messers Burgess and Ouellette understood the implication of what was said to mean that the Special Agents would offer leniency in exchange for information against the GSDA. EX5, Stephen Ouellette Testimony Before The Domestic Policy Subcommittee Oversight and Government Reform Committee, U.S. House of Representatives (Mar. 2, 2010). Mr. Burgess had only positive things to say about GSDA and its business practices.

Ultimately, EA Casey issued Mr. Burgess a three (3) count NOVA on May 11, 2009 for $58,700 for Scotia Boat Too's YTF LOA violations in January and March 2006. The case was settled for a permit sanction of eighteen (18) DAS.

*Scott Swicker*

Mr. Swicker of Gloucester, MA, is the captain of the fishing vessel Aaron & Alexa[23] and another vessel, Ashley & Anthony. He has been a fisherman for almost thirty-five (35) years. As with other fishermen, SA Henry and SA Moro interviewed Mr. Swicker on September 27, 2007. On July 23, 2005, Mr. Swicker allegedly landed twenty-two (22) lbs of codfish at GSDA beyond the 800 lbs catch limit. The focus of the questioning then turned to the GSDA's practices. Although the exact words may be in dispute, the Special Agents told Mr. Swicker, at some point during the interview, that if he provided any information about illegal activity at GSDA, then it would be considered cooperation and forwarded to GCEL. Mr. Swicker, much like the other fishermen, interpreted that statement to mean that the Special Agents could make his overage violation disappear if he provided any information against GSDA. Mr. Swicker informed the Special Agents that GSDA is the most honest dealer anywhere, and that they would not do anything illegal. EX6, Special Master Interview with Scott Swicker, Fisherman (Feb. 10, 2011). NOAA did not charge Mr. Swicker for the 22 lbs overage.

**II. Conclusion**

There is a factual dispute concerning the exact wording of what the Special Agents said during these, and other interviews. However, based on my interviews with Messers Ansara, Burgess, and Swicker, the implications are clear that the Special Agents offered leniency in return for any information about alleged illegal activity at GSDA. Moreover, based on my

[23] The Aaron & Alexa was one of the vessels that SA Henry chose to establish probable cause in his affidavit in support of the AIW at the GSDA (paragraph #33). It was later discovered that a glitch in the computer system caused two separate landings made by the Aaron & Alexa to be reported on March 13, 2006, which resulted in an apparent overage that never happened. See supra, Discussion Case 1.

interviews with SA Moro and SA Henry, they had no authority to effectuate the outcome of the charges against the fishermen. Their role as Special Agents is to investigate and write up the violation and it would be up to GCEL to make the appropriate determination concerning what to charge in every case. I should note that it is not unusual for law enforcement officials to employ such tactics as a means to solicit information against someone they are investigating. However, it is beyond the scope of my authority in this investigation to conclude whether the tactics employed by NOAA Special Agents were justified during the course of their investigation into alleged illegal business practices at GSDA.

## III. Recommendation

I recommend that the Secretary take no action in this case.

## CASE 17: PETER HANLON

*In its report, the OIG found inconclusive, based on unreconciled accounts, a complaint that at the behest of OLE a state game warden was threatened with termination by his supervisor if he testified as scheduled on a fisherman's behalf at a NOAA enforcement proceeding. (The alleged incident occurred around June 2001). The Special Agent in Charge of OLE's Northeast Division at the time denied, when we interviewed him, of making a request to a state game warden's supervisors that they terminate the warden's employment if he testified for the defense on a case. However, the then SAC acknowledged that he was frustrated with the state game warden in this case and communicated his frustration to the warden's supervisors. We interviewed two of the state supervisors referenced in this case who indicated they did not recall the incident. In our interview with the referenced warden he was clear in his recollection that the threat was made. Ultimately the warden was not called and did not testify on this case. However, he did provide a report to defense counsel in support of the fisherman's position. The report was submitted by the defense as part of the official record.* (OIG Description of Case, September 2010 Report).

### I. Findings of Fact

Captain Peter Hanlon is a retired Massachusetts Environmental Police ("MEP") officer. Captain Hanlon started with MEP in 1976, was promoted to sergeant in 1985, to lieutenant in 1987 and to Captain before retiring in March 2009 after thirty-three (33) years of service. Captain Hanlon spent multiple years on the New Bedford waterfront and was well known and respected by fishermen, fish dealers and other local law enforcement personnel, including OLE Special Agents.

On or about July 12 or 13, 2000, Captain Hanlon received a call from a New Bedford lawyer, Pamela Lafreniere, who asked him to document that two (2) specific vessels were secured to a particular pier. Ms. Lafreniere explained that NOAA's Boatracs (a VMS) system was documenting these vessels in a location 1.5 miles from the pier. Captain Hanlon was not aware of any case involving either vessel nor did he know the identity of Ms. Lafreniere's client.

On July 15, 2000, while working the docks, Captain Hanlon took a picture of both vessels tied to the dock and noted their position in his daily report. When requested by Ms. Lafreniere, Captain Hanlon sent her a copy of his daily report and pictures of the vessels docked at the pier on July 15, 2000.

Sometime later, Captain Hanlon was advised by his superiors that a subpoena had been served for him to appear as a witness in a case involving NOAA and Lawrence Yacubian. Ms. Lafreniere represented Mr. Yacubian. Captain Hanlon's superiors, MEP [redacted] and [redacted] were displeased with Captain Hanlon. [redacted] told Captain Hanlon that he could not go to court on state time and that he could not use his cruiser because he would not be on duty.[24] During [redacted] interview, she stated that she remembers being displeased with Captain Hanlon, but does not remember anyone telling Captain Hanlon that he could not use his government vehicle. EX1, Special Master Interview with [redacted] Retired Captain, MEP (Mar. 24, 2011). However, [redacted]an explained that this might have happened as Captain Hanlon was to appear in court on his day off and he would not be performing work for the government. Id. That evening, Captain Hanlon called Ms.

[24] Mr. Hanlon's interview was among the first ones conducted and was recorded with substandard technology. As a result, there is no complete summary of his interview, which took place on November 20, 2010.

Lafreniere and requested that he be excused from appearing in Court. At trial, Ms. Lafreniere was able to use a copy of Captain Hanlon's daily log and photographs of the docked vessels.

However, this was not the end of Captain Hanlon's travails. Sometime later, [redacted]. [redacted] called Captain Hanlon and told him that NMFS called and complained that Captain Hanlon was a witness for the defense in a NOAA case. Captain Hanlon explained the incident to [redacted] and he seemed satisfied with Captain Hanlon's explanation. A few months later, [redacted] told Hanlon that the "feds" were still calling about the witness for the defense incident. Still later, Captain Hanlon was called to a meeting with [redacted] and [redacted] who again discussed the same incident. In her interview, [redacted] stated that she did not remember having such a meeting. Id. Finally, out of frustration and to halt the harassment from within and without his agency, Captain Hanlon called Ms. Lafreniere and related to her the problems he had encountered for complying with her request. Shortly after the call, Captain Hanlon received a call from someone at NMFS and thereafter, the saga ended.

On August 8, 2001, shortly after Captain Hanlon requested that he be excused as a witness, Ms. Lafreniere called NOAA's counsel in the Yacubian case, Charles Juliand, and accused OLE SAC Cohen with obstruction of justice by forcing Captain Hanlon not to testify in the Yacubian case. That same day, EA Juliand related to SAC Cohen the substance of Ms. Lafreniere's accusations. SAC Cohen replied: "Nope, it didn't happen." EX2, Handwritten Notes by Charles R. Juliand, Enforcement Attorney, NOAA (Aug. 8, 2001). On June 13, 2001, there was an email exchange among George Bell, a NOAA employee in New Bedford, SAC Cohen and SA Moro with copies sent to EA Juliand and others in the GCEL office in Gloucester. Mr. Bell

outlined the Hanlon incident. SAC Cohen asked SA Moro how "to initiate paperwork to remove his name [Hanlon] from our list of Deputized Officers" and SA Moro advised that the agents "should confirm by written letter to MEP that given the circumstances his credentials have been revoked." EX3, Email from George Bell, Special Agent, NOAA, to Andrew Cohen, Special Agent in Charge, NOAA (June 13, 2001). [redacted] In his interview with the OIG, SAC Cohen, after some prodding by the OIG, acknowledged that he was frustrated with Hanlon and called [redacted] about his frustration. EX5, OIG Interview with Andy Cohen, Special Agent in Charge, NOAA, pp 31-2 (Aug. 20, 2010).

NOAA deputized MEP officers to carry out law enforcement duties on NOAA's behalf. When asked if Peter Hanlon's actions had an effect on this arrangement, [redacted] stated that it is possible, but that she does not know that it happened. Supra, EX1. [redacted] explained that NOAA has no input in which MEP officers are to work under the contract. Id.

**II. Conclusion**

NOAA and MEP had a working relationship where MEP officers were deputized for certain law enforcement duties. This was/is a valuable contract to MEP. However, I find that Captain Hanlon was requested to document a certain fact, which he did and when the subpoena was delivered at MEP's offices, Captain Hanlon was chastised for his actions. One of the issues in the Yacubian case was the reliability of the Boatracs systems. Captain Hanlon's testimony and documentation could have challenged that reliability. However, Captain Hanlon

was not prevented from testifying by SAC Cohen but his actions were sufficient to put enough pressure on Captain Hanlon to request that he be excused from testifying. SAC Cohen's conduct was inappropriate.

**III. Recommendation**

Captain Hanlon does not seek monetary relief. SAC Cohen has retired from NOAA. Therefore, I make no recommendation to the Secretary in this matter.

## CASE 21: LAWRENCE M. YACUBIAN

*In its report, the OIG found inconclusive a complaint that GCEL unfairly delayed the sale of a fisherman's vessel and release of the vessel's permit for a period of two years, causing undue financial hardship including possible foreclosure proceedings against the fisherman's family home. (The NOVA was issued in June 2000, and a settlement agreement was reached in June 2005.) In order to settle this case, proceeds of the sale of the vessel and permit were to pay fines levied against the fisherman. According to the complainant, GCEL rejected two purchase offers for the fisherman's vessel and the release of its associated permits delaying sale for a period of two years. According to the fisherman, GCEL did not state any specific objections or reasons for rejecting the proposed transactions. The GCEL attorney handling this matter indicated in cases such as this they vet purchases of vessels and permits to ensure that any such sale is legitimate and not an attempt by a charged fisherman to maintain ownership and control of a permit they have agreed to surrender. Additionally, to ensure a sale does not go to anyone with a history of violating fisheries regulations. GCEL ultimately allowed the fisherman to sell his vessel and the associated permit without sanction, enabling him to fulfill his financial obligations under the settlement agreement.* (OIG Description of Case, September 2010 Report).

### I. Findings of Fact

Lawrence M. Yacubian is a retired fisherman. He has lived in Florida since 2003. Prior to that, Mr. Yacubian lived in Westport, Massachusetts where he grew up on Westport Point. Mr. Yacubian comes from a maritime background on his father's side. Mr. Yacubian was the Captain of the fishing vessel Independence, a 95-foot eastern rig scalloper. He was president

and sole stockholder of Lobsters, Inc., which owned the Independence. Mr. Yacubian was an activist in the fishing industry. In 1998, a group of scallopers established Fisheries Survival Fund ("FSF") to ensure the sustainability of the Atlantic Ocean scallops fishery. Mr. Yacubian was part of this group almost from the beginning.

At some point in the 1990's, Woods Hole Oceanographic Institution and the University of Massachusetts, Dartmouth, School of Marine Sciences and Technology ("SMAST") combined efforts with the fishing industry to conduct a study of the bottom of Georges Bank. Mr. Yacubian and the Independence were to participate in this survey. At the last moment, K [redacted] who worked for [redacted], at the time a fisheries scientist at SMAST, received a telephone call from someone in Gloucester stating that Mr. Yacubian would not be allowed to participate in this survey. Mr. Yacubian's replacement would have to be approved by EA Charles R. Juliand. In his interview with me, EA Juliand stated that he did not recall calling either [redacted] or [redacted]. EX1, Special Master Interview with Charles R. Juliand, Enforcement Attorney, NOAA (Mar. 14, 2011). EA J. Mitch MacDonald does not remember making such a telephone call. In addition, EA MacDonald stated that there was a bright-line rule that would prevent anyone with prior enforcement history from participating in a survey. EX2, Special Master Interview with James Mitchell MacDonald, Enforcement Attorney, NOAA (Mar. 14, 2011). Mr. Yacubian had a history of prior violations.

On June 14, 2000, EA Juliand issued a NOVA charging Lobsters, Inc. and Mr. Yacubian with two (2) counts of incursions into a restricted area, one (1) on December 8, 1998 and the other on December 11, 1998, and one (1) count of making a false oral statement to an authorized officer on December 11, 1998. EX3, Notice of Violation Assessment. As to counts 1

and 2, Mr. Yacubian and Lobsters, Inc. were assessed on each count a penalty of $110,000 (aggregate $220,000) and on Count 3, $30,000, a total monetary penalty of $250,000. Mr. Yacubian and Lobsters, Inc. also received a NOPS that permanently revoked the vessel permit for the Independence and Mr. Yacubian's operator's permit. EX4, Notice of Permit Sanction. Mr. Yacubian and Lobsters, Inc. requested a hearing before an ALJ. The case was assigned to ALJ Edwin M. Bladen, who found Mr. Yacubian and Lobsters, Inc. liable on all three (3) counts. ALJ Bladen assessed the penalties de novo, but arrived at the same permit and monetary sanctions originally assessed by EA Juliand.

Mr. Yacubian and Lobsters, Inc. appealed Judge Bladen's December 5, 2001 decision to the NOAA Administrator pursuant to 15 C.F.R. 904.273. Review was denied on July 2, 2003. On August 1, 2003, Mr. Yacubian and Lobsters, Inc. appealed to the United States District Court (D.MA). The case was assigned to Judge Nathaniel M. Gorton.

After receipt of the NOVA, Mr. Yacubian tried to sell the Independence with its vessel permit. On May 31, 2003, [redacted] made an offer to purchase the Independence for $900,000, but EA Juliand refused permission for the sale. EA Juliand was concerned that if the sale were to be approved, Mr. Yacubian would become a silent partner, as [redacted] had been a former employee of Mr. Yacubian. EX5, Special Master Interview with Lawrence M. Yacubian, Fisherman (Dec. 14, 2010). On July 8, 2003, [redacted] made an offer to purchase the Independence for $900,000. EA Juliand denied approval of that offer. In his interview with me, EA Juliand stated that he denied the initial offers because he believed that Mr. Yacubian did not have a rightful claim to sell the Independence with its permits. Supra, EX1.

On August 13, 2003, Mr. Yacubian, with the knowledge of his lawyers, met with NOAA Enforcement Attorneys Juliand and MacDonald at the United States District Court in Boston and requested an explanation as to why he was not allowed to sell the Independence with its fishing permit. At that meeting, Mr. Yacubian expressed his desire to settle his case for "something short of a complete death sentence." EX6, Handwritten Notes by Charles R. Juliand, Enforcement Attorney, NOAA. EA Juliand's response was: "I'll think about it." Supra, EX5. However, EA MacDonald said this was a reasonable request and a week later, Mr. Yacubian received permission to offer the vessel for sale with the fishing permits. Id. On March 11, 2004, [redacted] made an offer to purchase the Independence for $1,050,000, for which EA Juliand denied approval because [redacted] was a close friend of Mr. Yacubian's and NOAA considered [redacted] to be a frequent violator.

On November 29, 2004, Judge Gorton issued an Order upholding the ALJ's decision with respect to Counts I and II (incursions into restricted areas), but vacated Count III (false statement) because of insufficient evidence. Judge Gorton remanded the case to NOAA for de novo reconsideration of the civil penalties and permit sanctions, with the further instruction that if NOAA intends to assess a penalty based on prior violations more than five (5) years old, it had to justify why it is departing from its five (5) year 'look back' policy. Lobsters, Inc. v. Evans, 346 F. Supp. 2d 340, 349 (2004). In a footnote, Judge Gorton stated that the monetary penalties and the permanent permit sanctions were excessive in this case. In his Order, he stated: "The civil penalties and permit sanctions assessed against plaintiffs are vacated." Id. Following this decision, Mr. Yacubian and his counsel made requests for the permits to be reinstated, but those requests were denied. On February 16, 2005, Judge Woodlock entered

judgment in this case consistent with Judge Gorton's Order. The judgment unequivocally remanded this case to NOAA for a de novo reconsideration of civil penalties and permit sanctions. EX7, Judgment of U.S. District Court, Woodlock, D. P. (Feb. 16, 2005).

[redacted]

On May 5, 2005, EA Juliand and EA MacDonald filed a motion for expedited hearing with an ALJ. On May 9, 2005, the case was assigned to ALJ Parlen L. McKenna. On May 13, 2005, Mr. Yacubian's and Lobsters, Inc. filed an opposition to the motion for expedited hearing, by arguing strenuously that Judge Gorton clearly remanded the case back to NOAA for a de novo reconsideration of the civil penalties and permit sanctions. On June 15, 2005, ALJ McKenna issued an Order granting the motion and scheduling a hearing for August 25, 2005. He further ordered that NOAA file its Preliminary Position on Issues and Procedures ("PPIP") by July 6, 2005 and that the respondents file their PPIP by July 19, 2005. Judge McKenna rejected the

arguments of Lobsters, Inc. and Mr. Yacubian that a new NOVA and a new NOPS should be issued by NOAA. ALJ McKenna completely ignored the District Court Judgment, finding that Judge Gorton's remand to NOAA was really meant to be a remand to the ALJ. ALJ McKenna's discussion of this issue is as follows:

> Respondents argue that the Agency's request for expedited hearing is premature and not in compliance with the judgment of the Federal District Court. In support of their argument, Respondents', relying on Black's Law Dictionary's definition of 'de novo', state that to effectuate the District Court's mandate a new NOVA and NOPS must be filed by the Agency because the 'Judgment ordered NOAA to undertake a de novo reconsideration of the penalties and permit sanctions, not the ALJ.' Respondents reason that there is a distinction between NOAA and the ALJ, and under the regulations and applicable case law, it is the obligation of NOAA to make an original assessment for review by the ALJ. Respondents further claim that procedural due process requires notice and opportunity to be heard and they have not been given any notice of the penalty or permit sanctions sought on remand. These arguments are rejected.
>
> Contrary to Respondents' assertion, a new NOVA and NOPS need not be filed. The NOVA and NOPS are initial pleadings by which an administrative action is commenced under NOAA's Rules of Civil Procedure. See 15 C.F.R. §§ 904.101 and 904.302. The NOVA and NOPS set forth the proposed penalty or permit sanction sought by the agency, set forth the nature of the violation, and advise respondents of an opportunity for hearing. See id. In simplest terms, the NOVA and NOPS are types of 'complaints.' See Black's Law Dictionary, at 285 (6th Ed. 1990) (defining 'complaint'). Implicit in the District Court's order of remand is the understanding that NOAA general Counsel is not required to file a new NOVA and NOPS, which would effectively commence a new administrative action against Respondents.
>
> I find that the District Court's reference to 'NOAA,' in the order of remand, refers to the ALJ. This interpretation is consistent with the interpretation of 16 U.S.C. § 1858(a) and (g), which requires the 'Secretary', after notice and opportunity for a hearing in accordance with section 554 of title 5 United States Code, to take into consideration certain mandatory factors…
>
> Order of U. S. Coast Guard, McKenna, Parlen, p. 3 (August 25, 2005).

From July 18 to 22, 2005, a month after ALJ McKenna issued the above Order, he attended the Global Fisheries Enforcement Training Workshop in Kuala Lumpur, Malaysia

together with Enforcement Attorneys Juliand and MacDonald. At that Workshop, EA Juliand presented the Independence case. This trip was planned many months prior to the Yacubian/Lobsters, Inc. case being assigned to ALJ McKenna. Prior to 2010, about 60% of the payment for ALJ services was derived from the Asset Forfeiture Fund and the remaining 40% was derived from Commerce Department appropriated funds. EX10, Email from Stephanie Hunt, Congressional Affairs Specialist, NOAA, to [redacted] Office of the Clerk U.S. House of Representatives (July 9, 2010). Counsel for Mr. Yacubian and Lobsters, Inc. were not aware until years later that before ALJ McKenna was assigned this case, he was scheduled to attend a foreign conference with Enforcement Attorneys Juliand and MacDonald.

In every interview I conducted with fishermen, fish dealers and their lawyers, questions were raised concerning the perceived bias in favor of NOAA by the Coast Guard ALJs. In this case, Mr. Yacubian and his counsel were upset when they learned many years later that when ALJ McKenna was assigned to this case, he was scheduled to attend a conference in Kuala Lumpur, Malaysia with Enforcement Attorneys Juliand and MacDonald. This is especially disturbing to Mr. Yacubian's lawyers since ALJ McKenna's ruling a month before the scheduled conference was completely inconsistent with Judge Gorton's prior order and was the reason they settled Mr. Yacubian's case on very unfavorable terms. If these circumstances do not present an actual conflict of interest, they certainly create the appearance of a conflict. At the very least, ALJ McKenna should have disclosed his trip to Mr. Yacubian's counsel and given them the opportunity to request that he recuse himself from presiding in this case. The resulting problem is that the timing and circumstances of ALJ McKenna's involvement in this case gives credence to the perception that, in general, the Coast Guard Administrative Law

Judges are biased in favor of NOAA and in particular, that ALJ McKenna was biased in this case which, in turn, allowed EA Juliand and EA MacDonald to extract an excessive settlement from Mr. Yacubian.

[redacted] I find this email to be credible evidence that money was NOAA's motivating objective in this case.

By June 2005, Mr. Yacubian had incurred legal fees in excess of $250,000; EA Juliand had rejected several offers over a two (2) year period to purchase the Independence submitted to him by Mr. Yacubian's lawyers; and both he and his fishing vessel had been prevented for over five (5) years from making a living by fishing. By that time, Mr. Yacubian's wife had sold her family farm in Westport, which had been in her family for several generations and the Yacubian family had relocated to Florida. Mr. Yacubian was desperate. After ALJ McKenna rejected Mr. Yacubian's argument that Judge Gorton's Order required the remand of his case to NOAA for a de novo determination of his penalties and sanctions, he lost all hope of having his case reviewed in accordance with Judge Gorton's decision. He was faced with continuing legal fees, which he could not afford, a predictable adverse result before ALJ McKenna, and an appeal to the NOAA Administrator also with a predictable result before he could appeal to Judge Gorton for further review of his case. Therefore, Mr. Yacubian was forced to make a business decision

to settle the case 'short of a death sentence' and instructed his lawyers to engage in settlement negotiations with EA Juliand.

Mr. Yacubian signed the settlement agreement on his own behalf and on behalf of Lobsters, Inc. on June 24, 2005. Enforcement attorneys Juliand and MacDonald signed the agreement on behalf of NOAA on June 27, 2005. This agreement provides for a compromise civil penalty of $430,000, forfeiture of catch proceeds resulting from the trip in the amount of $25,972.26, and permanent revocation of the federal vessel permit for the Independence and Mr. Yacubian's federal operator permit.

Pursuant to the June 24/27, 2005 settlement agreement, EA Juliand agreed to allow [redacted] to purchase the Independence with its permit. This was the same [redacted] whose prior 2003 offer had been rejected by EA Juliand. It is important to note that prior to the settlement agreement in June 2005, both the monetary and permit sanctions had been vacated by Judge Gorton in the Lobsters, Inc. case. Lobsters, Inc. v. Evans, 346 F. Supp. 2d 340, 349 (D. Mass. 2004).

**II. Conclusion**

NOAA's penalty schedule in effect at the time of Mr. Yacubian's offenses reflects that a third time violator who has entered into a closed area beyond 1/4 of a mile is subject to a monetary penalty of "$110,000 and/or up to permit revocation or permanent ban on entry." EX12, NOAA Penalty Schedule, p. 39 (May 2, 1997). Under the Magnuson-Stevens Fishery Conservation and Management Act the maximum monetary penalty then allowed was $110,000 per count. 16 U.S.C. 1858(a) (1996); Federal Civil Penalties Inflation Adjustment Act

of 1990 (Pub. L. 101-410, as amended by Pub. L. 104-134); Debt Collection Improvement Act, 69 FR 74416-01 (Dec. 14, 2004).

NOAA takes the position that the increased monetary penalty from the maximum allowable $220,000 to $430,000 was justified. According to NOAA, allowing the sale of the fishing vessel Independence together with its permit warranted the collection of an additional $210,000. I disagree. First, Judge Gorton had vacated the permanent revocation of the vessel and operator permits. Second, EA Juliand refused to return the permits to Mr. Yacubian after they were vacated. In other words, I find that EA Juliand had no right to extract an oppressive penalty for the sale of the permits because EA Juliand and others at NOAA completely ignored the plain meaning of Judge Gorton's decision. Under the circumstances of this case, I find by clear and convincing evidence that imposing a monetary penalty of $210,000, the statutorily allowed maximum penalty against Mr. Yacubian and Lobsters, Inc., is excessive and unfair. NOAA takes the position that a civil penalty of $110,000 per count for Counts I and II is justified. However, NOAA never complied with Judge Gorton's order to explain why it was diverting from its five (5) year 'look back' policy and refused a de novo review of the penalty as ordered by Judge Gorton. Under the circumstances of this case, I agree with Judge Gorton that the monetary penalty of $110,000 per count (for a total of $220,000) was excessive and unfair. I find that an appropriate monetary penalty should be $55,000 each for counts 1 and 2 for a total of $110,000.

Judge Gorton further found that the permit sanctions were excessive. Since Mr. Yacubian has been out of the fishing business since 2000, I recommend that the Secretary take no action concerning the permanent revocation of Mr. Yacubian's operator permit. However, I

find that NOAA had no right to extract $210,000 from Mr. Yacubian in exchange for allowing him to sell the Independence with its permit. Judge Gorton held first, that this permit sanction was excessive and second, that it was vacated under the circumstances. I find that Mr. Yacubian should be reimbursed for the amount extracted for the sale of the Independence. I further find by clear and convincing evidence that NOAA coerced a settlement with Mr. Yacubian by refusing to adhere to Judge Gorton's order and by seeking and relying on a questionable ruling by ALJ McKenna.

Mr. Yacubian and his counsel seek an award of attorney's fees in this proceeding. As I made clear in the GSDA case, I do not have the authority to award such fees. Pursuant to the 5 U.S.C. §504(a)(4) (Equal Access to Justice Act) such fees may be awarded "… in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement…" However, this is not an adversary adjudication and for that reason, the request is denied.

**III. Recommendation**

I recommend that Mr. Yacubian be reimbursed the total sum of $330,000 as follows: $210,000, which was coerced in return for permission to sell the Independence, with its permit and $110,000 representing the excessive monetary penalty paid.

## CASE 19: THOMAS H. MORRISON

*In its report, the OIG found inconclusive a complaint that a fisherman in the Northwest was inappropriately fined $75,000 for fishing in a closed area on four separate occasions and over a three-day period. (The NOVA was issued in August 2008). According to the fisherman, Vessel Monitoring System data did show that his vessel entered a closed area on several occasions. However, according to him it also confirmed that he could not have been fishing there because the course and speed of his vessel were inconsistent with the act of fishing. While the fisherman acknowledged being in the closed area, he asserted to us that the incursions were caused by extenuating circumstances and were unintentional. Given the circumstances he believes that the amount of the fine was excessive, including that this was his first offense. The case was ultimately settled for $25,000 with a further payment of $20,000 suspended. We were unable to assess the validity of the complainant's claim regarding VMS data and therefore, find this matter inconclusive.* (OIG Description of Case, September 2010 Report).

### I. Findings of Fact

Thomas Henry Morrison has been a commercial fisherman since 1978. He has a limited entry trawler permit. Mr. Morrison owns one vessel, Captain Ryan, which is a trip boat. Since about 1989-1990, he has been fishing off of the Oregon/Washington coast.

On October 19, 20 and 21, Captain Ryan was documented by NOAA to have been located within the Rockfish Conservation Area ("RCA") off the Oregon Coast. On October 23, 2006, Mr. Morrison offloaded from the Captain Ryan $23,202.25 worth of multispecies fish. There is a question of fact, which I am unable to resolve, as to whether Mr. Morrison self reported these incursions to NOAA or whether OLE agents first confronted Mr. Morrison with

these incursions. In any event, OLE SA Mitchel Fong interviewed Mr. Morrison on November 3, 2006, concerning these alleged violations. Mr. Morrison was courteous and helpful during the interview and allowed the OLE Special Agents full access to his internal computers, logbooks, etc.

On August 26, 2008, EA Niel B. Moeller sent Mr. Morrison a NOVA containing six (6) counts for an assessed monetary penalty of $70,702.25 as follows:

Count 1 – fishing unlawfully with trawl gear in the RCA on October 19, 2006 – $10,000;

Count 2 – fishing unlawfully with trawl gear in the RCA on October 19, 2006 – $10,000;

Count 3 - fishing unlawfully with trawl gear in the RCA on October 20, 2006 – $10,000;

Count 4 - fishing unlawfully with trawl gear in the RCA on October 21, 2006 – $10,000;

Count 5 – selling about 41,057 pounds of groundfish caught as result of unlawful fishing with trawl gear in the RCA – $28,202.25 ($23,202.25 represents the value of the catch and a $5,000 additional penalty);

Count 6 – failure to submit VMS activation report and receive confirmation that transmission is occurring – $2,500.

EX1, Notice of Violation Assessment (Aug. 26, 2008).

Upon receiving the NOVA, Mr. Morrison began negotiations with EA Moeller to settle this case. Mr. Morrison was able to negotiate the penalty down to $25,000. When Mr. Morrison explained to EA Moeller that he made little money fishing, EA Moeller responded: "you have assets you can sell." EX2, Special Master Interview with Thomas H. Morrison, Fisherman (Jan. 26, 2011). Mr. Morrison hired counsel, Robert A. Green, to represent him in further negotiations with NOAA. Mr. Green was unable to further reduce the negotiated amount of $25,000. EA Moeller told Mr. Green that Mr. Morrison had 'assets' he could sell in

order to pay the fine. During my interview of EA Moeller, he admitted that he probably made that comment, but thinks it would have been in response to the financial reporting forms provided by Mr. Morrison. EX3, Special Master Interview with Niel B. Moeller, Enforcement Attorney, NOAA (Mar. 17, 2011). Mr. Morrison chose not to appeal before an ALJ because his legal fees could triple with uncertainty whether the end result would be better than a negotiated settlement. Supra, EX2.

Mr. Morrison signed the settlement agreement on February 4, 2009. Pursuant to that agreement, he had to pay a civil penalty in the amount of $25,000 and agreed to a permit sanction of thirty (30) days from April 1, 2009 until April 30, 2009, during which he could not fish.

Mr. Morrison does not deny the incursions in the RCA, but insists that they were always unintentional, weather or current related. Id. Mr. Morrison explains that even if his vessel was over the line, the gear was not. However, the law in this area is clear. Under 50 C.F.R. 660.306(h)(1), it is unlawful to fish with trawl gear in the RCA. Under 50 C.F.R. 660.381(d)(4)(ii), trawl vessels may travel through the RCA, provided that their gear is stowed "below deck; or if the gear cannot readily be moved, in a secured and covered manner, detached from all towing lines, so that it is rendered unusable for fishing; or remaining on deck uncovered if the trawl doors are hung from their stanchions and the net is disconnected from the doors." Mr. Morrison's gear was in the water when he was in the RCA.

On December 5, 2008, Mr. Green sent a letter to EA Moeller, in which Mr. Green outlined Mr. Morrison's position with respect to each count charged in the NOVA. EX4, Letter from Robert A. Green, Attorney, to Niel B. Moeller, Enforcement Attorney, NOAA (Dec. 5,

2008). With respect to count 5, Mr. Green calculated that the RCA incursion time constituted only 5% of the fishing time and therefore, only 5% of the catch should be calculated as a penalty. NOAA documents reveal that on December 10, 2008, SA Mitchel Fong made comments concerning each of Mr. Green's arguments. As to count 3, Mr. Green argued that this incursion was caused by the Captain Ryan gear getting tangled with someone else's ground gear. EX5, Notes by Mitchell Fong, Special Agent, NOAA (Dec. 10, 2008). SA Fong noted that he believed that the Captain Ryan had gear problems on this occasion and maintained that position during his interview with me. EX6, Special Master Interview with Mitchel Fong, Special Agent, NOAA (Mar. 22, 2011). Mr. Morrison confirmed that fact. Supra, EX2. As to count 4, Mr. Green stated that Mr. Morrison was asleep when he drifted across the line. SA Fong points out that Coast Guard regulations require that all ships under way must post a lookout if adrift. Supra, EX5. With respect to count one (1), after reviewing the case package, SA Fong, in rechecking the vessel's coordinates, does not, now, believe that there was a violation. Supra, EX6. Currently, Mr. Morrison has three (3) pending NOAA cases, all arising from incursions in the RCA. Id.

**II. Conclusion**

The total penalty of $70,702.25 for this first time offense (considering this trip as a whole) is arguably excessive, especially to a fisherman who either self reported the incursions or, at a minimum, fully cooperated with the SA's investigation. The penalty range for incursions into the RCA is from $5,000 to $20,000 and the penalty assessed to Mr. Morrison was $10,000 for each incursion, the value of the entire catch ($23,202.25) plus a $5,000 add on and $2,500 for a reporting violation.

Eventually, Mr. Morrison was successful in settling this case for payment of $25,000 plus a thirty (30) day permit sanction. That is still a substantial penalty, especially since Mr. Morrison lost thirty (30) DAS. However, Mr. Morrison was able to keep the $23,202.25 he received from the sale of the entire catch. There is a reasonable likelihood that Mr. Morrison might prevail as to counts one (1) (not over the line) and three (3) (over the line because of tangled gear). NOAA would most probably prevail in the remaining counts. Therefore, I conclude that some adjustments should be made for count 1 and 3 which provide for a minimum monetary penalty of $5,000 each for a total of $10,000.

If a fisherman pleads inability to pay, he is required to file with NOAA a complete financial statement listing among other things, all of his assets which are considered in determining whether a fisherman has the ability to pay a penalty. 15 CFR 904.108(c) (1993). EA Moeller's remarks to Messers Morrison and Green that Mr. Morrison had other assets to pay the fine were justified.

**III. Recommendation**

I recommend that the Secretary reimburse Mr. Morrison the sum of $10,000. However, I further recommend that this amount not be paid to Mr. Morrison until his pending cases are resolved.

**CASE 22: JAMES FLETCHER**

*In its report, the OIG found inconclusive a complaint made by a representative for a fisherman that a NOVA issued to his client in the amount of $38,000 for filing Fishing Vessel Trip Reports (FVTR) with estimated weights that did not match more precise dealer reports was excessive and unfair. (The NOVA was issued in January 2004). The fisherman's agent argued that NOAA advises fishers that weights listed on FVTRs are only good faith estimates. While this is correct, we were advised by GCEL that they generally allow for five to ten percent landing overages in cases like this one, which are based on estimated poundages. In this particular case the fisherman underestimated his fish poundage by 20 percent. We are not in a position to judge if 5 to 10 percent or 20 percent variances are reasonable.* (OIG Description of Case, September 2010 Report).

I. **Findings of Fact**

James Fletcher of Manns Harbor, North Carolina, is the representative of Fisherman's Wharf Fillet Inc. ("client"), which owned the fishing vessel Triangle I around 2003 to 2004. On June 16, 2003, NMFS Special Agent Sarah Block submitted an OIR citing four (4) separate violations committed by the Triangle I. The case was assigned to EA Juliand. On January 30, 2004, the Triangle I received a four (4) count NOVA from EA Juliand concerning two (2) incidents of non-reporting on January 1, 2001, and November 11, 2002, and two (2) additional counts where the Triangle I failed to submit accurate FVTRs on various dates in 2001 and 2002. EA Juliand assessed a $38,000 penalty for the four (4) counts: $5000 each for counts 1 and 4 for failure to submit a FVTR, and $10,000 and $18,000 respectively for counts 2 and 3 for submitting inaccurate FVTRs. EX1, Notice of Violation Assessment (Jan. 30, 2004).

Mr. Fletcher made numerous attempts to contact NOAA officials on behalf of his client after it received the NOVA. He explained that the two (2) missing FVTRs cited in counts 1 and 4 were unintentional. In fact, after his client was informed of the FVTR issues, it amended all of its FVTRs for all of its vessels, including for the Triangle I. Sufficient evidence suggests that Mr. Fletcher re-submitted the missing FVTRs for the Triangle I specifically. EX2, Facsimile from Gregory Powers, Chief, Fishery Information Section, NOAA, to James Fletcher, Representative (May 11, 2004).

The focus of Mr. Fletcher's complaint is on counts 2 and 3, which cited the Triangle I for submitting inaccurate FVTRs. Fishermen are required under the regulations to submit FVTRs for each fishing trip, and to record the pounds, by species, of all fish landed or discarded. "Hail weights" are defined as "good faith estimates." EX3, Vessel Reporting Changes, 65 Fed. Reg. 60893 (Oct. 13, 2000). In assessing the penalty for those counts, EA Juliand acknowledged that hail weights are estimates only. He stated that the general rule is to apply a 10% margin of error. However, he applied a 5% margin of error in this case because it involved many incidences of either non-reporting or mis-reporting. EX4, Special Master Interview with Charles R. Juliand, Enforcement Attorney, NOAA (March 14, 2011).

In all, three (3) different captains operated the Triangle I between 2001 and 2002, the alleged violations cited in counts 2 and 3. They were [redacted], [redacted] and [redacted]. A description of each violation for counts 2 and 3 is listed below:

**Count 2**

EA Juliand cited the Triangle I for an incident that occurred on January 8, 2001. On that trip, [redacted] failed to report all 200 lbs of monkfish. The 200 lbs of monkfish amounted to 2% of the total 9,732 lbs catch listed on the FVTR for that particular day.

On January 26, 2001, [redacted] failed to report 369lbs of black sea bass, monkfish, and weakfish. The 369 lbs of unreported species amounted to 4.9% of the 7,494 lbs total catch listed on the FVTR for that particular day.

On February 6, 2001, [redacted] failed to report 59 lbs of fluke, which amounted to 4.7% of the total 1,234 lbs of total fish caught that day. Additionally, EA Juliand cited the Triangle I for over-reporting striped bass by 251 lbs, which was a 20% over-reporting.

On February 8, 2001, [redacted] failed to report 130 lbs of fluke, which amounted to 8.1% of the total 1,597 lbs catch that day. He also underreported striped bass by 107 lbs (7.3%).

On February 10, 2001, [redacted] failed to report 303 lbs of monkfish and gray trout. The non-reporting amounted to 5.7% of the total 5,300 lbs landing for that particular day.

On March 5, 2001, [redacted] failed to report 50 lbs of monkfish, which amounted to .28% of the 17,978 lbs total landed on that particular day. Further, he underreported cod by 610 lbs (3.4% of total landing) and over-reported yellowtail flounder by 795lbs (4.4% of total landing).

On March 13, 2001, [redacted] failed to report 215 lbs of witch flounder, which amounted to 4.4% of the total 4845 lbs of fish landed on that particular day. He also under-reported cod by 185 lbs (3.8% of total catch), American Plaice flounder by 300 lbs (6.2% of total catch), and over-reported winter flounder by 560 lbs (11.5% of total catch). In total, [redacted] Tate misreported 26% of his total landing for that day.

On March 22, 2001, [redacted] failed to report 110lbs of witch flounder, which amounted to .5% of the total 22,740 lbs catch for that day. Additionally, he under-reported cod by 165 lbs, and American plaice flounder by 55 lbs. The total underreporting amounted to .97% of the total catch. [redacted] also over-reported winter flounder by 205 lbs and over-reported yellowtail flounder by 600 lbs. The over-reporting totaled 3.5% of the catch for that day.

On April 12, 2001, [redacted] failed to report 80 lbs of monkfish, 250lbs of fluke, and 560lbs of witch flounder. The total amount of non-reporting equaled 7.3% of the total 12,185 lbs landed that day. Further, he under-reported 90 lbs of American Plaice flounder, 215 lbs of cod, and 385 lbs of yellowtail flounder. The total under-reporting amounted to 5.6% of the total catch. Finally, [redacted] over-reported 245 lbs of winter flounder, which was 2% of the total catch for that day.

**Count 3**

On January 1, 2002, [redacted] failed to report 224 lbs of butterfish (1.9% of total catch), underreported 6,680 lbs of horseshoe crab (58% of total catch), and over-reported 98 lbs of channeled whelk (.8% of total catch).

On January 28, 2002, [redacted] failed to report 100 lbs of monkfish, and underreported 549 lbs of fluke. The non-reporting of monkfish amounted to 1.7% of the total 5997 lbs catch, and the under-reporting of fluke amount to 9.1% of the total catch.

On February 1, 2002, [redacted] failed to report 230 lbs of monkfish, and 106 lbs of black sea bass. The total non-reporting amounted to 4.4% of the 7,596 lbs catch for that day.

On February 7, 2002, [redacted] failed to report 107 lbs of monkfish, which amounted to 1.5% of the total 6,886lbs catch for that particular day.

On March 13, 2002, [redacted] failed to report 150 lbs of King Whiting fish – 2.9% of the total 5,157 lbs catch for that particular day.

EX5, Offense Investigation Report by Sara M. Block (June 16, 2003).

Mr. Fletcher communicated frequently with NOAA officials, including EA Juliand, after receipt of the NOVA. However, he never made a formal request for a hearing in front of an ALJ. He testified during my interview of him that most fishermen choose to settle the NOVAs because the cost of bringing a case before an ALJ greatly outweighs the assessed penalties. Accordingly, he settled the NOVA on behalf of his client on May 26, 2004 for $19,000, with $5,000 suspended for a total payment of $14,000. EX6, Settlement Agreement (May 26, 2004).

**II. Conclusion**

Counts 2 and 3 in the NOVA charged Mr. Fletcher's client with inaccurately reporting catch, or failing to report certain species of fish. An examination of the NOVA revealed that most of the documented incidences of non-reporting or misreporting, including some incidences of over reporting, were below 10% of the total weight of the catch. It is important to note that none of

the catches reported by the Triangle I documented any overages, and the fish dealer reported all landings accurately. However, in many instances, hundreds of pounds of a particular species went unreported. The unreported species amounted to under 10% of the total catch, with some as little as .28%.

EA Juliand noted in the NOVA that he allowed a 5% error margin for the Triangle I in assessing the penalties. However, EA Juliand's handwritten notes on Mr. Fletcher's letter dated July 6, 2003 revealed that EA Juliand initially considered a 10% error margin before finally applying the 5% rule. EX7, Handwritten Notes by Charles Juliand, Enforcement Attorney, NOAA. Had EA Juliand applied the 10% variance, which is the normal practice, it would have eliminated the majority of the violations in counts 2 and 3.

Furthermore, "good faith" is not defined in the regulations, and there was no evidence to suggest that the Triangle I captains intended to mislead NOAA. The arbitrariness of the regulations affords NOAA enforcement attorneys unfettered latitude in determining whether a fisherman is in violation. "When considering the falsity of a statement of opinion, the party alleging falsity need not prove that the fact underlying the opinion is untrue but rather that the statement of opinion is untrue. Thus, the plain language of the regulation requires that the prosecuting Agency prove that [Triangle I captains] did not subjectively believe that the estimates [they] gave were accurate." Lobsters, Inc. v. Donald Evans, 346 F. Supp. 2d 340, 346 (D. Mass. 2004). The non-reported or misreported FVTRs appear to be estimates only, and there was no evidence to suggest intentional deception. Fishing vessels generally handle large volumes of fish at sea with unpredictable weather conditions. Without an accurate scale on

board, fishing captains are forced to rely on good faith estimates to fill out FVTRs prior to landing their catch. It is the dealers who are required to report accurate landing information.

In this case, the dealers accurately reported the landings, and none resulted in overages. The Triangle I captains made estimates for their landings that were mostly within 10% of the total catch weight. Absent any evidence that the Triangle I captains intentionally misled NOAA officials, I find that a $38,000 total penalty assessment, with $28,000 associated with counts 2 and 3 for mis-reporting or non-reporting of species, was excessive in this case. In turn, I find the $14,000 settlement amount also to be excessive. This case demonstrates the arbitrariness in NOAA's enforcement, and should have warranted leniency, particularly because sufficient evidence established that Mr. Fletcher made vociferous efforts to rectify the issues cited in the NOVA by resubmitting all the FVTRs after notification.

I recognize the importance of accurate reporting for conservation purposes. As SA Block noted in a memo dated June 16, 2003, "[A]lthough each individual FVTR may on its face appear insignificant, the practice of not reporting all species on the FVTR certainly adds up over a period of time." EX8, Memorandum from Sara M. Block, Special Agent, NOAA, to Case File (June 16, 2003). However, I base my finding on the fact that the dealers accurately reported the catch information, and that the captains did not exceed the allowable catch limit on any of these landings. Furthermore, EA Juliand cited the Triangle I for over-reporting as well. None of the captains impeded conservation purposes by unintentionally misreporting hail weights on FVTRs.

I should note that the Triangle I did commit gross mis-reporting on at least two (2) occasions cited in the NOVA. On January 1, 2002, the Triangle I underreported almost 7,000 lbs of

horseshoe crab, which is 58% of the total catch. On March 13, 2001, the Triangle I misreported 26% of its total catch for that day. These incidents warrant an appropriate penalty. With the exception of these two (2) cases, I find that a written warning would be an appropriate action for the rest of the violations. It would have served as proper deterrence against future oversight and carelessness on the part of the captains.

EA Juliand argues that if a species of fish caught was not reported, then that is 100% underreporting of that species. Several fishermen have addressed this issue. They explain that when fishermen haul in their nets containing thousands of pounds of fish, they are dumped on board and it is very difficult to estimate the various small number of species that may be buried under each haul of the nets. For example, the Triangle I had a total catch of 9,732 lbs of fish on January 8, 2001, 22,740 lbs of fish on March 22, 2001, and 12,185 lbs of fish on April 12, 2001.

**III. Recommendation**

I recommend that Counts 1 and 4 be reduced to warnings. Mr. Fletcher and his client made every effort to re-submit the two (2) missing FVTRs from January 1, 2001 and November 11, 2002 after notification. As such, a written warning would be appropriate to serve as a general deterrence concerning timely submission of FVTRs. That leaves counts 2 and 3, which were originally assessed at $28,000. The entire case was settled for $14,000. As I explained, the Triangle I captains made good faith estimates with no intention to deceive, and most of the FVTR estimates were within 10% of the total catch for that day, with the exception of January 1, 2002, when the Triangle I misreported 58% of its total catch, and March 13, 2001, when 26% of its catch was misreported. Also, EA Juliand's arbitrary application of a 5% variance when the general rule provides for a 10% variance is further evidence that the Triangle I's settlement of

$14,000 should be further reduced to $7,000 and the difference of $7,000 be remitted to Mr. Fletcher's client.

**CASE 24: ETHICS COMPLAINT AGAINST DEIRDRE CASEY BY RICHARD BURGESS**

*In its report, the OIG found inconclusive an allegation that a GCEL attorney in the Northeast Region inappropriately attempted to leverage settlement of a case. (The incident occurred in July 2009.) According to a fisherman a GCEL attorney threatened his counsel with professional ethics violations regarding the handling of his case. According to an email from the GCEL attorney to the defense attorney, the defense attorney was not fulfilling a professional obligation to properly inform his client of a settlement offer. According to the fisherman in question, he told his attorney that he was not guilty and would not settle the case. The GCEL attorney indicated intent to file a motion against the defense attorney alleging violations of American Bar Association (ABA) rules regarding conflicts of interest. The GCEL attorney believed that the fisherman in question was interested in settling his case and conveyed this information to the defense attorney. The GCEL attorney further indicated the belief that offers of settlement were not being relayed to the attorney's client. The defense attorney recalled that he communicated to GCEL his client's unwillingness to settle the case, at least in part, because of the pending OIG Review. He further advised that his clients are always advised of offers of settlement as they are received and that this case was no different. The OIG is not in a position to judge the GCEL attorney's obligation to report what she believed could be ABA rule violations by a defense attorney, nor can we judge if the threat of these types of charges might be an attempt to inappropriately force settlement of a case. This case is also referenced as one of the yellowtail flounder cases in example #4 to this chart, which is a confirmed allegation, and as such is appropriate for further review.* (OIG Description of Case, September 2010 Report).

## I. Findings of Fact

During the months of March, April and May 2009, EA Deirdre Casey issued NOVAs to 12 separate fishermen for landing yellowtail flounder without a letter of authorization. See supra, Case 4 Discussion. Gloucester lawyer Stephen M. Ouellette represented at least seven (7) of these fishermen. Eventually, each of these cases was settled between EA Casey and Mr. Ouellette. Id. However, on July 2, 2009, during settlement discussions, EA Casey sent Mr. Ouellette the following email:

> From: Deirdre Casey
> Sent: Thursday, July 02, 2009 1:50 PM
> Subject: Harvest moon, Scotai Boat II, terminator, alyssa & andrew
>
> ---
>
> Steve,
> I am writing to let you know that I plan to file a motion raising my concern that you have a conflict of interest (ABA Model Rule 1.7) in your representation of the boats charged with yellowtail LOA violations. I am going to request that the Court do a colloquy with Mark Carroll and Paul Theriault and your other clients in these matters.
> My reasons are twofold.
>
> First, because both Mark Carroll and Paul Theriault have called my office and left messages requesting an opportunity to try to resolve the cases but you have made no attempt to settle their cases, and because you have failed to answer my repeated questions about whether you have conveyed my specific settlement offers in the above-referenced cases, I am concerned that these offers have not been conveyed and that your scheme to challenge these cases has subjugated the interests of your clients (Model Rule 1.2, 1.7). It is also my understanding that Richard Burgess is interested in settling, as I have conveyed to you, and you have made no attempt to do such, despite my offers to settle.
>
> Second, you are filing virtually the same PPIP and identify the same discovery in all cases. You are filing one PPIP making claims that the vessels did not know they needed the letters when 6 out of your 7 clients all had LOAs at multiple times during the life of the regulation. I have provided this information to you in discovery. You have stated to me that the fines are $3500 or less. Clearly, it is in these clients interest, who have admitted to purchasing YTF during periods that they did not hold an LOA, to settle these cases rather than pay legal fees to do

> extensive discovery to challenge-what? The penalties- which are all less than $3500 (which is based on the value of the unlawful landings) and could be settled for significantly less? Clearly, for your clients that have been issued larger penalties, it may make sense to (1) settle or (2) challenge the penalties, but not for the other three. (ABA Model Rule 1.7)
>
> I want to give you an opportunity to respond before I file this motion.

---

EX1.

Mr. Ouellette responded by email denying EA Casey's allegations. EX2, Email from Stephen M. Oullette, Attorney, Ouellette & Smith, to Deirdre Casey, Enforcement Attorney, NOAA (July 6, 2009). EA Casey then sent Mr. Ouellette a follow-up three (3) page email on July 7, 2009 which can best be described as an argument in support of NOAA's and her actions in prosecuting fishermen for landing yellowtail flounder without a letter of authorization, and a rehash of issues then being reported by the Gloucester Daily Times. EX3, Email from Deirdre Casey, Enforcement Attorney, NOAA, to Stephen M. Ouellette, Attorney, Ouellette & Smith (July 7, 2009). Richard Burgess gave the OIG a copy of EA Casey's email during his interview on July 6, 2009, just days after she sent the email to his lawyer. Messers Burgess, Carroll, and Theriault were clear in their interviews with me that Mr. Ouellette successfully represented them in resolving their yellowtail cases.

EA Casey was admitted to practice in the Commonwealth of Massachusetts on January 21, 1997. She is also admitted to practice in Maine and New Hampshire, but not admitted to any federal court. EA Casey worked for a Massachusetts law firm for 6 months in 1997, was an Assistant District Attorney in Massachusetts from 1997 to 2000, and has been a NOAA Enforcement Attorney in the GCEL Gloucester, MA office from 2000 to the present.

## II. Conclusion

In EA Casey's email, she referenced the ABA Model Rules. As a member of the Massachusetts bar, and practicing in Massachusetts, EA Casey and Mr. Ouellette, as Massachusetts lawyers with offices in Gloucester, are subject to the Massachusetts Rules of Professional Conduct (MRPC). Although there is little difference between the Massachusetts and ABA Model Rules EA Casey cited in her email, she failed to cite the correct rule in challenging Mr. Ouellette's representation of his clients.

Several facts are clear. There is no conflict of interest as alleged by EA Casey pursuant to MRPC 1.7.[25] There is no joint representation of clients by Mr. Ouellette, who was representing many different fishermen charged civilly with similar but separate violations. There is no prohibition in filing similar or even identical pleadings in separate cases, where the factual/legal

[25] **RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE**

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

issues are similar. In fact, this is commonly done by lawyers as a cost-saving method for similarly situated clients.

Inferentially, Ms. Casey is accusing Mr. Ouellette of violating MRPC Rule 1.4[26] by failing to keep his clients "reasonably informed about the state of a matter…," and failing to "…inform the client of communicating [offers of settlement] from another party." EX4, Mass Rules of Professional Responsibility Rule 1.4, Comment 1 (2010). It is interesting that the comment to Rule 1.4 further provides that there is no need to communicate a settlement offer to a client if prior discussions with the client have left it clear that the proposal will be unacceptable. Id. This was the case with Richard Burgess, who was adamant that there would be no settlement. Mr. Ouellette has stated that he kept his clients informed of all settlement offers, and from my interviews of these specific clients, I found this to be the case. EX5, Special Master Interviews with Richard Burgess, Mark Carroll and Paul Theriault, Fishermen (Dec. 7, 2010). The fact that these fishermen may have called Ms. Casey expressing an interest in settling does not infer that Mr. Ouellette was not communicating offers of settlement to his clients.

I further find that EA Casey's threat to file a motion to have a judge conduct a colloquy with all of Mr. Ouellette's clients to determine if he had a conflict of interest, or was violating the rules of professional conduct, to be unusual. This led Mr. Burgess to complain to the OIG about EA Casey's email, which is the genesis of this complaint. Mr. Burgess alleges that EA Casey's

[26] **RULE 1.4 COMMUNICATION**

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

emails were designed to threaten Mr. Ouellette with professional discipline in order to obtain an advantage in their settlement discussions. Although not cited by Mr. Burgess or OIG, Rule 3.4(h) of MRPC provides, in relevant part as follows:

> **Rule 3.4 Fairness to Opposing Party and Counsel:**
>
> 1. A lawyer shall not:
>
> (h) present, participate, or threaten to present criminal or disciplinary charges solely to obtain an advantage in a private civil matter;… (emphasis supplied)

The operative word in paragraph (h) is "solely" and it is clear from EA Casey's email and interview with me that that was not the case and I so find.

## III. Recommendation

This case involves a training issue which is beyond the scope of my authority and for that reason, I make no recommendation in this matter.

**CASE 26: MICHAEL J. ANDERSON**

*In its report, the OIG found that a fisherman claimed that GCEL threatened to increase his fine from $10,000 to $110,000 if he took the case to an ALJ hearing. (The NOVA was issued in August 2002.) The GCEL attorney assigned to this case denied making a specific threat for an increased fine but acknowledged that his standard practice is to tell fishermen that the ALJ is limited to the highest fine he can assess by the statutory maximum, not by the amount assessed in the NOVA. As outlined in Case #9 to this chart, a confirmed complaint, this type of representation by GCEL during negotiations to settle a case is consistent with other complaints we received and with standard language found in GCEL settlement documents.* (OIG Description of Case, September 2010 Report).

**I. Findings of Fact**

Michael Joseph Anderson from his homeport of Rye, NH, has been a full-time fisherman since 1980. He fishes for "anything that has eyes" from his current fishing vessel, Rim Rack. EX1, Special Master Interview with Michael J. Anderson, Fisherman, Dec. 16, 2010). From 1987 to approximately two (2) years ago, Mr. Anderson fished from the vessel, Madrigan, which is a day boat.

In the fall of 2001, Kenneth A. Crossman, Jr. (Mr. Crossman or SSA Crossman), OLE Senior Special Agent, was in charge of the Days at Sea (DAS) program for the Northeast Region. At that time, fishermen were required, under the DAS program, to contact a call center to obtain confirmation numbers for each fishing trip or DAS. In late October 2001, the call center was backed up with excessive hold times for fishermen calling in to obtain their trip numbers.

On October 31, 2001 at 2:30am, Mr. Anderson had a telephone conversation with the DAS call-in system operator. During this conversation, Mr. Anderson strongly expressed his dissatisfaction about the call-in system because he had been put on hold for thirteen (13) days in a row. The operator told Mr. Anderson that he was the only call-in operator on duty that morning. Mr. Anderson replied that the next time he was put on hold, he would go fishing regardless of whether he received his trip number. That day, Mr. Anderson was given a trip number and he went fishing.

On the next day, November 1, 2001, Mr. Anderson again called the call-in system but was again placed on hold. Mr. Anderson then called Mr. Crossman's emergency pager and left a message that the call-in system was not working, and that he would go fishing the next time he was put on hold. Following the first message, Mr. Anderson called again complaining about the call-in system.

On November 1, 2001, between 5:08 and 5:10am, Mr. Crossman received two (2) beeper pages. The first was from Mr. Anderson's cell phone and the second was from his residence phone. Mr. Crossman immediately returned the cell phone call. No one answered and he left a message identifying himself, his agency, and the date and time of his return call. Mr. Crossman then called Mr. Anderson's residence telephone number and woke [redacted] who said that her husband had gone fishing. Later that day at 1750 hours, Mr. Crossman received a beeper page, which he returned. He reached Mr. Anderson, who was agitated and complained about the "hold time" problem with the call-in system. Mr. Crossman informed Mr. Anderson that he had addressed that issue that day with the call-in center. However, Mr. Anderson continued to admonish Mr. Crossman angrily for the call-in center

problem. Mr. Crossman was polite and professional in his responses to Mr. Anderson during this conversation. At some point, Mr. Anderson admitted that he had gone fishing that day without a trip number. He described what he had done as "rightly wrong." EX2, Offense Investigation Report by Kenneth Crossman (Dec. 12, 2001). On November 1, 2001, the DAS call center successfully processed two hundred ninety seven (297) separate calls; ninety one (91) calls were processed between the hours of 0200 and 0600 hours; nine (9) of these calls originated in coastal New Hampshire; and four (4) were processed from Mr. Anderson's homeport of Rye, New Hampshire. Id. Had Mr. Anderson remained at home a few more minutes in the early morning of November 1, 2001, he would have received a trip number from SSA Crossman.

On November 2, 2001, SSA Crossman issued an EAR to Mr. Anderson for his failure to comply with the DAS Notification Program by fishing for and landing regulated multispecies without authorization. This EAR did not contain a penalty and SSA Crossman elected not to seize Mr. Anderson's November 1, 2001 catch, containing a maximum limit of cod (400 lbs) and 651 lbs of monkfish.

After the Crossman conversation on November 1, 2001, Mr. Anderson sent letters to New Hampshire elected officials to complain about the NOAA call-in system. As a result, those public officials made inquiries of NOAA concerning this problem. SSA Crossman responded to inquiries made by NOAA concerning the call-in system in general and Mr. Anderson's complaints in particular. On November 27, 2001, SSA Crossman wrote an internal memorandum about his interactions with Mr. Anderson, and concluded his comments by recommending "subtraction of general DAS days from F/V Madrigan in the current year as an

appropriate penalty for Mr. Anderson." EX3, Memorandum by Kenneth Crossman (Nov. 27, 2001). This memo was given to enforcement attorney, Charles Juliand, to whom the Anderson case was assigned.

On August 12, 2002, EA Juliand issued a NOVA to Mr. Anderson assessing a penalty of $10,000, a NOPS for a seven (7) DAS permit sanction, and an offer of settlement for $7,500 plus the permit sanction. EA Juliand assessed the penalty amount because he believed Mr. Anderson willfully violated the regulations when he went fishing without his DAS confirmation number. In a letter to Mr. Anderson enclosing the NOVA, NOPS, and settlement proposal, EA Juliand informed Mr. Anderson of his right of appeal to an ALJ and of the possibility that the assessed penalty could be increased to $110,000 per count. On advice of counsel that Mr. Anderson would not prevail before an ALJ, Mr. Anderson allowed the appeal period to lapse without filing an appeal. Sometime in September 2002, Mr. Anderson attended a meeting with EA Juliand and SSA Crossman.

Mr. Anderson expressed his continued anger over the call-in system problem. At some point, EA Juliand became agitated and said to Mr. Anderson, "How would you like to walk out the door and turn around and we start over at $110,000?" EA Juliand denies he made the comment but others have testified that EA Juliand had made a similar comment to them. Therefore, I accept Mr. Anderson's testimony that the statement was made. Mr. Anderson then settled his case for a six (6) DAS permit sanction with two (2) DAS during the 2002 season and two (2) DAS each during 2003 and 2004. EA Juliand noted that the settlement was "as light as I could hit him" given the violation. EX4, Special Master Interview with Charles R. Juliand, Enforcement Attorney, NOAA (March 14, 2011).

**II. Conclusion**

Mr. Anderson has pursued his complaint as a matter of principal on the grounds that he was being punished for a failed system. I find, however, that Mr. Anderson's impulsive, intentional action in going fishing without authorization cannot be ignored or excused. I find that SSA Crossman acted professionally at all times concerning the complaint; that EA Juliand's original penalty assessment of $10,000 and seven (7) DAS was excessive in the circumstances of this case; and his threat of a higher penalty at his meeting with Mr. Anderson was not justified. However, I find that the eventual settlement of six (6) DAS over three (3) years was appropriate.

**III. Recommendation**

I recommend that the Secretary take no action concerning this complaint.

## CASE 27: JAMES D. GILLIKIN

*In its report, the OIG found that a fisherman complained that when he asked GCEL for an extension to pay his fine, he was told that if an extension was granted the fine would increase to $685,000. (The NOVA was issued in December 1997.) According to the fisherman he was issued a NOVA for $483,000. When he approached GCEL to request an extension of time by which to pay the fine, he was told one would be granted but that the fine would then rise to $685,000. The fisherman indicated he could not pay a $685,000 fine. Ultimately, he settled the case for $15,000 plus a permanent revocation of a dealer permit and a ten-year sanction against a second permit. The GCEL attorney who handled this case stated that the primary factor in accepting a reduced monetary amount was the fisherman's "financial inability to pay the assessed penalties." The GCEL attorney also denied making a specific threat regarding an increase in the fine if a time extension was granted. Further, that if a settlement figure is agreed upon and a payment plan is involved, agency policy requires NOAA to charge interest.* (OIG Description of Case, September 2010 Report).

### I. Findings of Fact

James Davis Gillikin currently resides in Harkers Island, North Carolina. He is a third-generation fisherman. His father, James T. Gillikin, and he previously owned and operated Gillikin Seafood, Inc., a seafood processing company located in Beaufort, North Carolina. Mr. Gillikin described himself as a former fishermen advocate, who has organized protests against fishing regulations in the past.

Gillikin Seafood, Inc.'s administrative assistant, [redacted] (then known as [redacted]), was responsible for reporting landing information to NMFS at the time, and has been

for the past twenty (20) years. Around January 1997, NMFS introduced new reporting requirements for dealers who had a NMFS Northeast Federal Dealer Permit. Elizabeth Moses, the Fishery Reporting Specialist for NOAA Northeast Region, met with area dealers, including Gillikin Seafood, Inc., and explained the new procedures. On April 16, 1997, NMFS Special Agent Radonski requested to see Gillikin Seafood, Inc.'s records for January 1997 from Ms. Moses. She did not have the requested Gillikin records, nor did another individual responsible for reporting requirements at NMFS have the requested documents.

Ms. Moses contacted Ms. Josey on April 16, 1997 to request the missing documents. On April 17, 1997, Ms. Moses received a fax from [redacted], informing her that the requested information was available. Ms. Moses picked up the records that same day. The January 1997 landing information for summer flounder landings at Gillikin Seafood, Inc. totaled 99,695 lbs. EX1: Affidavit With Attachments of Elizabeth Moses, Northeast Fisheries Reporting Specialist, NOAA.

On June 25, 1997, NMFS OLE Special Agents Tracy Dunn, Casey Oravetz, and Jeff Radonski from the SED in North Carolina, executed an AIW on Gillikin Seafood, Inc. Several other North Carolina Division of Marine Fisheries Marine Patrol officers accompanied them to the premises to secure the area. Only OLE agents conducted the search of the Gillikin Seafood, Inc. premises. The Special Agents seized various sales receipts, invoices, and dealer reports pertaining to summer flounder landings.

A subsequent investigation ensued. During the course of reviewing records obtained from the AIW, SA Radonski suspected that Gillikin Seafood, Inc. was working in concert with F.H. Williams Seafood, Inc. to conceal summer flounder landings on various dates in January 1997.

According to SA Radonski's analysis, F.H. Williams Seafood, Inc. submitted various dealer reports late from January 1997 that corresponded closely with the non-reporting by Gillikin Seafood, Inc. In essence, both dealers attributed summer flounder landings to one another in an attempt to conceal landings from fishing vessels Lady Helen, Julie Renee, and Shekinah Glory. These vessels were owned by F.H. Williams Seafood, Inc. Also, F.H. Williams Seafood did not have a federal permit to land summer flounder during January 1997. The combination of this evidence led SA Radonski to suspect that F.H. Williams Seafood, Inc. and Gillikin Seafood, Inc. colluded with one another to hide flounder landings. EX2, Offense Investigation Report by H. Jeff Radonski, Special Agent, NOAA (Oct. 17, 1997).

The case was assigned to EA Juliand in the NED because the violation implicated the NED Fishery Management Plan. On December 31, 1997, EA Juliand sent a NOVA to Gillikin Seafood, Inc., assessing a penalty of $483,000 based on thirty five (35) counts of either non-reporting or late reporting of summer flounder landings. He later sent an amended NOVA on March 5, 1998 to correct the spelling of Mr. Gillikin's name. EA Juliand charged $18,000 for each of the twenty one (21) counts involving non-reporting, which totaled approximately 190,000 lbs of summer flounder landed at Gillikin Seafood, Inc. in January 1997. Further, he charged $7,500 for each of the fourteen (14) counts for the late reporting submitted by [redacted] on April 17, 1997. The late reporting totaled over 100,000 lbs of summer flounder. EX3, Amended Notice of Violation Assessment (Mar. 5, 1998). EA Juliand noted that he calculated the $18,000 penalty per count based on the sum of an assessed fine from a previous similar case, and the average value of the unreported catch. However, he did not recall his specific method in calculating the $7,500

penalty for the late reporting. EX4, Email from Charles R. Juliand, Enforcement Attorney, NOAA, to Office of Inspector General.

Mr. Gillikin hired counsel to defend the NOVA and NOPS. He also gave his counsel authority to settle the case because, at the time, his wife was suffering from throat cancer. On October 30, 1998, Gillikin Seafood, Inc., James T. Gillikin and James D. Gillikin (Respondents) settled the NOVA for $15,000 based on its inability to pay the $483,000 fine. Mr. Gillikin noted that he settled the case to "get [NOAA] off his back." EX5, Special Master Interview with James D. Gillikin, Fisherman (Feb. 24, 2011). The Respondents, James T. Gillikin and Gillikin Seafood, Inc., agreed to forfeit their federal dealer permit permanently. Mr. Gillikin agreed to not apply for a federal dealer's permit for ten (10) years from the date of the settlement. However, should Mr. Gillikin make a written request for a federal dealer permit five (5) years after signing the settlement agreement, NOAA reserved the right to grant him a permit. Also, the Respondents agreed to sell one (1) of its three (3) vessels and use the proceeds to pay the penalty. Finally, the Respondents agreed to no longer operate their business under the name, Gillikin Seafood, Inc. The Respondents would encourage and assist their successor, Kerry & Son Seafood, to implement a quality-control system for accurate reporting. EX6, Settlement Agreement (Oct. 30, 1998).

It should be noted that this case originally implicated both civil and criminal violations. In fact, when OLE agents were preparing the AIW application, the local AUSA expressed an interest in prosecuting the fraud component of this case. However, after EA Juliand reduced the penalty from $483,000 to $15,000, the local AUSA elected not to pursue the criminal

charges because the reduced penalty lacked jury appeal. EX7, Office of Inspector General Interview Notes of Interview with H. Jeff Radonski, Special Agent, NOAA (June 3, 2010).

*Additional Cases*

James T. Gillikin and James D. Gillikin were both involved in two (2) violations after the settlement of the thirty five (35) count NOVA. First, James T. Gillikin, and [redacted] received a NOVA on November 23, 2004 for allegedly possessing forty one (41) monkfish tails onboard the F/V James T. Gillikin while inside the United States Exclusive Economic Zone. The incident allegedly occurred on or about January 8, 2001. EA Alexa Cole from GCEL in Silver Springs, MD, imposed a $5,000 fine on James T. Gillikin, with an option to settle for $3,500. Mr. Gillikin passed away on June 12, 2004, and [redacted] had passed away on June 1, 2003. Ultimately, James T. Gillikin's attorney informed EA Cole of their deaths, and provided death certificates. EA Cole subsequently dismissed all charges against Messers Gillikin and [redacted].

Second, on March 25, 2006, NOAA enforcement attorney Mitch MacDonald sent James D. Gillikin a NOVA for $15,000, and a NOPS for thirty (30) days. EA MacDonald alleged that [redacted], operator of the James T. Gillikin, possessed 428 lbs of shucked Atlantic sea scallops in excess of the 400 lbs limit. Additionally, [redacted] falsified a FVTR by recording that he possessed only 388 lbs of sea scallops, instead of 428 lbs. James D. Gillikin eventually sent a letter to EA MacDonald explaining that the crew on the James T. Gillikin had kept some Atlantic sea scallops to bring home to their families without his knowledge. EX8, Letter From James D. Gillikin, Fisherman, to Charles Juliand, Enforcement Attorney, NOAA (June 12, 2006). Mr. Gillikin noted that he makes a strong effort to comply with the fishing regulations, but that he cannot prevent actions that are effectively beyond his control. Mr. Gillikin also wrote that

his wife had suffered a serious injury, and that he did not have the ability to pay the assessed fine. Based on this letter, and a subsequent discussion with Mr. Gillikin, EA MacDonald reduced the penalty to a written warning.

**II. Conclusion**

During the course of the settlement discussions concerning the 1998 NOVA, Mr. Gillikin alleged that EA Juliand threatened to raise his $483,000 penalty to $685,000 when Mr. Gillikin requested an extension to pay the fine. EA Juliand denied making such a threat. Mr. Gillikin had counsel representation at the time, and EA Juliand communicated exclusively with counsel concerning the settlement discussions. EA Juliand noted that it was not uncommon for fishermen to call him to request an extension after arriving at a settlement agreement. EX9, Special Master Interview with Charles R. Juliand, Enforcement Attorney, NOAA (March 14, 2011). In fact, I found evidence that indicated EA Juliand granted a one (1) month extension. EX10, Handwritten Notes by Charles R. Juliand, Enforcement Attorney, NOAA. Mr. Gillikin did not remember speaking to EA Juliand about the settlement, but may have spoken to him on the telephone after the settlement.

**III. Recommendation**

I find the allegations against EA Juliand in this case to be unfounded. Therefore, I recommend that the Secretary take no action concerning this complaint.

## CASE 28: PETER SCHUMANN AND JEFFREY AIKEN

*Fish dealer complains that he was wrongly charged as a vessel joint owner for violations by the vessel's other joint owner/Captain, that his employee was mistreated by a Special Agent and that he was coerced into paying an excessive penalty.*

### I. Findings of Fact

Peter Schumann of Frisco, North Carolina is the captain and joint owner of the fishing vessel Raven. Jeffrey Aiken of Hatteras, North Carolina, is the owner of Janet W. Whitbeck, Inc., which does business as Jeffrey's Seafood. Mr. Aiken is also a joint owner of the Raven. Mr. Aiken is the third generation of his family to be in the fishing business. He started fishing in 1970 while in college and transitioned to become a fish dealer around 1995.

Southeast OLE SA, John F. Barylsky, was among the agents that executed an AIW in October 2003 on Agger Fish Corp., in Brooklyn, New York. During the AIW execution, SA Barylsky discovered purchase records pertaining to the Raven and Jeffrey's Seafood, which revealed several potential violations in 2002 and 2003. Based on those records, SA Barylsky initiated an investigation into Jeffrey's Seafood on January 29, 2004. On that date, SA Barylsky, accompanied by two (2) state marine enforcement officers, went to Jeffrey Seafood's Office to obtain records. They first encountered Mr. Aiken who then introduced them to his bookkeeper, [redacted] EX1, Offense Investigative Report by John Barylsky, Special Agent, NOAA (May 22, 2004). Both Mr. Aiken and [redacted] were polite and co-operative. In fact, [redacted] accommodated SA Barylsky's request to take the records to his office to copy because Jeffrey's Seafood did not have a copy machine capable of copying the records. Mr. Aiken stated that sometime in April 2004, agents returned to Jeffrey's Seafood and were

rude to [redacted], who called Mr. Aiken in tears. Mr. Aiken came to the office and told the agents to act like gentlemen. The agents left shortly after their encounter with Mr. Aiken. [redacted] told Mr. Aiken that the agents tried to intimidate her and coerce her into saying something that was not true. The agents allegedly threatened to make her "the next Martha Stewart." EX2, Special Master Interview with Jeffrey Aiken, Fish Dealer (March 9, 2011). There is a record of an interview by two (2) OLE Special Agents of [redacted] on April 2, 2004. EX3, Charles Raterman Interview with [redacted], Secretary, Jeffrey's Seafood (April 2, 2004). Partway through this interview, [redacted] called Mr. Aiken who questioned the Special Agents why they were asking [redacted] questions about his business. Shortly after the encounter, the agents left to copy some records. SA Barylsky was not present during this encounter as he was then interviewing Mr. Schumann at his residence.

However, SA Barylsky returned to Jeffrey's Seafood later that day to speak with Mr. Aiken. Id.; See also supra, EX1. SA Barylsky and EA Cole each acknowledged that they had heard of the alleged mistreatment of [redacted] SA Barylsky, at a debriefing later that day, learned that [redacted] was upset by the agents' comment. EX4, Special Master Interview with John Barylsky, Special Agent, NOAA (March 22, 2011). EA Cole stated that when she learned of the allegation, she confronted the agents who denied making any inappropriate remarks. EX5, Special Master Interview with Alexa Cole, Enforcement Attorney, NOAA (March 16, 2011). If the agents made the comment, in jest or otherwise, it is something better not said. However, I cannot conclusively determine what was said to [redacted] during this encounter.

On April 2, 2004, SA Barylsky interviewed [redacted], the fish house manager at Jeffrey's Seafood. SA Barylsky provided [redacted] with inconsistent landing documents from the Raven. As a fish house manager, [redacted] was responsible for recording tally sheets and fish tickets for the state of North Carolina. [redacted] provided a written statement to SA Barylsky stating that he did not remember any specific incident concerning the Raven, but if the tally sheets were different from the actual landings, then someone must have told him that it was "okay to do so." EX6, Statement of [redacted] Jr., Fish House Manager, Jeffrey's Seafood (April 2, 2004).

SA Barylsky interviewed Mr. Schumann on that same day at his residence. During the interview, SA Barylsky stated that Mr. Schumann admitted that he landed in excess of 4,000 lbs on multiple occasions, and that he told [redacted] to falsify reports at Jeffrey's Seafood. Mr. Schumann also admitted to targeting sandbar sharks, which has a higher ratio of fins to carcass than the 5% fin to carcass allowable limit. Finally, Mr. Schumann contended that he did not land a dusky shark, which is a prohibited species. Rather, he claimed that Jeffrey's Seafood mislabeled the shark. However, Mr. Schumann told SA Barylsky that he received a higher amount per pound for that particular landing. SA Earl Parker, who accompanied SA Barylsky to this interview, corroborated these statements in a separate written report. EX7, Statement of Earl Parker, Witness (April 8, 2004).

The case was assigned to GCEL EA Alexa Cole in Silver Spring, MD. On April 11, 2006, EA Cole sent a NOVA and NOPS to Mr. Schumann and Jeffrey Aiken, Janet W. Whitbeck, Inc. and Jeffrey's Seafood (collectively known as the respondents). EA Cole charged the respondents with nine (9) counts of possessing, purchasing, or selling shark fins that exceeded the 5% fin to

carcass ratio at various times in 2002 and 2003. Further, she charged Mr. Schumann and Mr. Aiken jointly with three (3) counts of landing in excess of the 4,000 lbs commercial retention trip limit at various times in 2002 and 2003 and Mr. Aiken and Mr. Schumann with two (2) counts of falsifying or failing to file required FVTRs. EA Cole assessed a total penalty of $70,000 and permit sanctions for sixty (60) days for counts 1-9, and $28,500, with permit sanctions for an additional thirty (30) days, for counts 10-14. The penalty assessment was consistent with similar penalties in the past from the SED. Supra, EX5.

Both Mr. Schumann and Mr. Aiken sent letters to EA Cole after receipt of the NOVA providing their accounts of the alleged violations. Mr. Schumann contested the validity of the 5% shark fin rule, which constituted counts 1-9 of the NOVA. He believes the rule to be arbitrary because he primarily targets sandbar sharks that have higher fin to carcass ratios. Mr. Schumann denied landing a dusky shark pursuant to count nine (9) and thought that it must have been a clerical error on the part of Jeffrey's Seafood. He also contested counts 10-12 because he believes the 4,000 lbs trip limit is not a per day limit, and that the Raven could make multiple trips in one day. He also claimed that the Raven has roughly a 4,000 lbs holding capacity, which would have made it impossible to land sharks beyond the allowable limit in one trip. Mr. Schumann, however, did not challenge counts 13-14 because he readily admitted that he is not adept at handling paperwork. He did note that any financial penalty would "just about ruin [him]." EX8, Statement of Peter A. Schumann, Fishing Vessel Captain.

Mr. Aiken vehemently denied his involvement in counts 1-9 because his joint interest in the fishing vessel Raven was solely as collateral for a personal loan Mr. Aiken had made to Mr. Schumann. Mr. Aiken claimed that was the extent of his involvement with the vessel and that

he had never fished from the Raven or had been at sea on board the Raven. Mr. Aiken explained that when he first loaned money to Mr. Schumann to enable him to purchase the Raven, his lawyers prepared documents that enabled Mr. Aiken to have a security interest or lien on the Raven as collateral for his loan to Mr. Schumann. However, in 2002, without advice of counsel, Messers Aiken and Schumann thought that transferring the Raven to their joint names would better secure Mr. Aiken's loan to Mr. Schumann. Ownership of the Raven was then transferred to their joint names. Mr. Aiken echoed Mr. Schumann's comments concerning the 4,000 lbs limit, which he believes is not a daily limit but rather, a trip limit, which allows shark boats such as the Raven, who do not venture too far offshore, to make numerous trips in one day. As such, Mr. Aiken believed the tally sheets in question reflected a combination of separate and distinct trips. Mr. Aiken also challenged the validity of the 5% fin to carcass rule. EX9, Statement of Jeffrey Aiken.

The parties were engaged in settlement discussions after the NOVA. After several stalled settlement negotiations between the respondents and EA Cole, the respondents elected to challenge the NOVA before an ALJ and the case was referred to ALJ Walter J. Brudzinski. Both parties submitted preliminary positions on procedures, but ALJ Brudzinksi granted a continuance at the request of the parties so that they may continue settlement discussions. The Respondents' lawyer, Stephen Ouellette, allowed EA Cole to negotiate directly with the Respondents. Mr. Ouellette noted in an email dated October 10, 2007, that "[h]opefully [EA Cole] can resolve this matter without the need for further proceedings or my continued involvement." EX10, Email from Stephen M. Ouellette, Attorney, to Alexa Cole, Enforcement Attorney, NOAA (October 10, 2007).

In a December 13, 2007 email between EA Cole and Mr. Aiken, EA Cole advised Mr. Aiken to settle because of the significant costs associated with bringing this case to trial. She expressed her confidence in a judgment for NOAA because neither he nor Mr. Schumann had provided any evidence to challenge the evidence presented in this case. EA Cole noted that she was willing to reduce the penalty to $45,000, which was less than half the original fine, based on conversations she had with both Mr. Aiken and Mr. Schumann, and Mr. Schumann's troubled financial situation. She believed that it would be in everyone's best interest to settle. EX11, Email from Alexa Cole, Attorney, NOAA, to Jeffrey Aiken, Owner, Jeffrey's Seafood (Dec. 13, 2007).

On February 21, 2008, the parties settled the NOVA. EX12, Settlement Agreement (February 21, 2008). Mr. Schumann agreed to pay a compromise civil penalty of $15,000 payable within three (3) years. He admitted to submitting several late or incorrect FVTRs, to exceeding the 5% fin to carcass ratio on a number of occasions, and to landing overages of less than 10% on two (2) occasions. However, Mr. Schumann expressly denied shark finning, landing prohibited species, or exceeding trip limits by 10%. He agreed to a ninety (90) day permit sanction of the Raven.

Mr. Aiken, along with Jeffrey's Seafood and Janet W. Whitbeck, Inc., agreed to a compromise civil penalty of $30,000 payable over three (3) years. Mr. Aiken admitted to one (1) incident of misidentifying a prohibited dusky shark, and more than one (1) incident of purchasing shark fins from Mr. Schumann in excess of the 5% ratio. Mr. Aiken denied purchasing overages as alleged in the NOVA.

## II. Conclusion

The facts are sufficient to demonstrate that Mr. Schumann and Mr. Aiken committed MSA violations to warrant the NOVA. Mr. Schumann admitted to knowingly landing sandbar sharks that exceeded the 5% fin to carcass ratio imposed by regulations. Mr. Aiken and Jeffrey's Seafood also admitted to purchasing sharks from Mr. Aiken, despite their challenge of the 5% regulation. It is beyond the scope of my authority to determine whether the 5% fin to carcass ratio for sharks is arbitrary. However, I am aware that as a result of another case that the rule has changed which, retroactively, may have afforded some relief in this case to Messers Schumann and Aiken.

However, I find that Mr. Schumann's admissions of certain violations to be sufficient to warrant a $15,000 monetary penalty together with a permit sanction. I am informed that the Raven has served the permit sanction but that Mr. Schumann has not paid the substantial balance due on the monetary penalty because of a possible inability to pay. Supra, EX2; See also supra, EX5.

I further find that Mr. Aiken, as the owner of Jeffrey's Seafood, is responsible for the actions of his employee, [redacted] and for misidentifying a shark purchased from Mr. Schumann and for purchasing shark fins from Mr. Schumann in excess of the 5% rule on more than one (1) occasion. I find that all of these violations stem from Mr. Schumann's shark fishing activities as operator and part owner of the Raven. Mr. Schumann was the person who told [redacted] to split a trip report to make two (2) trips out of one (1) to avoid an overage. Since Mr. Aiken was a joint owner of the Raven, he was assessed a penalty for all of Mr. Schumann's violations plus Jeffrey's Seafood's offloading violations. From the documentary evidence, I find

that Mr. Aiken was technically a joint owner of the Raven and that SA Barylsky and EA Cole were justified in charging him as a joint owner.

However, my mandate from the Secretary is to right unfair results in a case and consequently, I find that there is sufficient evidence for me to conclude that although Mr. Aiken was the record joint owner of the Raven, he had no control of the vessel, had never fished from the vessel, never been to sea in the vessel and has repeatedly asserted that his interest in the Raven was collateral for a personal loan to Mr. Schumann. Supra, EX9. Mr. Schumann, in his written statement to SA Barylsky, states clearly that he is the "owner/operator" of the Raven. Supra, EX8. I conclude that Mr. Aiken should be absolved as joint owner of the Raven from Mr. Schumann's violations as the other joint owner of the Raven. Therefore, I find that Mr. Aiken is entitled to have a portion of his penalty remitted and suggest that the fair and reasonable result would be to pay the same penalty assessed against Mr. Schumann which would be $15,000. Since Mr. Aiken paid a $30,000 penalty, he should be reimbursed $15,000.

**III. Recommendation**

I recommend that the Secretary remit to Mr. Aiken the sum of $15,000.

## CASE 29: WILLIAM F. CALLAWAY

*Fisherman complains about having to choose between a scallops and multi-species permit while others were allowed to have both. Subsequently, NMFS refused to speak to him. Fisherman further complains that on one occasion, he was fined for fishing with a "twisted knot" net although it was not yet illegal to do so. He complains that on another occasion, he was issued a NOVA four years after an alleged violation had occurred and NOAA Enforcement Attorney assigned to this case told him that he had made a mistake and that the NOVA was supposed to be for $20,000 and not $16,000.*

### I. Findings of Fact

William F. Callaway has been fishing for over thirty (30) years. He owns a fishing trawler named C-Venture and is based in Wanchese, North Carolina. Mr. Callaway fishes from Wanchese to the Canadian border.

On October 6, 1993, the Coast Guard boarded the C-Venture, which was then fishing for summer flounder, for the purpose of checking the vessel's net size. Regulations at that time required that the tail end (cod end) of the net must have a mesh size of 5.5''. On instruction of the Coast Guard, Mr. Callaway hauled back the net that he was using to catch flounder. Once the net was on board, it was laid out on deck and measured. The average net mesh size measured out to be 5.21''. The individual mesh areas measured varied from as high as 5.75'' to a low of 5''. Thereafter, the Coast Guard measured the mesh size of a second net on board. The average mesh size of that net measured out to be 5.36''. The individual mesh areas measured varied from a high of 5.5'' to a low of 5.25''. Mr. Callaway challenged the Coast Guard's method of measuring his nets and requested that it be done again. The request was

denied. When Mr. Callaway returned to port, he requested first, that the local Coast Guard office re-measure the net, which it denied and second, called the NMFS hotline to request a re-measure, which was also denied. Mr. Callaway explained that both nets that were measured by the Coast Guard were "twisted knot" nets which, when towed, because of pressure, had a tendency to reduce the size of the mesh. In fact, these nets were to become illegal as of a certain date but were legal when the Coast Guard boarded the C-Venture. Mr. Callaway stated that his "twisted knot" net was custom made by a man in New Bedford. EX1, Special Master Interview with William Callaway, Fisherman (Jan. 26, 2011).

Since Mr. Callaway was getting no cooperation from the Coast Guard or NMFS concerning his allegations that the Coast Guard improperly measured the mesh of his nets, he contacted his U. S. Senator, who contacted NOAA and as a result, Enforcement Attorney Juliand and others went to Wanchese to conduct a seminar/meeting on how to measure the mesh of a fishing net. The meeting was held at the Wanchese Fish Company restaurant where the people accompanying EA Juliand explained how the measurement was to be made. Mr. Callaway observed that this was not the way that the Coast Guard measured his net. After lunch, EA Juliand's group went to a local supply store for a net measuring demonstration. Mr. Callaway went home and retrieved the net for which he was cited and brought it to the store. The group measured his net and concluded it was legal. Mr. Callaway then explained that this was the net for which he was cited and EA Juliand responded that Mr. Callaway could have brought a different net to be measured. Id. Mr. Callaway challenged EA Juliand's comment to which EA Juliand responded that he "does not go to court to lose." EX2, Special Master Interview with Charles R. Juliand, Enforcement Attorney, NOAA (Mar. 14, 2011). This meeting took place

sometime after May 31, 1994. On EA Juliand's notes of September 28, 1994, concerning this case, he states that it was his plan to "[h]it him (Callaway) fairly hard." EX3, Handwritten Notes by Charles R. Juliand, Enforcement Attorney, NOAA (Oct. 6, 1993). The next day, on September 29, 1994, EA Juliand sent Mr. Callaway a NOVA containing a civil penalty of $2,500 together with an offer of settlement for $1,750. EX4, Notice of Violation Assessment (Sept. 29, 1994). Mr. Callaway retained counsel, who appealed his case to an ALJ. Approximately two (2) years and eight (8) months later, on May 9, 1997, EA Juliand and Mr. Callaway's counsel settled this case for $1,300.

This was not Mr. Callaway's last encounter with EA Juliand. Sometime later, Mr. Callaway was fishing when a Coast Guard aircraft flew over the area. At the time, Mr. Callaway did not have a net in the water but upon inquiry from the Coast Guard aircraft, he responded that he was fishing. The Coast Guard informed him that he was in a closed area. He disagreed. The Coast Guard instructed him to stay where he was. Five (5) hours later, the Coast Guard returned and informed Mr. Callaway that this area was closed as of midnight (it was then 8 am). This was the first time that this area had been closed. Mr. Callaway was not aware of the closure. Mr. Callaway stated that three (3) or four (4) years later he received a "bill" (NOVA) for $16,000 (Mr. Callaway's fishing records have been destroyed as a result of three (3) hurricanes and his recollection of events is accurate but his recollection of dates and receipt of official documents is less accurate). Supra, EX1. The date was June 6, 2003 and the NOVA was for fishing in a closed area. The assessed penalty was $20,000 and the offer of settlement was for $16,000. EX5, Notice of Violation Assessment (June 3, 2003). Upon receipt of the NOVA, Mr. Callaway immediately called a number and spoke to EA Juliand about the "bill" for $16,000. EA

Juliand stated "this was a mistake; it should have been $20,000." Supra, EX1. Mr. Callaway said in response that EA Juliand might as well come get his boat and nets; he quits. Id. EA Juliand then offered to reduce the penalty to $10,000. Mr. Callaway said no. Finally, the case was settled on July 30, 2003 for $5,000 paid in $600 monthly installments.

Mr. Callaway acknowledged that sometime during this period of time, he received a warning from the Coast Guard for possessing large coastal sharks, which a local OLE agent acknowledged were dogfish (small sharks).

Mr. Callaway's real complaint is that several years ago he was forced by NMFS to choose between a multispecies or scallops permit. Eventually, he received a letter that if he did not pick one, the choice would be made for him. He chose a multispecies permit. Later, he learned that other Wanchese fishermen were able to retain both permits. Mr. Callaway wants his scallop permit back but he cannot get the permit without a "vessel history," which NMFS refuses to give him after repeated verbal and written requests.

**II. Conclusion**

The only demonstrative evidence I have on the size of the net mesh are the Coast Guard's measurements. From those records, the variance from the 5.5'' standard is miniscule but those records do demonstrate that there is considerable variance among the measurements taken. Since this was a custom net made by 'some guy' in New Bedford, I cannot find by clear and convincing evidence that the entire net did not conform to the required standard. As to Mr. Callaway's second NOVA, he admits that he was in a closed area and was successful in negotiating a suitable penalty for that offense. I do not find that Mr. Callaway is entitled to any

monetary relief. However, I do find that Mr. Callaway should be given an opportunity to re-apply for a scallop permit and in order to do that, he needs his vessel history from NMFS.

**III. Recommendation**

I recommend that NMFS send Mr. Callaway his vessel history. Otherwise, I recommend that the Secretary take no other action in this complaint.

**Case 32: E. Sherrill Styron**

*Fisherman complains about being told incorrectly that he had to choose between a scallop or multi-species permit. Nine (9) years later he received both, but he requests that he receive double the number of days for the next few years to make up for the nine (9) years he lost one (1) of his permits. Fisherman further complains about a 2003-2004 NOAA enforcement action against him for actions by the captain/operator of his fishing vessel.*

**I. Findings of Fact**

Sherrill Styron is former mayor and currently one of the Commissioners of Oriental, North Carolina. He is the owner of Garland F. Fulcher Seafood Company, Inc., which is a wholesale seafood company. He is also the owner of the fishing vessel, Capt. Cecil and the fishing vessel, Capt. Garland. [redacted] is the Captain/operator of the Capt. Cecil, which is an eighty (80) feet trip boat. [redacted] nickname is [redacted] "

On October 6, 1993, Mr. Styron was informed that both the Capt. Garland and the Capt. Cecil would be preliminarily classified as full-time scalloping vessels pursuant to Amendment 4 to the Atlantic Sea Scallop Fishery Management Plan. However, on December 16, 1993, he received notification that both his vessels would only be classified as occasional scallopers. EX1, Letters from Richard B. Roe, Regional Director, NOAA, to F/V Capt. Garland (owner Sherrill Styron) (Oct. 6, 1993 and Dec. 16, 1993). Later, Mr. Styron was informed over the telephone that he could only keep either his scalloping permits, or his Northeast Multi-species DAS permits, but not both. He chose the latter because the multi-species permit provided him with more fishing days. EX2, Special Master Interview with Sherrill Styron, Dealer (Feb. 22, 2011).

Almost ten (10) years later on April 29, 2003, NOAA Regional Administrator Patricia A. Kurkul wrote a letter to Mr. Styron, informing him that NOAA had misinformed him about his eligibility to receive Limited Access Occasional Scallop permits for the Capt. Garland and the Capt. Cecil. In fact, Mr. Styron's vessels should have been found eligible in 1993 for both permits. EX3, Letter from Patricia Kurkul, Northeast Regional Administrator, NOAA, to Sherrill Styron, Dealer (Dec. 9, 2003). As such, Mr. Styron should have been able to scallop part-time for those years, but was denied eligibility. He estimates that he lost between $100,000 and $200,000 in revenue annually per vessel during those years because he was unable to scallop. Supra, EX2.

On October 23, 2002, the Capt. Cecil was cited for not having an approved Turtle Exclusion Device (TED) installed in the vessel's nets used for fishing. The Capt. Cecil was assessed $10,000 for the violation. On December 23, 2002, Mr. Styron and [redacted] settled this TED violation case for $5,000, plus the value of the seized catch ($5,950.90). EX4, Settlement Agreement (December 23, 2002).

On April 2, 2003, the Capt. Cecil was docked at L.D. Amory's & Co. Inc. Reni Rydlewicz, an observer, approached an individual she knew as [redacted] based on a former encounter with him when her supervisor, Kristin Ealy, was present and who she thought to be the Captain of the Capt. Cecil. Federally permitted fishing vessels are required to take observers on board to record what is caught. [redacted] denied that he was [redacted] and Ms. Rydlewicz left to speak with the owner of the fish house to contact the captain of the Capt. Cecil. [redacted] set sail in the Capt. Cecil as soon as Ms. Rydlewicz left the dock.

It was later determined that the Capt. Cecil sailed from April 2, 2003, until April 5, 2003. Over the next couple of months, Special Agent Daniel L. Driscoll contacted [redacted] on two (2) occasions concerning this incident. [redacted] initially denied that he was at the dock during the time in question. SA Driscoll eventually confirmed [redacted] identity with Ms. Rydlewicz using a color photograph. SA Driscoll also learned that [redacted] is [redacted] nickname. EX5, Offense Investigation Report by Daniel Driscoll, Special Agent, NOAA (Oct. 31, 2003).

On October 27, 2003, SA Driscoll again interviewed [redacted]. At that point, [redacted] admitted that he told the observer that he was not the operator of the Capt. Cecil, waited for her to leave the dock, and then set sail. [redacted] submitted a written statement on that same date, which indicated that he was sorry that he refused the observer on April 2, 2003 but explained that he did not want a female observer on board because he was having marital problems with his wife. EX6, Statement of [redacted] Fisherman (Oct. 27, 2003). [redacted] had previously stated that his wife would have been uncomfortable with the knowledge that a female observer was on board the Capt. Cecil on a multi-day fishing trip. Mr. Styron confirmed that [redacted] would have been uncomfortable in knowing that a female observer was on her husband's vessel an overnight trip because the sleeping quarters do not distinguish between genders. EX7, Patricia Smith, Boat captain gets fined by NOAA, Sun Journal, Feb. 29, 2004.

On February 10, 2004, enforcement attorney Mitch MacDonald issued a $35,000 NOVA and forty five (45) day NOPS to both Sherrill Styron and [redacted] for failure to carry an observer at the request of the regional administrator. EA MacDonald also included a

compromised civil penalty of $30,000 and a forty five (45) day permit sanction. EX8, Notice of Violation Assessment and Notice of Permit Sanction (Feb. 10, 2004). EA MacDonald indicated that he came to the penalty amount based on the Capt. Cecil's prior NOVA for failure to maintain a TED device. He also considered this occurrence a "serious violation" and assessed what he thought to be an appropriate penalty. SA Driscoll also played a role in influencing EA MacDonald's decision to assess the $35,000 penalty. EX9, Memorandum from Daniel Driscoll, Special Agent, NOAA, to Charles R. Juliand, Enforcement Attorney, NOAA (Oct. 31, 2003).

Mr. Styron did not contest the violation, but rather, sought leniency for the penalty imposed. After EA MacDonald issued the NOVA, Ms. Rydlewicz's supervisor, Kristin Ealy, vouched for Mr. Styron's credibility and willingness to support the observer program. In Ms. Ealy's opinion, had Mr. Styron been alerted to [redacted] actions, he would have rectified the situation immediately.

Based primarily on this information, EA MacDonald reduced Mr. Styron's penalty to $15,000. The parties ultimately settled the NOVA on April 12, 2004 for a $10,000 monetary penalty, a thirty (30) day operator sanction, and a suspended thirty (30) DAS vessel sanction for one (1) year contingent on no further violations. EX10, $10,000 check from Sherrill Styron (April 12, 2004).

**II. Conclusion**

Mr. Styron would like to be reimbursed for the nearly ten (10) years of lost revenue as the result of a NOAA administrative error denying scalloping permits for his vessels in 1993. However, the MSA provides the Secretary with the authority to "compromise, modify, or remit, with or without conditions, any civil penalty which is subject to imposition or which has been

imposed under this section." 16 U.S.C 1857 (2000) (emphasis added). Accordingly, Mr. Styron's lost revenues for those years are outside the scope of my authority because the denial of his permits did not constitute a civil penalty.

With regard to the observer case, the record establishes that [redacted] committed the alleged violation on April 2, 2003 when he refused to take an observer on board. In fact, [redacted] admitted to the violation, and Mr. Styron does not contest the charge. The question presented is the severity of the penalty imposed. EA MacDonald initially imposed a $35,000 NOVA and a forty five (45) day NOPS for a single, non-conservation oriented violation. As [redacted] admitted in his written statement, he was experiencing marital problems at the time of the violation, and did not feel comfortable having a female observer on board for an overnight fishing trip. [redacted] also noted that he has, in the past, welcomed male observers on board, and has done so after the violation as well.

This case appears to be a single, isolated case premised on a personal issue on the part of the operator. [redacted] does not oppose the observer program. He did, however, mislead SA Driscoll on more than one occasion concerning his role in the violation. It is important to note that SA Driscoll did not charge [redacted] with providing a false statement to an enforcement officer, which I have found during this investigation, to be an overused enforcement tool for forcing settlement.

EA MacDonald further justified the assessed penalty based on a prior NOVA against Capt. Cecil, which involved a TED violation. However, the TED violation is wholly unrelated to the current NOVA involving a refusal to allow an observer on board. Neither violation is

evidence of a propensity to continually commit fishing violations. Without the requisite intent to violate fishing regulations, I find it difficult to justify such a high initial penalty assessment.

EA MacDonald took into consideration mitigating factors, such as Mr. Styron's reputation with Ms. Rydlewicz supervisor and Mr. Styron's willingness to comply with the observer program after the violation. Based on these factors, the parties ultimately settled for $10,000 and a thirty (30) day operator sanction. However, had the initial penalty not been disproportionate to the violation charged, the settlement amount would have resulted in a monetary figure significantly less than $10,000.

In the circumstances of this case, I find that the prior violation was insufficient to justify a heightened penalty for the second violation. Instead, I would consider the refusal to accommodate an observer to be a first violation, subject to the NOAA penalty schedule. There is no evidence in the record to suggest that [redacted] intentionally refused observers on board the Capt. Cecil beyond this single, isolated incident involving a female observer whose presence on board could have caused [redacted] further marital problems.

I find that the assessed penalty should be reduced to $5,000 to be consistent with the low end of the NOAA penalty schedule. I base my conclusion on Mr. Styron's exemplary reputation as a vessel owner and his willingness to comply with the observer program, both before and after the violation. This violation is also an example of a fishing vessel owner who follows the rules being punished for actions of his captain that are contrary to the owner's stated and proven support of the observer program.

## III. Recommendation

I recommend that the Secretary take no action with respect to the scallop permits issue. I further recommend that the Secretary remit the sum of $5,000 to Mr. Styron with respect to the observer case.

**CASE 34: JAMES A. RUHLE**

*Fisherman complains about NOAA's use of Fishing Vessel Trip Reports to charge fishermen with violations although the FVTRs are only estimates and contain information written prior to arrival at the dock. Fisherman further complains about a 2004-2006 case against him that was a witch hunt created by his action in 2003.*

## I. Findings of Fact

James Alan Ruhle lives in Wanchese, North Carolina. He is a 3rd generation commercial fisherman and has been fishing for 47 years. Mr. Ruhle owns the fishing vessel Darana R, which he bought in 1978. The Darana R is mostly a trip boat, but it depends on the fishery. Mr. Ruhle has been an activist in the fishing industry since the mid 1970's or early 1980's. Currently, Mr. Ruhle is president of the organization Commercial Fishermen of America ("CFA") and is on the CFA's board of directors. The CFA was formed in 2006 primarily to educate the public about commercial fishing, but also to foster collaborative research. For the last three (3) years, Mr. Ruhle has been the president of the Gulf and South Atlantic Fisheries Foundation, a group created in the 1970's-80's to bring together fishermen and researchers to provide opportunities for cooperative research. Mr. Ruhle has been a member of the North Carolina Fisheries Association for at least twenty (20), probably twenty-five (25) years. For nine (9) years, Mr. Ruhle served as a voting member on the Mid-Atlantic Management Fisheries Council ("Council"); during four (4) to five (5) of those nine (9) years he was a liaison to the NEFMC. For thirteen (13) years Mr. Ruhle was also an advisor on the Mid-Atlantic Management Fisheries Council.

In 2003, according to Mr. Ruhle, scientific information claimed that for three (3) or four (4) years there had been no dogfish reproduction. In August of 2003, Mr. Ruhle inadvertently caught young dogfish, about 5,000 lbs by his estimate, of which he kept less than thirty (30) fish, or about 8-10 lbs. He froze the fish until October 2003, at which time he brought them to a Council meeting in North Carolina. EX1, Special Master Interview with James Ruhle, Fisherman (Feb. 15, 2011). Mr. Ruhle's sole purpose in keeping the fish was to bring it to the meeting and show that science was wrong and that there was in fact dogfish reproduction. Id. SA Gino Moro was present at the meeting. [redacted], who worked with Ocean Conservancy at that time, told SA Moro that it was illegal to possess dogfish and that he, SA Moro, should do something about it.

SA Moro forwarded a complaint to SA R. Logan Gregory in NOAA's Southeast Division, informing him that Mr. Ruhle had brought a prohibited species to a Council meeting. SA Gregory decided to check the FVTRs for the Darana R. He noticed many discrepancies between the FVTRs and the dealer reports. SA Gregory interviewed Mr. Ruhle about fifty-five (55) FVTRs with such discrepancies. With respect to most of the FVTRs, Mr. Ruhle was simply unable to estimate the precise catch due to the large volume of fish caught. On December 7, 2004, SA Gregory sent Mr. Ruhle an EAR for failure to file accurate trip reports. This EAR concerned FVTRs for which Mr. Ruhle did not have an explanation. EX2, Enforcement Action Report (Nov. 22, 2004).

On December 21, 2004, EA Gregory interviewed Mr. Ruhle and his son, [redacted] As a result of this interview, the number of questionable FVTRs was reduced to thirteen (13), seven (7) in 2002 and six (6) in 2003.

On February 10, 2006, EA J. Mitch MacDonald issued a NOVA, containing two (2) counts:

Count 1 – maintaining inaccurate information on a number of FVTRs from 2002 - $3,750;

Count 2 – maintaining inaccurate information on a number of FVTRs from 2003 - $3,750.

EX3, Notice of Violation Assessment (Feb. 10, 2006).

Mr. Ruhle signed a settlement agreement on March 14, 2006. EX4, Settlement Agreement (Mar. 14, 2006). Under its terms, the assessed penalty was reduced to $5,000 and the compromise payment was further lowered to $3,000. Further, this matter would only constitute a warning in NOAA's future consideration of penalties or permit sanctions.

Mr. Ruhle's position is that this case was a 'witch hunt' created by the dogfish displayed by Mr. Ruhle at the Council meeting that challenged the current thinking on dogfish reproduction. Supra, EX1. He does not find fault with NOAA's Special Agents, but with NOAA's Enforcement Attorneys. Id. He points out that EA Juliand has made remarks to the effect of: "we can do what we want, we are not accountable." EA Juliand denied having made comments to that effect. EX5, Special Master Interview with Charles R. Juliand, Enforcement Attorney, NOAA (March 14, 2011). It is Mr. Ruhle's opinion that NOAA Enforcement Attorneys intimidate fishermen and the excessive fines represent one form of intimidation. According to Mr. Ruhle, from 1976 until 2009, the fishing industry has been reduced by two thirds, while imports have tripled and the NMFS employment base has quadrupled. Supra, EX1.

**II. Conclusion**

I conclude that Mr. Ruhle was not assessed an excessive penalty for submitting inaccurate FVTRs. I further conclude that the investigation into Mr. Ruhle's offloading records was not a

'witch hunt' occasioned by his Council meeting demonstration since he was not charged with illegal possession of dogfish.

**III. Recommendation**

I recommend that the Secretary take no further action in this matter.

## CASE 37: VICTOR J. LUBIEJEWSKI

*Fisherman complains about the unfairness of fishing regulations and penalties. Fisherman further claims that NOAA unfairly forced him out of the fishing business.*

### I. Findings of Fact

Victor J. Lubiejewski has been a fisherman for 48-49 years. He owned the fishing vessels Finest Kind and Lilli Mae. He bought the Finest Kind, a 48 foot day boat, in 1979 and sold it about 1.5 to 2 years ago. He purchased the Lilli Mae in 2002-2003 and still owns this vessel, which is currently named the Lady Linda. Mr. Lubiejewski thought he sold the Lady Linda for $60,000. EX1, Special Master Interview with Victor J. Lubiejewski, Fisherman (Mar. 16, 2011). The "buyer" fished with the vessel in Scituate, Massachusetts but never paid any money toward a $60,000 purchase mortgage. Id. Recently, Mr. Lubiejewski repossessed the Lady Linda. Id.

On April 20, 2007, around 7:00pm, SA Joseph D'Amato observed the Finest Kind sailing from New Bedford, MA. The Finest Kind was equipped with fishing gear, but had not called into the DAS system. SA D'Amato observed the Finest Kind return around 8:45pm on April 22, 2007. On Sunday, April 22, 2007 around 7:08am, SA Shawn M. Eusebio received a text message, informing him that the Finest Kind had received a sailing number. At 6:40pm that same day, he received a text message that the Finest Kind had received a landing number. SA Eusebio contacted Nebula Foods, Inc. whose president confirmed that the Finest Kind had landed 10,000 lbs of whole monkfish and 1,100 lbs of monkfish tails earlier that day. The FVTR for that trip reveals a departure date of April 21, 2007 around 3:00am, which is contrary to SA D'Amato's personal observation of when the trip started. The proceeds from that sale of fish were seized.

On April 24, 2007, Special Agents D'Amato and Eusebio met with [redacted], Mr. Lubiejewski's son and the operator of the Finest Kind. At that meeting, [redacted] denied having left for a fishing trip on April 20, 2007. [redacted] then stated that he had tried to call into the DAS system multiple times, but it was busy. When told the system was fully operational during that time, he responded that he had "screwed up" and that he had left port around 6 pm on Friday, April 20, 2007 when he was observed leaving by SA D'Amato. With respect to a FVTR covering April 13 through April 15, 2007, the Finest Kind's loran coordinates showed the vessel fishing in the SFMA ("Southern Fishery Management Area"). [redacted] acknowledged that he knew he wasn't supposed to fish within the SFMA, since he was enrolled in the Northern Fishery Management Area ("NFMA") and said that he was going to get a lawyer before answering any further questions.

On May 31, 2007, [redacted] called into the DAS system and declared into a monkfish gillnet category fishing trip but failed to have an operational VMS installed aboard the Finest Kind as required for someone with monkfish and multispecies permits. SA D'Amato spoke with [redacted] over the telephone on June 4, 2007 at about 8:45am. At that time, [redacted] stated that he wasn't aware that he was required to have a VMS unit installed. SA D'Amato responded that SA Eusebio had informed [redacted] of that requirement on April 24, 2007. [redacted] also stated that he didn't know he couldn't fish for summer flounder. With respect to the overages, [redacted] opined that he could let the DAS clock run at the dock to gain additional DAS and prevent an overage. NOAA seized the proceeds from the vessel's catch.

According to SA D'Amato's report, on June 8, 2007, USCG Falcon jet observed the Lilli Mae in the SFMA. USCG Cutter Bainbridge Island boarded the Lilli Mae, determined that the vessel was fishing under a monkfish DAS under NFMA restrictions, but was fishing in the SFMA, and escorted it back to port. NOAA seized the proceeds from the sale of 6,607.25 lbs of monkfish, dogfish, and skate wings for $6,184.89. Operator of the vessel at that time was Mr. Lubiejewski's son, [redacted] who did not have his operator's permit aboard the Lilli Mae when he was boarded by the Coast Guard. EA D'Amato boarded the vessel in port and [redacted] stated that he was only fishing in the NFMA, but he spent a lot of time in the SFMA because he "was wasting time, and transiting through the area."

The assessed monetary and permit penalties are as follows for these three (3) cases. In the April 2007 case, the monetary penalty assessed was $420,000 together with a three (3) year permit sanction and forfeiture of some monkfish DAS. EX2, Email from Mitch MacDonald, Enforcement Attorney, NOAA, to Stephen Ouellette, Attorney (Jan. 23, 2008). In the May-June 2007 case, the monetary penalty assessed was $180,000. Id. In the June 2007 case, the monetary penalty assessed was $160,000 together with a three year permit sanction. Id.

Mr. Lubiejewski signed a comprehensive, three (3) case settlement agreement on March 4, 2009. EX3, Settlement Agreement (Mar. 4, 2009). The Agency amended the civil penalty to $10,000 due to inability to pay. Under the settlement agreement, Mr. Lubiejewski had to pay a $5,000 fine, forfeit the proceeds from the sale of fish in the amounts of $15,158.1, $4,096.2, and $6,184.89, and agree to a 6-year vessel and operator permit sanction. Additionally, Mr. Lubiejewski was to sell the federal permits for the fishing vessels Finest Kind and Lilli Mae with or without the vessels by September 15, 2009. If the vessels and/or permits were sold for over

$250,000, Mr. Lubiejewski was to pay NOAA 40% of the sale price in excess of $250,000. From the sale date of the permits/vessels or September 15, 2009, whichever first occurs, Mr. Lubiejewski was to cease fishing in the Exclusive Economic Zone until September 16, 2015.

In an email dated March 30, 2009, EA MacDonald states that the permits are to be sold "free and clear of all penalties or permit sanctions included in the settlement agreement." EX4, Email from Mitch MacDonald, Enforcement Attorney, NOAA, to Stephen Ouellette, Attorney (Mar. 30, 2009). In an email dated April 3, 2009, EA MacDonald states that he had forgotten about an on-going sanction on the Lilli Mae's permit from a previous settlement. EX5, Email from Mitch MacDonald, Enforcement Attorney, NOAA, to Stephen Ouellette, Attorney (Apr. 3, 2009). In another email later that day, EA MacDonald states: "[once] the prospective owner knows about the 4-month sanction, the cost of it either could be incorporated into their P&S agreement or [they] could work something out about implementing the permit sanction." EX6, Email from Mitch MacDonald, Enforcement Attorney, NOAA, to Stephen Ouellette, Attorney (Apr. 3, 2009).

This prior violation involved Mr. Lubiejewski, and not his son, and was for failure to submit FVTRs for the period March through December 2005, failure to fill out reports in November of 2005 and January of 2006, and fishing for monkfish without calling into the DAS system on January 24-25, 2006. Supra, EX2. The assessed penalty was in the amount of $200,000 and a two (2) year vessel and operator permit sanction. Mr. Lubiejewski signed a settlement agreement on August 31, 2006, agreeing to pay a compromise civil penalty of $20,000 and forfeiting the proceeds of $2,211.40 from the sale of the catch. Under the agreement, Mr.

Lubiejewski had to serve a one (1) year permit sanction for the vessel and operator in four (4) month blocks.

There was also an earlier violation, involving Mr. Lubiejewski, his son, and the Finest Kind in 2000. They were cited for exceeding the monkfish landing limits on three days, fishing for and possessing monkfish without DAS on nine days, and late reporting on a number of days. Id. The assessed monetary penalty was in the amount of $85,000. There was also a ten (10) multispecies DAS permit sanction, a twenty (20) monkfish DAS permit sanction, and a sixty (60) day operator sanction. This case was settled around September 2002 for $17,000 and a thirty (30) day operator sanction.

**II. Conclusion**

Mr. Lubiejewski is a long-time fisherman who had trouble adjusting to more and more regulations of the fishing industry. In the days before confining regulations, Mr. Lubiejewski was a very successful fisherman who was proud of his profession and his success. Unfortunately, starting in 2000, Mr. Lubiejewski and his son ignored many of the regulations that limited where he could fish, when he could fish, how much fish he could catch, what equipment he was required to install on his vessels and the paperwork he was required to file with NOAA. Starting in 2000, Mr. Lubiejewski and his son, [redacted] began violating all of these regulations. In April, May and June 2007, father and son Lubiejewski committed numerous violations that resulted in near maximum monetary penalties and substantial permit sanctions. This was a continuing pattern of willful violations which resulted in severe penalties. Unfortunately, this conduct resulted in the total collapse of Mr. Lubiejewski's fishing business, personal finances and his personal life. This conclusion was recognized by EA MacDonald who

accommodated Mr. Lubiejewski in a resolution of all his outstanding violations in a fair and reasonable settlement agreement.

**III. Recommendation**

As much as I empathize with Mr. Lubiejewski's plight, I recommend that the Secretary take no action in this matter.

## CASE 38: TERENCE J. MULVEY

*Fisherman complains that he is the victim of selective prosecution and harassment by two NOAA OLE Special Agents.*

Because of scheduling problems involving Mr. Mulvey, his lawyer, and me, I was unable to interview Mr. Mulvey within a reasonable time prior to submitting this report. However, with the consent of Mr. Mulvey's lawyer, I have agreed that this case will be reviewed as part of the second phase of this investigation as provided in Secretary Locke's second Secretarial Decision Memorandum.

**Case 43: Bruce Stiller**

*Fisherman complains that he was the victim of unintentional circumstances that resulted in excessive penalties.*

**I. Findings of Fact**

Bruce Stiller started fishing when he was 13 years old and has continued fishing for over 55 years. Mr. Stiller's home port is Port Saleno, Florida and he fishes only in federal waters. Currently, Mr. Stiller owns and operates a 43' fishing vessel and a 25' master marine vessel. Previously, Mr. Stiller owned and operated the Miss Sharon which was formerly named the B&C's Lady. Mr. Stiller sold the Miss Sharon five (5) or six (6) years ago to his nephew.

On October 25, 1996, while Hurricane Wilma was blowing offshore, the Coast Guard, on marine patrol because of the hurricane and traveling without running lights, approached the B&C's Lady. At first, the Coast Guard thought Mr. Stiller was attempting to ram its vessel but Mr. Stiller did not see the Coast Guard vessel until it was close to the B&C Lady and turned on its running lights. Heavy seas contributed to the confusion.

The Coast Guard then boarded the B&C's Lady and discovered several suspected prohibited shark fins, which they laid out on deck. When the Coast Guard officials were preoccupied, an unidentified crewmember was observed to have thrown the fins overboard. Thereafter, Mr. Stiller received a NOVA dated May 23, 1997, charging him with interfering with an investigation for which he was assessed a penalty of $50,000. Mr. Stiller requested an ALJ hearing. ALJ Joseph N. Ingolia presided over the hearing, found Mr. Stiller in violation of the MSA, and fined him $50,000. Mr. Stiller paid the full penalty. See generally In the Matter of: Bruce Stiller, 1998 WL 1277931 (NOAA).

On January 7, 2005, SA Oravetz and SA Richard Chesler responded to several non-reporting VMS systems from the Miss Sharon, Foxy Michele, and Foxy FL3458AH. All the vessels were engaged in shark gillnetting. When SA Oravetz and SA Chesler boarded the Miss Sharon, with Mr. Stiller as captain, SA Oravetz discovered a red mesh bag full of shark fins. Mr. Stiller claimed that he had no knowledge of this bag of shark fins. EX1, Written Statement of Bruce Stiller (January 7, 2005).

Thereafter, SA Oravetz and SA Chesler, along with another official, observed the offloading of the shark fins and carcasses from the Miss Sharon. The agents counted ninety-two (92) shark carcasses offloaded. The Miss Sharon crew then placed the shark carcasses, boxes and bags of fins onto a refrigeration truck, which was secured by a padlock. On January 8, 2005, the next day, SA Oravetz and SA Chesler transported the refrigeration truck to Port Canaveral, and recounted the supply of shark carcasses and fins. The agents, accompanied by a shark expert, observed that there were ninety-two (92) shark carcasses to 107 fins. The fifteen (15) fin differential indicated that the Miss Sharon was engaged in shark finning, in violation of the MSA.

SA Oravetz thereafter seized the entire catch, and sold the 3,723 lbs of shark meat for $987.60. NOAA retained the shark fins. EX2, Offense Investigation Report by Casey S. Oravetz, Special Agent, NOAA, p. 4 (January 24, 2005). In a written statement provided by Mr. Stiller on January 11, 2005, he noted that the twenty (20) fins in the red bag were from a crewmember concerned about exceeding the 4,000 lbs trip limit. Supra, EX1. As a result, this crewmember, who had a prior violation in Georgia, discarded the shark carcasses overboard and kept the fins without Mr. Stiller's knowledge. Id.

On March 7, 2005, SE Enforcement Attorney Robin Jung issued a NOVA to Mr. Stiller for one (1) count of landing shark fins without the corresponding carcasses. He assessed a penalty of $18,000, and the value of the seized catch. On May 7, 2005, Mr. Stiller requested a hearing before an Administrative Law Judge. Mr. Stiller appeared pro se. On July 22, 2005, the parties ultimately settled the case for a compromised civil penalty of $12,000. Mr. Stiller also forfeited the proceeds from the catch seized on January 7, 2005.

**II. Conclusion**

In the 2005 case, the evidence is clear that a crewmember onboard the Miss Sharon committed the alleged violation. The NOAA Special Agents were justified in boarding the Miss Sharon based on a malfunctioning VMS system. While on board, the agents discovered a bag of shark fins prohibited by law, and a subsequent tally of the shark fins and carcasses revealed a violation. Though Mr. Stiller claims that he had no knowledge of the violation, as captain of the Miss Sharon on the date the violation occurred, he is responsible for the actions of his crew for which he paid a $50,000 penalty confirmed by an ALJ. Mr. Stiller previously experienced a similar violation in a 1996 case involving the actions of a crewmember.

In this most recent case, the EA assessed an $18,000 penalty, but reduced it to $12,000 presumably based on an assessment of Mr. Stiller's unique circumstances. The fine was not excessive relative to the violation and Mr. Stiller paid it in full and agreed to forfeit the value of the seized proceeds. Accordingly, I find no evidence to justify disturbing the ultimate resolution of this case.

**III. Recommendation**

I recommend that the Secretary take no action on this case.

**CASE 46: ARTHUR SAWYER**

*Fisherman complains that he paid a penalty for an offense that others, who committed the same offense, received only a warning. Fisherman further complains that a NOAA Special Agent asked him inappropriate, personal questions.*

**I. Findings of Fact**

Arthur Henry Sawyer is a full-time third generation fisherman from Gloucester. Mr. Sawyer owns and operates the Miss Clara, which he purchased in 1996. From 1978 to 1996, Mr. Sawyer owned and operated the Miss Jennifer. Mr. Sawyer has been catching fish and lobsters since 1973, when he graduated from high school.

Many years ago, Mr. Sawyer worked for Star Fisheries, which is owned by the Ciulla family and has been offloading at the GSDA since 2002. At one time, Mr. Sawyer was married to Rosemarie Ciulla Cranston.

On October 8, 2004, Mr. Sawyer received a NOVA charging him with landing a 60 lb overage of cod in excess of the 500 lb limit. The 10% overage policy would allow for a 50 lb variance in this case. Mr. Sawyer exceeded that amount by 10 lbs. Mr. Sawyer explained that he encountered bad weather on this trip and paid little attention to the totes of cod until returning to port with a 60 lb cod overage. The NOVA provided for a $5,000 assessed penalty and seizure of the catch, which he valued at approximately $1,400. The NOVA was accompanied by a compromise settlement offer of $4,000 plus the catch. Mr. Sawyer contacted Stephen Ouellette and he was able to settle the NOVA for payment of $2,250 plus the catch for a total settlement of fines from $3,600 to $3,700. The settlement agreement provided for a two (2)

year probationary period. If Mr. Sawyer committed an offense within that two (2) year period, he would have to pay the original assessed penalty.

Mr. Sawyer complains, first, that others charged with a similar offense received a warning and second, that the "ability to pay" policy goes both ways. EX1, Office of Inspector General Interview with Arthur Henry Sawyer, Fisherman (July 9, 2009).

In August 2005, an OLE Special Agent, whom Mr. Sawyer identified as Daniel D'Ambruoso, came to his vessel while tied to the dock and asked questions about the GSDA. Mr. Sawyer respectfully told the Special Agent that there was nothing illegal going on at the GSDA. The Special Agent then made some comments about Mr. Sawyer's prior relationship with someone at the GSDA. Mr. Sawyer was upset that the Special Agent was discussing his personal life and refused to speak further with the Special Agent. I questioned SA D'Ambruoso about this conversation with Mr. Sawyer and he denied the conversation ever took place and did not know, until I mentioned it, that Mr. Sawyer had been previously married to Rosemarie Ciulla Cranston. I find that the encounter between Mr. Sawyer and a Special Agent may have occurred, but it did not occur with SA D'Ambruoso.

Mr. Sawyer further noted that many fishing vessels had stopped doing business with GSDA because of the excessive law enforcement presence at that facility. Mr. Sawyer stated that he had been out fishing in terrible weather but that did not compare to the fear of approaching the GSDA docks with the ever present law enforcement personnel waiting for fishermen to offload their catch.

**II. Conclusion**

I could justify finding that a $5,000 penalty plus seizure of a catch of $1,400 was excessive under the particular circumstances of this case. However, I am not aware of any fishermen being given a warning for a 60 lbs cod overage.

Since the case was finally resolved by payment of a $2,250 penalty plus the catch, I find that to be a fair and reasonable resolution of this case.

I can understand Mr. Sawyer being upset that a Special Agent would have asked him about the GSDA's business practices and refer to information about his personal life. Mr. Sawyer joins a long list of fishermen, that in 2007, were interrogated by Special Agent about the GSDA and it is not unusual for these same Special Agents to have personal information about the Ciulla family, who were the object of an intense and prolonged investigation. It is unfortunate that because of Mr. Sawyer's former marriage to a Ciulla family member, he became involved in the investigation.

**III. Recommendation**

I recommend that the Secretary take no action in this matter.

**CASE 47: AGGER FISH COMPANY, INC.**

*Fish dealer complains that he was threatened with a multiple million dollar penalty and the closure of his business if he didn't agree to pay a $750,000 penalty.*

## I. Findings of Fact

Marc Agger resides in Brooklyn, NY and is the owner of Agger Fish Corp. (AFC) which is also located in Brooklyn. AFC does not commonly offload fishing vessels at its facility because it primarily receives fish by truck from dealers up and down the east coast. Mr. Agger noted that his company usually 'adds value' to the fish by processing it before exporting the fish primarily overseas. In that sense, AFC's business differs from both the Whaling City Display Auction and the GSDA. EX1, Special Master Interview with Marc Agger, Owner, Agger Fish Corp. (Mar. 10, 2011).

Mr. Agger started his business around 1981 when he purchased oysters and scallops in Wellfleet, Massachusetts, and sold them to New York City restaurants. Eventually, the business expanded and Mr. Agger moved to Brooklyn where AFC began selling fish to wholesalers in addition to restaurants. In 1988, after Mr. Agger graduated from Yale Business School, he started the current AFC business model which includes exporting product to foreign countries. His product line included shark fins and shark meats, which made up his primary exports for about five (5) to six (6) years. At that time, Mr. Agger noted that he had permits from the NYS Department of Agriculture, NYS Department of Environmental Affairs and another fish purchasing license. Id.

In the early 1990's, Mr. Agger recognized problems concerning newly promulgated regulations for shark fins. As a result, he started to diversify his product line to include

monkfish, skates and salt sharks. At the time, Mr. Agger stated that his company was probably the second largest exporter from the United States of shark fins by weight. At this time, Mr. Agger paid for advertisements in various magazines that stated his company would not accept fins from finning vessels. Mr. Agger noted that shark finning officially became illegal in 2000. By the end of the 1990's, AFC had revenues of $15-$17 million dollars, primarily through export, and shark fins accounted for perhaps 10% of his total exports. Id.

Mr. Agger stated that the percentage of shark fins AFC purchased gradually decreased starting in the early 1990's. From 2000-2003, AFC handled some high value fins from larger sharks, but there was an increasing amount of fins from smaller sharks, such as dogfish and sand sharks. Mr. Agger provided me with various charts indicating the volume of his business and its decreasing revenues over time. During this time, though, the margin on shark fins had stayed relatively the same. Supra, EX1.

From 2000 to 2003, AFC made some direct shark fin purchases from vessels, but the percentage of landings AFC received directly from vessels decreased gradually since that time. Mr. Agger noted that if he did not purchase directly from a vessel, then he did not need a federal permit. I have reviewed a chart prepared by Mr. Agger indicating trends in his business with respect to the purchase of shark fins directly from vessels. EX2, Shark Fin Vessel Purchase Table as Percentage of Total Fins and Total Fish Purchases. Specifically, 15% of his total shark fin purchases during the time period between 2000 and 2003 involved purchasing fins directly from vessels. However, AFC's shark fins purchases from vessels accounted for 1.6%, on average, of his total business between 2000 and 2003. AFC's overall sales have decreased from 2006 through 2009. Id.

On October 15, 2003, NOAA Special Agents James Cassin, Jr., Joe Wilson, and John Barylsky, were conducting a routine inspection at AFC when they discovered an extensive shark operation in the facility. Upon further inspection, SA Cassin and SA Barylsky came upon two (2) bags of shark fins, with one (1) bag labeled "blanco" (meaning "white" in Spanish) and another labeled "basxin" (basking shark). Both are prohibited shark species. Mr. Agger alleged that he purchased the fins five (5) to seven (7) years before when their purchase was legal. However, Mr. Agger could not produce a valid shark permit when agents requested a copy. SA Cassin then requested a spreadsheet of shark purchases made by AFC since 2000 and determined that between January 1, 2000 and October 15, 2003, AFC purchased shark fins and shark meats from approximately twenty nine (29) fishing vessels without a valid dealer permit. EX3, Offense Investigation Report by James Cassin, Special Agent, NOAA (Mar. 1, 2005).

Based on this investigation, SA Cassin drafted an affidavit in support of an AIW to conduct a search of AFC's premises. NOAA Special Agents executed the AIW on October 29, 2003. During the execution of the AIW, agents discovered that AFC had a NMFS permit to deal in sharks that expired in 1996. AFC did not possess a valid shark permit from 1996 to 2003. AFC did, however, possess a valid multi-species permit. Id.

Further, agents discovered that 232 lbs from AFC's 4,000 lbs shark fin inventory came from suspected prohibited shark species. After the execution of the AIW, agents contacted the director of the NOVA Southeastern University's Oceanic Research Center in Dania Beach, to conduct DNA testing on a sample set of AFC shark fins to determine precise shark species. Based on the shark fins alone, the director determined that AFC possessed seven (7) prohibited species from up to 193 individual fish. Mr. Agger agreed to abandon the prohibited fins to

NOAA fisheries enforcement. NOAA ultimately returned some of the seized shark fins that it could not determine were unlawfully landed. Id.

Agents also accessed AFC's dealer information and conducted a detailed analysis of those records. The agents concluded that AFC landed shark fins and shark meats on 323 occasions from thirty one (31) federal permitted vessels, but partially reported landings for only eight (8) of those vessels. The agents discovered a spreadsheet that indicated exactly how many pounds of shark meat AFC reported to NMFS, as well as the amount of unreported pounds. In all, AFC purchased approximately 36,076.38 lbs of shark fins and 373,919 lbs of shark meat over a three (3) year period worth approximately $815,683.90. Supra, EX3.

Mr. Agger stated that when AFC first started offloading sharks, shark permits were included with AFC's federal multispecies permits. Supra, EX1. However, Mr. Agger did not realize or understand that in the mid 1990's, NOAA created a new multispecies dealer permit that did not include sharks. Therefore, a separate shark dealer permit was required. EX4, Letter from Eldon Greenberg, Attorney, Garvey Schubert Baer, to Charles B. Swartwood III (Oct. 22, 2010). Two (2) facts are worth noting. First, the cost of a separate shark dealer permit was minimal and second, the new multispecies permit issued to AFC, after the mid 1990's, included spiny dogfish, which are small sharks. Id. However, it is clear that before 1996, AFC had a separate shark permit and from 1996 to 2003 it did not. When asked directly why Mr. Agger did not apply for a separate shark permit as he had in the past, he stated that he either lost the application or did not receive it in the mail because of problems with the mail service at the Brooklyn Navel Yard where AFC was located. Supra, EX1. Mr. Agger was then asked whether he had reported to NOAA the offloading of shark fins even if he did not have a valid permit. Mr.

Agger responded that currently, he reports all landings electronically but in the late 1990s and early 2000s, AFC reported its landings to NOAA port officers by sending it copies of checks paid for fish offloaded at AFC's facility. Id. The port officers, in turn, would enter the information into their computers. At some point, shark fins only accounted for a total of 1% of AFC's purchases by dollar value, which amounted to .16% of his total weight for purchases from fishing vessels. Id. Mr. Agger stopped reporting shark fins because he purchased a large portion of his shark fins from dealers. Furthermore, a NOAA port agent told him that AFC did not have to report shark fins purchased from dealers and Mr. Agger took this statement to mean all fins. Id.

The case was assigned to EA Charles Juliand for prosecution, but a NOVA was never issued to Mr. Agger or AFC because EA Juliand engaged directly in settlement discussions with AFC's counsels: Stephen Ouellette and Eldon Greenberg. On June 22, 2006, the parties settled the case and agreed that Mr. Agger would not be named individually in the case. On behalf of AFC, Mr. Agger agreed to pay a compromised civil penalty of $1,000,000, with $250,000 suspended, and the balance of $750,000 paid over eighteen (18) months. AFC further agreed to provide all relevant shark landing data to NOAA for the time period between 2000 and 2003. In the settlement agreement, NOAA consented to modify the penalty schedule should AFC provide NOAA with relevant financial documents demonstrating financial hardship. Further, NOAA agreed to consult with AFC concerning any press release or written public statement concerning this case. EX5, Settlement Agreement (June 22, 2006).

Pursuant to the settlement agreement, EA Juliand sent a draft copy of a press release to Mr. Ouellette on the morning of August 1, 2006. EA Juliand, along with NOAA staff members,

had been working on the press release for over one (1) month. EX6, Timeline Prepared by Charles R. Juliand, Enforcement Attorney, NOAA. Mr. Ouellette provided several comments to EA Juliand within an hour. EA Juliand then sent the press release for publication before considering a later email from Mr. Ouellette, who opposed the inaccurate portrayal of his client as having admitted to the violations. EX7, Email from Stephen Ouellette, Attorney, to Charles R. Juliand, Enforcement Attorney, NOAA (Aug. 1, 2006). In fact, the settlement agreement stipulates that AFC does "not contest the violations," but does not admit the violations. The press release was never altered. EX8, Press Release, "NOAA Settles Shark Case with New York Fish Dealer for $750,000" (July 31, 2006).

EA Juliand believed that the AFC settlement was fair. EX9, Special Master Interview with Charles R. Juliand, Enforcement Attorney, NOAA (Mar. 14, 2011). He perceived Mr. Agger as a millionaire because he dealt with millions of fish annually. EA Juliand stated that "no penalty should be the cost of doing business," that he is not in the business of putting companies out of business and that wealthier violators should be assessed higher fines than the "little guys." Id. Mr. Ouellette stated that EA Juliand originally suggested a 6.6 million dollar penalty and a two (2) year permit sanction. Supra, EX1. EA Juliand denied threatening AFC/Mr. Agger with a six (6) million dollar fine. Supra, EX9.

The settlement agreement recites a 3.4 million dollar default payment if AFC fails to pay the compromise civil penalty or cure a deficiency of any payment due in accordance with the payment schedule. Supra, EX5. I note that the agreement further provides that Mr. Agger is personally liable, as a guarantor, for payment of the compromise penalty. Id. In fact, if AFC fails to pay the penalty as agreed, any federal fishing permits issued to a company, in which Mr.

Agger or any member of his immediate family, have operational or management control or have in excess of a 25% ownership interest will be suspended until payment of the compromise penalty. Id.

Mr. Agger showed me copies of AFC's federal tax returns for some of the last several years. I did not keep copies of those returns but reviewed them and they reveal the following by rounding off the numbers: a loss in 2005 of $191,000; a loss in 2007 of $52,000; a loss in 2008 of $494,000; and a zero gain/loss in 2009. Since signing the settlement agreement in June 2006, AFC's total revenues have declined substantially as follows:

| | |
|---|---|
| 2006 | $10,586,746.48 |
| 2007 | $11,423,893.10 |
| 2008 | $9,147,157.13 |
| 2009 | $6,678,814.59 |
| 2010 | $7,240,257.28 |

EX10, Email from Marc Agger, Owner, Agger Fish Corp, to Charles B. Swartwood III (Mar. 30, 2011).

On October 24, 2007, at Mr. Ouellette's request and because of losses and declining revenue, the settlement payment schedule was modified by extending the payment period and reducing the penalty payments. EX11, Revised Payment Schedule (Oct. 24, 2007).

In an email dated March 10, 2009, Mr. Ouellette requested a further adjustment in the payment schedule because of AFC's declining business. EX12, Email from Stephen M. Ouellette, Attorney, to Charles Juliand, Enforcement Attorney, NOAA (Mar. 10, 2009). Mr. Ouellette stated that AFC's primary business, monkfish, had a significant decline in price. Because of this decline, Mr. Ouellette requested that NOAA agree to accept a compromise settlement final

payment of $28,436.77. If this compromise was accepted, AFC would have paid in excess of $550,000 of the total $750,000 penalty. Id.

On August 20, 2009, Mr. Ouellette again emailed EA Juliand about AFC's troubled financial condition. EX13, Email from Stephen M. Ouellette, Attorney, to Charles Juliand, Enforcement Attorney, NOAA (Aug. 20, 2009). The email from Mr. Ouellette noted that AFC had incurred substantial losses in 2007 and 2008 based on its federal income tax returns. The tax returns did not reflect the fines paid to NOAA since they were not deductible expenses. As a result, Mr. Ouellette requested that EA Juliand reduce his client's monthly payments to $1,000 per month. Id.

EA Juliand's response was a December 7, 2009 letter to Mr. Ouellette and AFC indicating that he would impose a permit sanction closing AFC for failure to make timely payments pursuant to the settlement agreement. The sanction would remain in effect until payments were made current. EX14, Letter from Charles Juliand, Enforcement Attorney, NOAA, to Stephen Ouellette, Attorney, Ouellette and Smith (Dec. 7, 2009).

On January 27, 2010, Mr. Greenberg, AFC's co-counsel, wrote to assistant general counsel for Enforcement and Litigation, Richard Mannix, concerning the financial difficulties of his client. EX15, Letter from Eldon Greenberg, Attorney, Garvey Schubert Baer, to Richard Mannix, Assistant General Counsel for Enforcement and Litigation, NOAA (Jan. 27, 2010). AFC had, up to that point, been unilaterally paying only $1,000 a month towards the penalty balance. In the end, Mr. Greenberg hoped that Mr. Mannix would terminate AFC's ongoing financial obligations because of the general downturn in the economy and the substantial losses incurred by AFC in its declining business.

On February 9, 2010, because of declining revenues, the settlement payment schedule was modified by extending the payment period by eighteen months. EX16, Revised Payment Schedule (Feb. 9, 2010). At that point, AFC had paid $540,000 over 3.5 years. As a compromise, the parties revised the payment schedule to allow for monthly payments of $8,600 for the remaining nineteen (19) months, with an initial payment of $64,400 to be made on April 1, 2010, and a final payment of $4,836.77, to be made on October 1, 2011. Id.

As of October 2010, AFC had paid a penalty of $655,962, with a $108,036 balance remaining to be paid. I am informed that no further payments have been made by AFC. Supra, EX1.

**II. Conclusion**

The facts are clear that from 1996 to 2003, AFC did not have a shark permit but offloaded a substantial amount of shark meat and shark fins during that period of time. I find that the failure to renew AFC's shark permits from 1996 to 2003 was not intentional but certainly negligent. Mr. Agger was running a substantial business and should have been more diligent in keeping track of his numerous permits and the requirements of ever-changing regulations. However, I further find that AFC was not hiding its shark purchases which were in plain view when the Special Agents inspected its facility. I also find that there was no economic gain to AFC in not obtaining a shark permit because it was easily obtainable for a nominal cost.

The questions presented in this review are first, whether the settlement agreement was coerced and second, whether the penalty was excessive.

As to the first issue, I find that Mr. Agger had no choice but to negotiate a settlement. The following emails from EA Juliand support this conclusion. For example, EA Juliand wrote on

June 19, 2006: "I've been getting a lot of inquiries about the status of settlement discussions from enforcement…I'm running out of excuses and I won't let this thing hang indefinitely…If we don't have a signed agreement by c.o.b. on the 22nd, I'm inclined to withdraw my settlement offer…His alternatives to settlement aren't, in my opinion, particularly attractive." EX17, Email from Charles R. Juliand, Enforcement Attorney, NOAA, to Stephen Ouellette, Attorney (June 19, 2006). The next day, on June 20, 2006, EA Juliand stated, in part: "I want the penalty paid, on time. I want a very heavy hammer hanging over the Respondent's head to ensure that this happens. This figure is an acknowledgement that "value" of the case, from the agency's perspective, is not less than $3.4 million. This is a non-negotiable item." EX18, Email from Charles R. Juliand, Enforcement Attorney, NOAA, to Stephen Ouellette, Attorney (June 20, 2006).

Mr. Agger initially thought that if he did not settle, he would be faced with a six (6) million dollar penalty and an unknown permit sanction which, if assessed, would have put AFC out of business. Although EA Juliand denies ever mentioning a six (6) million dollar penalty, Mr. Agger believed, from discussions with his lawyers, that it was a possibility. A resolution by me of what was said in the negotiations between EA Juliand and AFC's lawyers is academic since the eventual settlement agreement provided for a default payment of 3.4 million dollars, which would similarly put AFC out of business.

Additionally, if a NOVA was issued, Mr. Agger had no confidence that he would prevail on an appeal to an ALJ and that he thought that the likely outcome would be an affirmation of a 3.4 million dollar penalty, which would put him out of business. From these facts, I conclude that Mr. Agger was coerced into settling his case.

As to the second issue, I find by clear and convincing evidence that the coerced settlement amount of $750,000, a default payment of 3.4 million dollars, Mr. Agger's personal guarantee of that amount and the prohibition of him or any member of his family from engaging in the fish business was excessive. I agree with Mr. Greenberg's assessment that "from the outset, the penalties sought by NOAA were disproportionate and primarily reflected the continuation of individually minor offenses stemming from just one initial failure to obtain a required permit." Supra, EX4. The primary violation is a negligent failure to obtain a shark permit from 1996 to 2003. The numerous counts are a subset of the primary violation of not having a shark permit. Putting this in perspective, I find that AFC was charged on 323 separate dates from January 1, 2000 through October 28, 2003, with purchasing shark or shark fins without a valid permit. Supra, EX3, pp 25-6. These continuing violations of offloading shark meat and shark fins without a valid permit occurred over a forty six (46) month period. EX19, Email from Eldon Greenberg, Lawyer, Garvey Schubert Baer, to Charles B. Swartwood III (Apr. 11, 2011).

The applicable penalty schedule in effect at the time of these continuing violations provided for a first offense penalty of $5,000 to $50,000. EX20, Penalty Schedule (Revised 5/02). This was AFC's first and last violation to date. The MSA provides, in part, that "each day of a continuing violation shall constitute a separate offense. 16 USC §1858(a). I find as relevant that the offenses charged occurred over a forty six (46) month period; that the offense was unintentional; that this was AFC's first offense; and although AFC did not have a shark permit for the period of time, it had records of all of its shark purchases during this time period. Therefore, I conclude that the settlement was coerced and that the $750,000 penalty was excessive.

Next, I need to determine a fair and reasonable penalty for his offense. I find that the duration of the violation charged of forty six (46) months is relevant as is the penalty schedule for a first offense. Because of the seriousness of that offense and the fact that although the violation was not intentional, it was negligent, I find that an appropriate penalty for the unintentional violation would be the sum of $10,000 a month for forty six (46) months or $460,000 together with a $5,000 (first offense) penalty for the possession of shark fins from seven (7) prohibited species for a total of $35,000. Therefore, I conclude that the appropriate penalty for AFC's offenses should be $495,000. AFC has paid a total of $655,962 to date. Therefore, I recommend that AFC be reimbursed a total of $160,962, which is the difference between what it paid NOAA and what I find to be a more reasonable and fair penalty.

**III. Recommendation**

I recommend that the Secretary first, cancel all future monetary obligations from AFC in accordance with the settlement agreement dated June 22, 2006, and second, remit the sum of $160,962 to AFC which represents the difference from what was paid by AFC and what I have recommended as an appropriate penalty.

## CASE 48: JAMES M. KENDALL

*Fisherman complains about the plight of fishermen under NOAA regulations which are harsh, difficult to understand, and intimidating to the average fisherman. Fisherman further complains about a 1985 NOAA enforcement action against him.*

### I. Findings of Fact

James Michael Kendall was a fisherman for thirty-two (32) years until he retired in 1994 because of an injury. As a fisherman, Mr. Kendall operated three (3) scalloping vessels for Eastern Fisheries, Inc.: Harvester, Nordic Pride (1980-1986) and the second Nordic Pride (1986-1994) and offloaded generally at the Eastern Fisheries facility in New Bedford.

Both before and after his retirement from fishing, Mr. Kendall has been actively involved in the fishing industry. From 1967 to 1985, Mr. Kendall was involved with the various incarnations of the union representing New Bedford fishermen; from 1994 to 2001, he was Executive Director of the New Bedford Seafood Coalition; he was the first president of an umbrella group of eighteen (18) organizations that provided partially subsidized health insurance to the fishing industry; from 1997 to 2003, he served on the New England Fishery Management Council (NEFMC); and since 1994, he has served as a consultant to the fishing industry.

In 1985, Mr. Kendall and his employer, Eastern Fisheries received a NOVA with an assessed penalty of $14,070.71 for exceeding the scallop meat count by one scallop. The Special Agents did not seize his catch after concluding the meat count. The NOVA was accompanied by an offer of settlement but Mr. Kendall elected to appeal this case to ALJ Dolan. Mr. Kendall and Eastern Fisheries were represented by counsel in that appeal. Mr. Kendall recalls presenting testimony by a qualified mathematician that challenged the SA's scallop meat count. That

testimony was rejected by ALJ Dolan, who then found Mr. Kendall and Eastern Fisheries liable for the violations charged and assessed the original penalty of $14,000. Mr. Kendall alleges that ALJ Dolan told him that they were lucky he did not increase the fine based on Mr. Kendall's appeal. Two important facts are relevant to this complaint. First, NOAA has no records of this twenty-five (25) year old case and second, Mr. Kendall's employer, Eastern Fisheries, paid the penalty. After discussing his case, Mr. Kendall made some general observations concerning NOAA's enforcement of its regulations. First, Mr. Kendall opines that it is common knowledge in the fishing industry that it is best to settle a case rather than file an appeal to an ALJ or the NOAA Administrator and second, that fishermen are worried and paranoid whenever they come into port because of fears that they may be in violation of some obscure or changed regulation involving turtles, fish sizes, closed areas, mesh requirements, etc. EX1, Special Master Interview with James Kendall, Fisherman (Feb. 14, 2011).

**II. Conclusion**

I do not question Mr. Kendall's recitation of the facts of his case but since NOAA's records have been destroyed and Mr. Kendall does not have any records, it is impossible for me to fully investigate the penalty assessed in this case. Additionally, Mr. Kendall would not be entitled to any modification or remission of the penalty since it was paid by his employer, Eastern Fisheries. However, I find that the assessed penalty of $14,070.71 for an overage of one scallop is excessive.

**III. Recommendation**

I recommend that the Secretary take no action in this matter.

## CASE 49: RODNEY AVILA

*Fisherman complains about GCEL aggressive enforcement of fishing regulations. He describes GCEL attorneys as "intimidating and harsh" and argues that mistakes and violations occurring beyond a fisherman's control should be handled properly. He proposes the formation of a Sustainable Fisheries Forum to allow Fisheries Management Council members throughout the United States to come together and discuss important issues. He further proposes the formation of a panel (with a member each from GCEL, OLE, the FMC and the fishing industry) to deal with violations and assess penalties. This fisherman complains that when he told GCEL enforcement attorney assigned to this case that he was taking his case to court, the GCEL attorney stated: "you're going to lose"; "I never take a case to court that I'd lose"; "I've never lost a case"; and "you can't win."*

### I. Findings of Fact

Rodney Avila is a consultant to the fishing industry and currently a member of the New England Fishery Management Council ("NEFMC"; "Council"). Mr. Avila's term on the Council expires in 2012 as he will have reached the maximum allowable length of service (three (3) terms of three (3) years each). Mr. Avila began fishing 47 years ago. He was a captain for 43-44 years and since 1985, has owned a 50% interest in the fishing vessel Seven Seas. Mr. Avila's partner, [redacted], is captain of the Seven Seas, which is either a trip boat or a day boat, depending on the time of year and the fish being caught. Mr. Avila previously owned a 33.3% interest and later a 50% interest in the fishing vessel Trident, which he sold in April 2010. The Trident was mostly a trip boat.

On July 20, 1995, Coast Guard aircraft observed the Seven Seas fishing in Closed Area I. The aircraft contacted the vessel and [redacted] stated that the vessel was engaged in fishing. United States Coast Guard (USCG) Officer Thomas S. Fullam told the Captain that the vessel was inside a closed area and asked the Captain if he agreed. [redacted] responded that he was not inside a closed area and read the coordinates that he believed to represent the boundary of the closed area. [redacted] relied on the Federal Register from Tuesday, March 1, 1994 as the source for this information. Officer Fullam stated that Seven Seas was in a closed area and in violation of 50 CFR 651 dated December 22, 1994. The Captain complied with the order to haul back and proceed out of the closed area.

USCG Officer John M. Murphy met and boarded the Seven Seas. [redacted] had already plotted the boundaries of Closed Area I under the emergency regulations that had gone into effect on December 22, 1994. He revealed the fishing logs from previous trips in this same closed area to Officer Murphy. The fishing logs showed the Seven Seas as being right outside of Closed Area I under the old regulations, but inside Closed Area I under the new regulations. Officer Murphy believed the incursion to be an honest mistake. Officer Murphy believed that, prior to being contacted by the aircraft, [redacted] had no knowledge of the new boundaries of the closed area. Officer Murphy's opinion is that [redacted] would not have kept a written log of the trips resulting in incursions if he had known he was in a closed area. Nevertheless, Officer Murphy filled out an EAR and gave it to [redacted].

On July 21, 1995, ASAC Kevin R. Sullivan and SA Kevin G. Flanagan boarded the Seven Seas at Homers Wharf in New Bedford and met with [redacted] and Mr. Avila. [redacted] created a floppy disk record from the navigational plotter for the agents. SA Flanagan kept the

vessel's navigational chart as evidence. The agents seized the catch (3,295 pounds of cod, monkfish, skate and YTF) and sold it to Dave's Seafood for $2,763.65. The Captain and the crew were very cooperative throughout the whole investigative process.

In his affidavit dated July 21, 1995, [redacted] stated that during the winter fishing season, his mail was forwarded to a post office box in Hampton, Virginia. EX1, Affidavit of [redacted], Fisherman, p. 1 (July 21, 1995). He believes that this may have been the reason for his not receiving information with respect to the regulatory change establishing a new boundary for Closed Area I. Mr. Avila did not know where [redacted] was fishing when he returned north for the summer fishing season and did not think to warn the Captain that the boundary for Closed Area I had moved thirteen (13) miles to the east. EX2, Special Master Interview with Rodney Avila, Fisherman (Feb. 14, 2011).

In his interview with the OIG, Mr. Avila stated that the OLE agents and the USCG officers treated him with respect and he found them to be fair. EX3, OIG Interview with Rodney Avila, Fisherman, p. 2 (July 28, 2009).

On June 18, 1996, EA Kevin Dufficy issued a NOVA for the July 20, 1995 incursion into Closed Area I. It assessed a monetary penalty of $20,000 and a 30-day permit sanction. EX4, Notice of Violation Assessment (June 18, 1996). The NOVA also sought forfeiture of the $2,763.65 that NOAA received from the sale of the seized catch. Mr. Avila retained Pamela Lafreniere to represent him in resolving this case.

At a NEFMC meeting, Mr. Avila spoke with EA Juliand and explained that the incursion was a mistake and there was no intent to violate the regulations. EA Juliand replied: "You are on the Council (NEFMC) so don't expect (any) special treatment." Supra, EX2. Mr. Avila responded

that he was not looking for special treatment, but that he was looking for fair treatment. When Mr. Avila filed an appeal to an ALJ, EA Juliand told Mr. Avila that the ALJ has the power to increase the fine up to $100,000. NOAA made several offers of settlement, but Mr. Avila rejected them because he wanted his day in court. Id. EA Juliand told Mr. Avila that he has a good record and he has never lost a case on appeal to an ALJ. Id. Ms. Lafreniere advised Mr. Avila to settle because he might win his case before the ALJ, but it will cost him more money to try the case than to pay the penalty. Mr. Avila and [redacted] had a discussion and decided to follow Ms. Lafreniere's advice. On September 2, 1997, Mr. Avila signed a settlement agreement. EX5, Settlement Agreement (Sept. 2, 1997). Under its terms, he paid a $7,000 fine and forfeited the proceeds from the sale of the seized catch, but did not have to serve a permit sanction.

**II. Conclusion**

The evidence establishes that Seven Seas engaged in fishing at the time of its incursion in Closed Area I. [redacted] freely admitted that the vessel was engaged in fishing when he spoke with USCG officers and OLE agents, as well as when he wrote his affidavit. Mr. Avila insists that this was an accident and not an intentional violation. [redacted] had no knowledge of the emergency regulation defining the new boundary for Closed Area I. However, when a regulation is silent with respect to the state of mind, intent is not a necessary element of a regulatory offense which imposes a civil penalty. Tart v. Com. of Mass., 949 F.2d 490, 502 (1991). This situation is different from criminal statutes because *mens rea* is a presumed requirement of criminal statutes. Morissette v. United States, 342 U.S. 246 (1952). "Public welfare offenses are not in the nature of positive aggressions or invasions, with which the

common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty." Id. at 255. I find that under the circumstances of this case, a $20,000 penalty, a thirty (30) DAS permit sanction and seizure of the catch was excessive. However, I also find that the eventual settlement of a $7,000 penalty, no permit sanction and seizure of the catch to be a reasonable resolution of this case.

**III. Recommendation**

I recommend that the Secretary take no action in this matter.

## CASE 52: DAVID FYRBERG

*Fishing vessel owner complains that he was the victim of inconsistent/confusing regulations and a rogue captain.*

### I. Findings of Fact

David Fyrberg lives in West Newbury, Massachusetts and is self-employed in the marine related business where he buys and sells fishing vessels, fishing permits, and marine equipment. Mr. Fyrberg comes from a long line of fishing captains on his mother's side of his family. Mr. Fyrberg was first involved in the fish business in the 1970's. Starting in 1972, Mr. Fyrberg was on the Board of Directors of Tri-Seafood Cooperative, Inc. and from 1975 to 1992, was its managing director. At this same time, Mr. Fyrberg was engaged in buying and selling tuna to Japan and owned and operated Old Port Seafood, which he used for offloading fish. Prior to 2002, Mr. Fyrberg built a processing plant to cook, peel, and freeze red shrimp (prawns) for shipment to foreign countries. Mr. Fyrberg was instrumental in creating a wharf take-out facility and he started the ground fish industry in Newburyport, Massachusetts. About twenty (20) years ago, Mr. Fyrberg incorporated Crescent Fisheries, Inc. through which he bought, reconditioned and sold fishing vessels. Mr. Fyrberg has never been an operator/captain of any of his vessels. Mr. Fyrberg bought the fishing vessel Harvester, rehabbed it and in around 2002, used it for catching monkfish. He sold the Harvester in 2008-2009. It was a trip boat and Matthew M. Vieira was the captain. Mr. Fyrberg bought the fishing vessel Sarah-Kate, which he purchased through the Sarah-Kate Fisheries, Inc. Starting in 2000, the Sarah-Kate was operated for about five-six (5-6) years, by [redacted], [redacted] and finally [redacted]

Mr. Fyrberg was a member of the Monkfish Committee Advisory Board. When the regulations imposed monkfish daily limits, Mr. Fyrberg pointed out that they would run afoul of the multispecies regulations. EX1, Special Master Interview with David Fyrberg, Fishing Vessel Owner (Mar. 21, 2011). The regulations required that nets have 10'' mesh size for monkfish fishing, but 6.5'' mesh size for multispecies fishing. Mr. Fyrberg later became a victim of his own prediction.

Mr. Fyrberg experienced difficulty with the captains who operated his fishing vessels.

On February 10, 2004, a NOVA issued charging, [redacted] operator, and Sarah-Kate Fisheries, Inc., owner of the Sarah-Kate, with landing two (2) sharks on November 26, 2003 without a valid shark permit and for improperly "finning and gutting the sharks." EX2, Notice of Violation Assessment (Feb. 10, 2004). The NOVA assessed a penalty of $5,000 which was subsequently amended to $2,500 but eventually settled for $1,300 plus forfeiture of $122.38 from the sale of fish that was seized when the Sarah-Kate offloaded. EX3, Settlement Agreement (Mar. 17, 2004).

On April 26, 2005, a NOVA issued charging [redacted], operator and Sarah-Kate Fisheries, Inc., owner of the Sarah-Kate, in count1, with four (4) separate landings of monkfish overages on February 12, 14, 26, and 29, 2004 for an assessed penalty of $40,000 and in count 2, with [redacted] with making a false statement on March 6, 2004, for which the owner was vicariously responsible, for an assessed penalty of $10,000. EX4, Notice of Violation Assessment (Apr. 27, 2005).

Additionally, Sarah-Kate Fisheries, Inc., as owner and [redacted], as operator, were charged in a NOVA in count 1, for exceeding the monkfish limit, in count 2, for failure to remove

gillnet gear and in count 3, with [redacted], making a false statement. The date of these violations was April 21, 2004. The penalty assessed for these violations was $35,000 together with a permit sanction.

These later two (2) cases were consolidated for settlement purposes in an agreement signed on February 22, 2006. EX5, Settlement Agreement (Feb. 22, 2006). The agreement provided for payment of $26,000, later amended to $28,000, plus interest, in accordance with a payment schedule; forfeiture of $7,801.60 from the sale of fish seized; a requirement that the vessel owner permanently install a VMS system on the Sarah-Kate; and a four (4) month permit sanction, which required the Sarah-Kate to remain tied to the dock. EX6, Modified Settlement Agreement (Mar. 3, 2006). While docked, the vessel was not permitted to be repaired, overhauled or maintained. Supra, EX1.

On July 3, 2007, USCG Boarding Officer Michael Barnes, USCG Assistant Boarding Officer Lieutenant Margaret Kennedy and boarding team members Ignatius Baran and Joshua Gomez boarded the Harvester inside the Seasonal Area Management ("SAM") East. Officer Barnes asked [redacted] if he were familiar with the regulations concerning the SAM area, to which he responded he was not. Officer Barnes noticed that there were no weak links for whales in the two (2) lines of gillnet gear. Upon being questioned, [redacted] explained how the gear was set up and Lieutenant Kennedy drew a diagram, without weak links for whales. [redacted] agreed that there were no weak links. EX7, Offense Investigation Report by Daniel D'Ambruoso, Special Agent, NOAA (Aug. 1, 2007).

In the meantime, Officer Baran and Officer Gomez measured the catch on board and determined that all of it was within the size limit and the breakdown of the catch was almost

exactly what [redacted] had reported in his logbook. Officer Barnes confirmed that the Harvester had declared into one area and was fishing in another without regulated gear. Id.

USCG informed Officer Barnes that the entire catch would be seized because it was caught with incorrect gear in the SAM. However, Officer Barnes did not share this with [redacted], who was worried about exceeding the limit and returning to port too early with an overage. Officer Kennedy told [redacted] not to worry because the order was coming directly from NMFS.

[redacted] telephoned Mr. Fyrberg to inform him of the boarding. Mr. Fyrberg obtained information from the manufacturer of the gill nets that the knots with electrical tape around them reduced the breaking strength by at least 50% and were whale compliant.

Officer Barnes and Lieutenant Kennedy escorted the vessel back to port.

Later that day, SA D'Ambruoso had a telephone conversation with Mr. Fyrberg. At that time, Mr. Fyrberg explained that the weak links were built into the gillnet panels. Mr. Fyrberg stated that he had obtained approval to use this type of panel from NOAA's Protected Resources employee, David Gouveia. SA D'Ambruoso spoke with Mr. Gouveia who informed him that the net panels were acceptable, but there might be an issue with the number of end lines and their configuration. SA D'Ambruoso informed Mr. Fyrberg of this conversation. SA D'Ambruoso called Mr. Fyrberg later to inform him that the Harvester was being directed back to port and he would not charge for any overages because NOAA OLE was ending the trip. SA D'Ambruoso also told Mr. Fyrberg that if there was any gear outside of the SAM, Mr. Fyrberg could leave it there legally. Id.

On July 6, 2007, Mr. Fyrberg informed SA D'Ambruoso that the Harvester was returning and would be in the port that evening. He did not know whether all of the monkfish tags would be

accounted for since the Harvester had lost some gear when another fishing vessel had towed through the Harvester's gillnet gear. The Harvester had also left some monkfish gear at sea. Mr. Vieira confirmed that the Harvester was fishing with two (2) different kinds of gillnet gear, 12'' monkfish nets and 6.5'' diamond groundfish nets. Id.

On July 10, 2007, SA D'Ambruoso interviewed Mr. Fyrberg in the presence of his lawyer, Stephen Ouellette. Mr. Fyrberg explained that his gear was set up to fish in the Dynamic Area Management ('DAM') zone and that the Harvester sometimes uses a Danforth anchor system and also a section of railroad track or a bar chain as an anchoring system, which is not permitted. With respect to regulations, Mr. Fyrberg typically receives them, passes them onto his son, who passes them onto [redacted] but [redacted] does not always get the notices.

On July 10, 2007, SA D'Ambruoso seized a check in the amount of $4,213.82 from Ipswich Shellfish representing the Harvester's offloaded catch. On July 11, 2007, he sent two (2) samples of rope from the Harvester to John Kenney, Fisheries Engineer with NOAA Protected Resources with the request that Mr. Kenney test the specific gravity of the rope. On July 25, 2007, the tests revealed that one (1) of the ropes was a sinking rope and the other was a floating rope. Under 50 CFR 229.32(g)(4)(i)(B) and (g)(4)(ii)(B), a vessel fishing in the SAM East area must have gear with ground lines and buoy lines made entirely with sinking or neutrally buoyant lines.

The Harvester made a fishing trip from July 13 to July 15 without Mr. Fyrberg informing SA D'Ambruoso. On July 17, 2007, SA D'Ambruoso seized a check in the amount of $24,679.40 from New England Marine Resources from the first trip (landed on July 6, 2007). On July 23, 2007, SA D'Ambruoso called Mr. Fyrberg to inform him that proceeds from the sale of fish

landed on July 15, 2007 would be seized for violation of gillnet gear requirements in the SAM zone. On July 26, 2007, SA D'Ambruoso seized a check in the amount of $8,693.20 from New England Marine Resources and a check in the amount of $1,935.75 from Ipswich Shellfish representing fish offloaded from the Harvester's second trip on July 15, 2007.

On July 26, 2007, SA D'Ambruoso called [redacted] and learned from him that the Harvester did not have monkfish tags. 50 CFR 648.92(b)(8)(ii) requires that a vessel fishing for monkfish have one (1) monkfish tag per net. [redacted] did not know if the Harvester was ever issued monkfish tags.

On July 30, 2007, SA D'Ambruoso sent an EAR to Mr. Fyrberg and the Harvester, and a separate one to [redacted], charging them with multiple violations. Thereafter, on August 29, 2007, EA MacDonald issued a NOVA, charging Crescent Fisheries, Inc. and [redacted] with ten (10) counts and assessed a civil penalty of $89,500, as follows:

Count 1 – from June 30, 2007 through July 6, 2007, unlawfully fishing in the SAM (Seasonal Area Management) with anchored gear partially comprised of floating ground line and bouy lines when the requirement was to use lines with sinking or neutrally buoyant lines - $1,500 assessed penalty;

Count 2 – from June 30, 2007 to July 6, 2007, fishing in the SAM without the required weak links - $5,000 assessed penalty;

Count 3 – from June 30, 2007 to July 6, 2007, fishing in the SAM with 9 lines totaling approximately 200 nets, where the requirement was to have no more than one buoy line per net string deployed at the northern or western end of the gillnet string - $1,500 assessed penalty;

Count 4 – from June 30, 2007 to July 6, 2007, fishing in the SAM East with about 4 sets of 15 nets each that did not have a Danforth-style anchor at each end of the net string, but had two chain links approximately 1.5 feet long - $5,000 assessed penalty;

Count 5 – from June 30, 2007 to July 6, 2007, fishing with 60 gillnets with mesh size of approximately 6.5 inches when the requirement is that they be at least 10 inches - $25,000 assessed penalty;

Count 6 – from June 30, 2007 to July 6, 2007, fishing with 200 gillnets when the limit was 150 - $25,000 assessed penalty;

Count 7 – from June 30, 2007 to July 6, 2007, fishing with 140 gillnets without monkfish tags - $10,000 assessed penalty;

Count 8 – from July 14, 2007 to July 15, 2007, fishing in the SAM with gear partially comprised of floating ground line and bouy lines when the requirement was to use lines with sinking or neutrally buoyant lines - $1,500 assessed penalty;

Count 9 – from July 13, 2007 to July 14, 2007, fishing with 140 gillnets that were missing monkfish tags, - $10,000 assessed penalty;

Count 10 – on three trips in June and July of 2007, fishing under NE multispecies DAS without obtaining an annual designation as a trip vessel and keeping a confirmation on board the vessel - $5,000 assessed penalty.

EX8, Notice of Violation Assessment (Aug. 29, 2007).

There was an accompanying NOPS, which suspended the vessel and operator permits for 120 days. EX9, Notice of Permit Sanction (Aug. 29, 2007).

Mr. Fyrberg did not consider requesting an ALJ hearing because the fines would be exponentially higher and there would be no jury of his peers. Supra, EX1.

[redacted]

On May 7, 2008, Mr. Fyrberg signed a combined settlement agreement on behalf of Crescent Fisheries, Inc. and [redacted] signed it on his own behalf. Under the agreement, count

4 was dismissed, count 7 was merged into count 9, and the assessed penalty in counts 5 and 6 were reduced to $10,000 each. The violations for fishing in the Eastern U.S./Canada Area without properly declaring into that area, which was the subject of another NOVA for fishing in a prohibited area on March 13 and 16, 2007, were reduced to a warning. Crescent Fisheries, Inc. and [redacted] agreed to pay a civil penalty of $25,000 and forfeit the balance of their 2007 monkfish DAS that would carry over to the 2008-2009 DAS allocation. They also relinquished the proceeds from the sale of 871 lbs of American lobster ($4,213.82) and 25,302 lbs of mixed fish ($24,679.40) seized on July 6, 2007, and the proceeds from the sale of 435 lbs of American lobster ($1,935.75) and 7,888 lbs of whole monkfish ($8,693.20) seized on July 23, 2007 for a total of $39,522.17. The parties agreed to a payment plan over twelve (12) payments. EX11, Settlement Agreement (May 7, 2008).

During my interview with Mr. Fyrberg, he recited an example of NOAA targeting him prior to his 2007 case. While Mr. Fyrberg was with Tri-Coastal Seafood (1992 or earlier), he was charged with intent to buy short tuna. Two (2) agents and the son of one of them came to Tri-Coastal Seafood with the son's pickup truck and tried to sell a short tuna to Mr. Fyrberg's employees. The employees did not buy the tuna because it appeared to be too short. Two (2) weeks later, two (2) agents came to Tri-Coastal Seafood and Mr. Fyrberg's employee informed him that they were the ones trying to sell short tuna. Later, Mr. Fyrberg was charged with intent to buy a short tuna. Mr. Fyrberg paid a fine in the amount of $1,000 and agreed to a six (6) month tuna license suspension. Supra, EX1. However, Mr. Fyrberg was vague in his recollection of the amount of the fine paid and I have seen no documents concerning this

violation. I can only conclude that Mr. Fyrberg believes that the OLE agents set him up for a violation. I cannot confirm the allegation.

**II. Conclusion**

Mr. Fyrberg believes that NOAA has mistreated him with respect to count five (5) in the 2007 case. He had relied on Ms. Ferrara's statement not to worry in response to his comment that the monkfish regulations would run afoul of the multispecies regulations. Yet, Mr. Fyrberg was charged in count five (5) with fishing with sixty (60) gillnets with mesh size of approximately 6.5'' when the requirement was that they be at least 10'' and he was assessed a civil penalty of $25,000 for this violation. However, this assessed penalty was amended to $10,000 in the final consolidated settlement agreement and the actual payment was reduced to $5,000 in that agreement. In light of the confusing interim rule concerning mesh size, I find by clear and convincing evidence that Mr. Fyrberg should not have been charged with this particular count in the July 30, 2007 NOVA and that this payment should be remitted to Mr. Fyrberg.

**III. Recommendation**

I recommend that the Secretary of Commerce remit the sum of $5,000 to Mr. Fyrberg.

**CASE 53: THOMAS KOKELL**

*Fisherman complains about limitations (reductions in catch and loss of earnings) placed on fishermen and the industry which make it difficult to stay in business much less make a profit. Fisherman furthers complains about a 2006-2007 NOAA Enforcement Action against him.*

## I. Findings of Fact

Thomas Kokell lives and works in East Northport, New York and owns the fishing vessel Cindisea, which is an 85' trip boat.

On November 21, 2006, Coast Guard officers boarded the Cindisea. A Coast Guard officer noticed a false bulkhead made of foam in the aft part of the fish hold. EX1, Offense Investigation Report by Anthony Truong, Special Agent, NOAA, p. 7 (Nov. 29, 2006). Mr. Kokell stated that there were fuel tanks behind the bulkhead. Further inspection of the area revealed several boxes of summer flounder. There were a total of seventeen (17) boxes, of which two (2) contained monkfish and fifteen (15) contained summer flounder. When asked how long he had had the compartment, Mr. Kokell could not provide an exact date, but he stated that he had made no more than three (3) or four (4) trips with that compartment. EX2, Special Master Interview with Thomas Kokell, Fisherman (Mar. 9, 2011). Officer Angell issued an EAR. Upon arrival at the dock, the fifteen (15) boxes containing 1,050 lbs of flounder were seized and sold for $2,100.

On November 22, 2006, Special Agents Anthony Truong and Ernie Soper interviewed Mr. Kokell. Mr. Kokell was agitated and frustrated during the interview. SA Soper assured Mr. Kokell that the violation was only civil, and not criminal. During the interview, Mr. Kokell admitted that he knew the summer flounder season had ended. Finally, Mr. Kokell told the

agents to "take his boat because he refuses to provide any additional information regarding his previous illegal actions." Supra, EX1, p. 15 (Nov. 29, 2006).

On February 12, 2007, EA MacDonald sent Mr. Kokell a NOVA, containing four (4) counts, as follows:

> Count 1 – interfering with an investigation by means of hiding fish in a secret compartment on November 21, 2006 - $50,000;
>
> Count 2 – fishing with nets with mesh sizes of 3 inches when the minimum required is 5.5 inches on November 21, 2006 - $15,000;
>
> Count 3 – landing 1,050 lbs of summer flounder on November 21, 2006 when the summer flounder commercial quota for New York had been harvested - $25,000;
>
> Count 4 – failure to maintain on board a fishing log report and make it immediately available for inspection on November 21, 2006 - $15,000.
>
> EX3, Notice of Violation Assessment (Feb. 12, 2007).

On February 12, 2007, EA MacDonald also sent Mr. Kokell a NOPS, suspending the vessel and operator permits for 180 days. EX4, Notice of Permit Sanction (Feb. 12, 2007).

Mr. Kokell retained J. David Eldridge to represent him in this matter.

On April 6, 2007, EA MacDonald issued an amended NOPS, in which he listed removal of the hidden compartment as a vessel and operator permit renewal condition. EX5, Amended Notice of Permit Sanction (Apr. 6, 2007).

On May 5, 2007, Mr. Kokell signed a settlement agreement in this case. Under the terms of the agreement, he agreed to pay a civil penalty of $65,000 (in accordance with a payment plan) and to serve a 6.5 month permit sanction on his vessel and operator permits. EX6, Settlement agreement (May 21, 2007). Mr. Kokell admitted to me that he was guilty of concealing the fish and he should have told the Coast Guard about the compartment. Supra, EX2.

## II. Conclusion

On November 3, 2008, EA MacDonald granted Mr. Kokell an extension to pay the civil penalty and drafted a new payment plan. Over the next three (3) years, it became apparent to EA MacDonald that Mr. Kokell did not have the ability to pay the balance of the penalty of approximately $30,000. As a result of Mr. Kokell submitting financial information, this fact was confirmed and on January 13, 2011, EA MacDonald notified Mr. Kokell that NOAA had written off "the full amount of the remaining debt." EX7, Letter from James Mitchell MacDonald, Enforcement Attorney, NOAA, to Thomas Kokell, Fisherman (Jan. 13, 2011). Under the circumstances of this case in which Mr. Kokell has admitted to concealing fish in a secret compartment and catching flounder out of season, I find that the eventual compromised penalty of $35,000 paid over time and a $30,000 balance of penalty written off is a fair and reasonable resolution of this case.

Mr. Kokell now has operator/vessel permits that allow him to fish in state and federal waters. However, Mr. Kokell complains that he has been excluded from the Research Set-Aside (RSA) program, which allows fishermen to bid for set aside DAS for scientific research. EA MacDonald has explained that fishermen with prior violations are usually excluded from scientific research programs. EX8, Special Master Interview with James Mitchell MacDonald, Enforcement Attorney, NOAA (Mar. 14, 2011). Mr. Kokell has a record of prior violations and as such, under the policy enunciated by EA MacDonald, would be excluded from the RSA program.

## III. Recommendation

I recommend that the Secretary take no action concerning this case.

## CONCLUSION

In conducting this investigation, I have focused primarily on the individual cases reviewed in the Report but incidentally, have made several observations that I feel compelled to include as a conclusion to this Report.

### Regulators Training the Regulated

First, there is a siege mentality throughout the fishing industry. Fishermen and fish dealers believe that they are treated like criminals. It is an "us against them" mentality. The regulations are complex, complicated, constantly changing, and in some cases, contradictory. Fishermen are paranoid every time they come ashore to offload their catch that they will be met at the dock by a Special Agent who will look for and find a violation of some obscure or even well known regulation. They feel that the offloading of their catch is fraught with peril. Fish dealers who daily offload volumes of fish are always apprehensive that they would be charged with a violation committed by a fisherman, over whom they have little or no control or that the daily requirement of reporting substantial volumes of fish may inadvertently be in error. All of these occurrences can result in a violation, which in turn, can result in a substantial monetary penalty or permit sanction. Either may be enough to put a fisherman or fish dealer out of business. There are cases reviewed in this Report that support this conclusion. This is the plight of the regulated.

The regulators have recently suffered a similar plight as their past actions in enforcing the fishing regulations are under public attack. The Special Agents and Enforcement Attorneys feel that they are now under siege because in their minds, they are being punished for merely doing their job. However, as the pendulum of public opinion swings away from them to the

fishermen and fish dealers, they should recognize that in some instances, their past actions may have precipitated their current plight. In this Report, I have documented several cases of aggressive enforcement by NOAA personnel that have resulted in the OIG investigation, my investigation and the consequent recommendation of relief for several fishermen and fish dealers. I am convinced that this siege mentality can be partially eliminated through meaningful contact between the regulators and the regulated. This contact can be accomplished by frequently scheduled training sessions on the regulations conducted by NOAA enforcement personnel. This includes the Special Agents and Enforcement Attorneys. The Massachusetts State Ethics Commission is an instructive example where numerous education and/or training sessions are the Commission's most effective enforcement tool for dealing with the more than 400,000 state, county and municipal employees subject to its jurisdiction.

Assessment of Penalties

There are a number of problems that require further review in connection with the assessment of penalties. First, some Enforcement Attorneys have told me that their approach to the assessment of monetary penalties is to start at the middle of the penalty range and then using the factors set forth in the MSA, go either up or down to what they believe to be a reasonable penalty. For most fishermen, this is a harsh approach. Assuming a maximum penalty of $110,000 and a starting point in the vicinity of $50,000, this is more than most fishermen can afford even if the assessed penalty is substantially less than $50,000. The Enforcement Attorneys point out that the MSA allows the Enforcement Attorneys to make a further adjustment to the assessed penalty based on the "ability to pay" provision of the statute. That has occurred in one or two cases reviewed in this Report. However, in some of

the other reviewed cases, fishermen were forced to pay a monetary penalty that they could not afford because the Enforcement Attorney refused to adjust the penalty on their ability to pay since they had other assets, such as a vacant lot or their marital residence, which they could sell to pay the penalty. One Enforcement Attorney stated that in some minor cases, she assesses a penalty of twice the value of the catch. For a trip boat, the value of the catch could be $24,000 which could result in an assessed penalty of $48,000. In some cases, the catch is seized which adds substantially to the penalty. I am not sure that this is an appropriate method for assessing penalties.

Second, I have noticed in practically every case a pattern of assessing high monetary penalties in order to force a settlement of approximately half of the assessed penalty. The fisherman or fish dealer has no option but to settle because as previously pointed out in this Report and discussed later, they have no confidence that they could get a fair de novo hearing before an ALJ. The choice is simple. Settle with the Enforcement Attorney for a coerced amount or run the substantial risk that the ALJ will uphold the original assessment which could force the fisherman out of business. This scenario becomes even more egregious because of the constant use of permit sanctions as a substantial bargaining chip and advantage to the Enforcement Attorneys in negotiating a settlement.

A third problem with the assessment of penalties is the fact that on appeal before an ALJ, the fisherman or fish dealer cannot cross-examine the Enforcement Attorneys who assessed the penalty to test whether the factors in the MSA were followed and/or whether the assessed penalty was consistent with penalty assessments in other similar cases. Since the Enforcement Attorney who assessed the penalty is usually the prosecutor of the case before

the ALJ, [s]he cannot be forced to testify. However, since this is an administrative hearing, the simple solution to this problem is to specifically provide by regulation or otherwise that the Enforcement Attorneys can and must testify during the ALJ hearing or in the alternative, which is more costly, have another Enforcement Attorney try the case to allow the penalty assessing Enforcement Attorney to testify.

ALJ Hearings

It is a common belief among fishermen on the East Coast that there is little or no chance of success before a Coast Guard ALJ and that NOAA and the Coast Guard ALJs work hand-in-hand. This same sentiment was expressed to me, probably more graphically, by every lawyer, fisherman and fish dealer I interviewed who has had experience in appealing a case to a Coast Guard ALJ. With few exceptions, every Coast Guard ALJ decision I reviewed during this investigation, upheld NOAA on the issue of liability and the originally assessed penalty. In one case, the Coast Guard ALJ increased the assessed penalty, in another, the ALJ decreased the penalty, and in most cases, the ALJ affirmed NOAA's assessed penalties. In one case, a Coast Guard ALJ totally ignored a United States District Court's Order on remand and re-instated an assessed penalty which the District Judge had vacated because it was excessive.

It is clear from my several month investigation that a vast majority of fishermen, fishing businesses and the lawyers that represent them have no confidence that any sort of justice would prevail by appealing a case to a Coast Guard ALJ. This perception is not lessened by the fact that both parties can appeal the ALJ decision to the NOAA Administrator. There is little or no confidence in the NOAA Administrator's neutrality on such an appeal. I have not reviewed every Coast Guard ALJ decision and cannot opine on whether the perception of futility on

appeal to a Coast Guard ALJ by people in the fishing industry and their lawyers is correct but I can state with certainty that the perception is universal and NOAA Enforcement Attorneys have a decided advantage in negotiating settlements because of this perception. I suggest a comprehensive review as to whether the Coast Guard ALJs should continue as the presiding officers on appeal in NOAA cases or whether there is an alternative forum where those involved in a de novo appeal of a NOAA enforcement case have confidence that they will get an impartial hearing.

Respectfully submitted,

Hon. Charles B. Swartwood, III (ret.)