

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

|                             |   |                               |
|-----------------------------|---|-------------------------------|
| <b>IN THE MATTER OF:</b>    | ) |                               |
|                             | ) |                               |
| <b>Lobsters, Inc.</b>       | ) | <b>NE980310M/V</b>            |
| <b>Lawrence M. Yacubian</b> | ) |                               |
|                             | ) | <b>Hon. Joseph N. Ingolia</b> |
|                             | ) |                               |
| <b>Respondents</b>          | ) |                               |

**AGENCY'S MOTION TO STAY THE PROCEEDINGS**

On June 16, 2011, Respondents Lobsters, Inc. and Lawrence M. Yacubian (Applicants) filed an application with this Court for an award of \$328,257.64 in attorney's fees and costs pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a). The underlying agency adversary adjudication that Applicants rests this claim on involved NOAA enforcement proceeding NE980310M/V, which settled by agreement on June 27, 2005. Applicant's complaints regarding the Agency's conduct in these cases were initially reviewed by the Department of Commerce Office of Inspector General and later by a Special Master appointed by the Secretary of Commerce. Based on the Special Master's findings, the Secretary made various determinations in a Decision Memorandum dated May 17, 2011, including a decision to remit penalties to Applicant. The Secretary further directed NOAA to hire ALJs from a different agency to hear its enforcement cases. NOAA is working diligently to hire new ALJs as quickly as possible.

The Agency requests that this matter be stayed until NOAA carries out the Secretary's direction to contract with ALJs from another agency, so that one of those


Agency's ALJs can hear this case. Unlike the other NOAA cases before Coast Guard ALJs, the instant matter and another. In the Matter of Louis Mitchell and Gloucester Fish Exchange, Inc., NE040024FM/V and NE0602918FM/V ("Gloucester Fish Exchange"), were reviewed by the Special Master and, based on his report, the Secretary remitted penalties to the applicants in these cases. In the present matter, U.S. Coast Guard ALJ Parlen McKenna recently recused himself "to ensure that Applicants receive consideration of their EAJA claim without unnecessary distractions and to uphold the integrity of the United States Coast Guard's Administrative Law Judge Program. . . ." July 29, 2011 *Order Granting Respondent's Motion for Recusal. In the Matter of Lobsters, Inc., Lawrence Yacubian*, NE 980310M/V (attached as Agency Exhibit 1, at 6). NOAA seeks a stay in this matter for similar reasons.

Although Applicant now states that it does not wish to delay this matter further, in its recusal motion, Applicant sought the recusal of not just the ALJ then presiding over the case, but all U.S. Coast Guard ALJs. Accordingly, out of an abundance of caution and to avoid further distractions, the Agency believes that a stay in this matter is appropriate.

For these reasons, the Agency requests a stay in this matter until it contracts with ALJs from another agency, so that an ALJ from that Agency can hear this case.

Respectfully Submitted.

National Oceanic and Atmospheric Administration

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

**IN THE MATTER OF:** )

**Lobsters, Inc.** )

**Lawrence M. Yacubian** )

**Respondents** )

**NE980310M/V**

**Hon. Joseph N. Ingolia**


**AGENCY'S MOTION TO STAY THE PROCEEDINGS PENDING  
REASSIGNMENT**

I hereby certify that a copy of the above-titled document was e-mailed to the following individuals on July 29, 2011:

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Honorable Joseph N. Ingolia  
Chief Administrative Law Judge  
Commandant (CG-00J)  
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UNITED STATES DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

|                             |   |                               |
|-----------------------------|---|-------------------------------|
| <u>IN THE MATTER OF:</u>    | ) | <b>Docket Number</b>          |
|                             | ) |                               |
| <b>Lobsters, Inc.</b>       | ) | <b>NE980310M/V</b>            |
| <b>Lawrence M. Yacubian</b> | ) |                               |
|                             | ) | <b>Hon. Parlen L. McKenna</b> |
|                             | ) |                               |
| <u>Respondents</u>          | ) |                               |

**ORDER GRANTING RESPONDENTS' MOTION FOR RECUSAL**

On July 25, 2011, Lobsters, Inc. and Lawrence M. Yacubian (Applicants)<sup>1</sup> filed a motion for my recusal from hearing and deciding their application for attorney's fees and expenses against the National Oceanic and Atmospheric Administration (NOAA or Agency) under 5 U.S.C. § 504 (the Equal Access to Justice Act or EAJA).

Applicants filed the recusal motion pursuant to 15 C.F.R. § 904.205. As indicated in an earlier order, NOAA EAJA proceedings are governed by the Department of Commerce's implementing regulations found at 15 C.F.R. Part 18 – not the civil enforcement proceedings at 15 C.F.R. Part 904. Neither the statute itself, nor Commerce's EAJA regulations contain specific provisions regarding such motions for recusal. Nevertheless, I will rule on the recusal motion, guided by general principles governing the recusal of judicial officers outlined by 15 C.F.R. § 904.205.

**Procedural History**

Judge Edwin M. Bladen originally presided over the underlying enforcement case and issued the Initial Decision and Order. See In re Lobsters Inc., et al., 2001 WL 1632538 (NOAA 2001). Judge Bladen determined that respondents had committed three

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<sup>1</sup> Applicants are also termed "respondents" in this Order when referring to the underlying NOAA enforcement case.

violations of the Magnuson Stevens Act (16 U.S.C. § 1857(1)(A) and the Agency's implementing regulations at 50 C.F.R. §§ 648.14(a)(39), 648.81(b)(1), and 600.725(i)). Specifically, the Agency charged respondents with unlawfully entering a closed fishing area on December 8 and 11, 1998 and also with making false oral statements to an authorized officer concerning the harvesting of fish. *Id.* Judge Bladen evaluated the required statutory and regulatory factors in considering the penalty for the three proven violations and determined that a fine of \$250,000 as well as the revocation of respondents' permits was appropriate under the law and the facts and circumstances of the case. *Id.*

Respondents sought review of the Initial Decision and Order under 15 C.F.R. § 904.273. On July 2, 2003, the NOAA Administrator denied respondents' petition for review, finding Judge Bladen's decision as to liability and penalty assessment were supported by substantial evidence and no basis for discretionary review existed. *See In re Lobsters, Inc. et al.*, 2003 WL 22000640 (NOAA 2003).

Respondents appealed the case to the United States District Court for Massachusetts under the review provisions of the Administrative Procedure Act (APA at 5 U.S.C. § 702). On November 29, 2004, Judge Groton issued a Memorandum and Order that found: (1) substantial evidence supported the Agency's determination that respondents committed the two closed area violations; (2) the evidence did not support the Agency's determination that Mr. Yacubian had made a false statement; and (3) the case should be remanded to NOAA for *de novo* reconsideration of civil penalties and permit sanctions. *See In re Lobsters Inc., et al.*, 346 F. Supp. 2d 340 (D. Mass. 2004).

Judge Groton specifically evaluated the penalties the Agency assessed and determined that Judge Bladen's consideration of several of the plaintiffs' prior violations

was in error. *Id.* at 347-349. First, the court found that respondents' 1998 violation was precluded from being considered by the terms of the settlement agreement resolving that violation. *Id.* at 347.

Second, the court analyzed Judge Bladen's consideration of violations occurring more than five years prior to the then-current offenses. *Id.* at 348-349. The court indicated that NOAA's policy was to consider only final administrative decisions within a 5-year period before the date of the subsequent offense in determining a respondent's prior history. *Id.* at 348. Judge Groton therefore concluded that Judge Bladen had abused his discretion by considering the violations that occurred more than five years before the violations being considered without providing any reasoned explanation for departing from the Agency's five-year "look back" policy. *Id.* at 349. Judge Groton ordered on remand that only the March 19 and April 10, 1994 prior offenses be considered in assessing a penalty or that the Agency explain its deviation from the "look back" policy. *Id.*

Judge Groton also addressed allegations that Judge Bladen disregarded the Agency's penalty schedules and stated in a footnote that "[i]n any event, considering the nature of the offenses and all other relevant circumstances, the severity of the monetary penalty and the permanent revocation of plaintiffs' fishing permits are deemed excessive in this particular case." *Id.* at n.1.<sup>2</sup>

On May 5, 2005, NOAA, Office of General Counsel, filed a motion for expedited hearing with the United States Coast Guard, ALJ Docketing Center, pursuant to 15 C.F.R. § 904.209. This action began the process of remanding the case to the Coast Guard ALJ

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<sup>2</sup> As recognized by the District Court, Mr. Yacubian had five prior fishery violations. See *Lobsters, Inc. v. Evans*, 346 F. Supp. 2d at 347 (noting Judge Bladen's listing of the five prior offenses). Adding the two upheld on appeal to the District Court, Mr. Yacubian has seven such offenses. Per the remand order, not all seven would have been taken into account in assessing a proper penalty for his two violations at issue.

Program for disposition in light of the District Court's vacating the penalty and permit sanctions earlier imposed. On May 9, 2005, the case was assigned to me by order of the Coast Guard's Chief Administrative Law Judge. I was assigned because Judge Bladen had retired in the interim and therefore the case could not be assigned to him following remand.

On May 13, 2005, respondents filed an Opposition to Agency Motion for Expedited Hearing. Respondents argued that the Agency's efforts to institute an expedited hearing did not comply with the remand from the District Court and that the Agency had to issue a new NOVA and NOPS due to the ordered de novo review of the penalty and permit sanction. Respondents also argued that discovery was needed to obtain information about the Agency's basis for any penalty it would seek following remand.

On June 15, 2005, I issued an Order Granting Agency's Motion for Expedited Hearing, Directing the Parties to Submit Preliminary Positions on Issues and Procedures (PPIP), and Notice of Hearing. That Order thoroughly discussed and evaluated respondents' arguments that a new NOVA and NOPS had to be filed. Under Agency law and precedent, as well as under due process principles of the APA, I found that these arguments should be rejected and set the case for hearing to consider what penalties should be imposed for the two proven violations. Contrary to Applicants' assertions, I never reinstated the penalties.<sup>3</sup> The PPIPs called for in that scheduling order specifically required Agency counsel to state what penalties it would seek to impose following remand (and what evidence the Agency proposed offering to support the penalty sought) and provided respondents an opportunity to respond to the Agency's proposed penalty.

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<sup>3</sup> This point of disagreement is incapable of resolution due to Applicants' continued misunderstanding of the purpose and character of Agency NOVA and NOPS and the scope of proceedings following remand from the District Court. Simply put, no penalty was "reinstated" following remand from the District Court. Applicants' claim that I made "patently false statements" in that regard is thus misleading at best. See Applicants' Recusal Memorandum at 3.

Applicants entered into a settlement agreement with the Agency on June 24, 2005, which the Agency signed on June 27, 2005. I never became substantively involved in Applicants' case and merely issued a procedural order dealing with how the proceedings would be governed following remand from the District Court of Massachusetts. I had no role in reviewing or approving the settlement agreement the parties executed. Indeed, pursuant to Agency regulations, NOAA does not inform the judge of the terms of its settlements but merely files a notification of settlement and request to have the case removed from the docket. See 15 C.F.R. § 904.213.

As for the adjudication of the underlying enforcement action, the settlement agreement ended all substantive matters associated with that case. Indeed, when I discussed the Applicants' enforcement case in an order issued in another pending case (i.e., In re Peter Pan Seafoods, Inc. and Seven Seas Fishing Co. (AK0401011)), it was extremely improbable, if not impossible, for me to have any further dealings with Mr. Yacubian's case because he had entered a settlement agreement with the Agency. The terms of such settlements generally preclude any such claims as each party agrees to pay for its own attorney fees and costs. See Agency's Opposition to Respondent's Motion for Additional Discovery (July 22, 2011) (attaching the Settlement Agreement as Exhibit 1).

#### **Ruling on Recusal Motion**

Appearance of bias is the incorrect standard to use in disqualification of an administrative law judge because administrative law judges work for the agency whose action they review and an "appearance of impropriety" standard would require recusal in every case. See Bunnell v. Barnhart, 336 F.3d 1112, 1114-15 (9th Cir. 2003) (holding that actual bias must be shown to disqualify an administrative law judge); Greenberg v. Bd. Of

Governors of Fed. Reserve Sys., 968 F.2d 164, 166-67 (2d Cir. 1992); Harline v. Drug Enforcement Admin., 148 F.3d 1199, 1204 (10th Cir. 1998). No justifiable basis exists for Applicants and their counsel to claim actual bias or prejudgment in this case despite their efforts to raise issues that have nothing to do with resolving Applicants' EAJA claim.

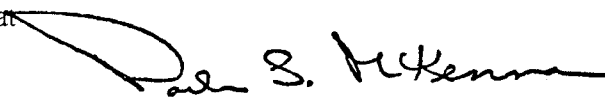
Nevertheless, in order to ensure that Applicants receive consideration of their EAJA claim without unnecessary distractions<sup>4</sup> and to uphold the integrity of the United States Coast Guard's Administrative Law Judge Program from further baseless attacks, I will recuse myself from these proceedings.

**ORDER**

**WHEREFORE:**

**IT IS HEREBY ORDERED** that Applicants' Motion for Recusal is **GRANTED** and I will have no further involvement in considering or ruling upon Applicants' EAJA claim.

Done and dated this 29th day of July, 2011 at Alameda, CA.



**HON. PARLEN L. MCKENNA**  
**Administrative Law Judge**  
**United States Coast Guard**

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<sup>4</sup> For example, Applicants have a pending motion for additional discovery that calls for information relating, in part, to funding for a trip I made to an international fisheries conference as a guest speaker. Litigants should not be able to force a judge to grant a recusal on the basis that the judge is subject to such discovery on ancillary matters and or stir up controversy where no basis in law or fact exists to support the allegations. However, in this case, to eliminate even the appearance of bias, I will recuse myself from further involvement in Applicants' case.

**CERTIFICATE OF SERVICE**

I hereby certify that I served the attached **ORDER GRANTING RESPONDENTS' MOTION FOR RECUSAL** upon the following parties (or designated representatives) and entities in this proceeding in the manner indicated:

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Done and dated this 29th day of July 2011 at  
Alameda, CA.



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