



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

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Mr. Michael A.D. Stanley
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Re: Petition for Rulemaking; Amendments to NOAA Civil Penalty Procedures; 15 C.F.R.
Part 904

Dear Mr. Walsh, Mr. Greenberg, and Mr. Stanley:

Thank you for your letter of June 26, 2012, in which you petition NOAA pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e), to initiate a rulemaking to revise its civil procedure regulations governing administrative enforcement proceedings. We appreciate your suggestions to improve the NOAA enforcement program and have carefully reviewed your proposal using the Agency's broad discretion to set priorities and allocate its limited resources.¹

You seek seven changes to NOAA's civil procedure regulations. As outlined below, we believe that four of your proposed changes are already addressed by current regulations, and we have legal or policy concerns with the remaining three. On balance, while we appreciate your attention to NOAA's enforcement process, we have decided not to initiate rulemaking on these regulations at this time.

Your petition indicates that it is supported, in part, by the Department of Commerce Inspector General's findings during 2010, and the April 2011 Report and Recommendations of Special Master Charles B. Swartwood, III. It is important to emphasize that since 2010, NOAA has

¹ See *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 527 (2007); *Bargmann v. Helms*, 715 F.2d 638, 641 (D.C. Cir. 1983).



made transformational changes to its enforcement program, creating a more effective, fair, and transparent enforcement process. An extensive list of modifications to the enforcement program is provided at <http://www.noaa.gov/lawenforcementupdates/timeline.html>. This list includes issuance in June 2010 of a new civil procedure regulation relating to burden of proof on penalties; mandated headquarters review and approval of all charging and settlement decisions since March 18, 2010; issuance of a new national penalty policy; implementation of greater compliance assistance by the Office of Law Enforcement; implementation of a new Office of Law Enforcement workforce management plan; replacement of key enforcement leadership and personnel; the creation, with public input, of national and regional enforcement priorities; implementation of a new Enforcement Section internal operations and procedures manual; publication of on-line biannual reports of enforcement charging and settlement decisions; a significant increase in oversight of the Asset Forfeiture Fund; development and implementation of a new Enforcement Section case tracking database system; and Secretarial commitment to work with fishery councils, fisherman, and stakeholders to streamline and simplify fishing regulations. In short, the enforcement program is substantially different from the program considered in the materials you reference.

We also note that NOAA periodically reviews its civil procedure regulations to ensure that they are both fair and efficient. NOAA's most recent revision of its civil procedure regulations occurred in June, 2010. This revision eliminated the presumption in favor of NOAA's assessed penalty or sanction at a hearing, thereby enhancing the fairness of NOAA's administrative proceedings. *See* 75 Fed. Reg. 35631 (June 23, 2010). In light of your petition, we have reexamined NOAA's civil procedure regulations and continue to believe that they are reasonable, impartial, and fair.

We have carefully considered the seven specific proposals contained in your petition, and have concluded that four of your proposals are already addressed under current law.

First, you request that NOAA's civil procedure regulations provide for the stay of administrative hearings while the Agency and a respondent confer on whether an amendment or modification of the NOVA is appropriate. Current regulations already provide a mechanism to stay proceedings for this purpose. Specifically, 15 C.F.R. § 904.102(c) permits a respondent to request from the Agency, within 30 days of service of a NOVA, an extension of time of up to 30 days in which to respond to the NOVA, including a delay in requesting a hearing. During this time, "[t]he respondent may seek amendment or modification of the NOVA to conform to the facts or law as that person sees them...." 15 C.F.R. § 904.102(b). Agency counsel may, for good cause, grant additional extensions of time for this purpose. 15 C.F.R. § 904.102(d).

Similarly, you propose that the regulations specify that "NOAA bears the responsibility to establish a violation, and the appropriate sanction, by a preponderance of the evidence." It is already well established that NOAA bears the initial burden of production and the burden of proving facts supporting alleged violations by a preponderance of the evidence. *See, e.g.,* 5 U.S.C. § 556(d) ("the proponent of a rule or order has the burden of proof."); In re Frenier and Rotoli, NOAA Docket No. SE1103883 (ALJ, Sept. 27, 2012), at 8, citing Cuong Vo, NOAA Docket No. SE010091FM, 2001 WL 1085351 (ALJ, Aug. 17, 2001) (citing Dep't of Labor v. Greenwich Collieries, 512 U.S. 267 (1994)); In re Niquet, NOAA Docket No. SE1100310 (ALJ,

May 4, 2012), at 6 (NOAA has burden of proving alleged violations by a preponderance of the evidence). As to proving that a penalty or sanction is appropriate, as described above, NOAA revised its regulations in June 2010 to make clear that the Agency has the burden of supporting its sanctions or penalties. Also, ALJs have full authority to independently “[a]ssess a civil penalty or impose a permit sanction . . . taking into account all of the factors required by applicable law.” 15 C.F.R. § 904.204(m).

You next suggest that NOAA amend its regulations to allow respondents to seek either an accelerated decision or a motion to dismiss from an ALJ, without first seeking approval from the Agency. The current regulations already provide a process for expedited review without consent of NOAA. Specifically, under 15 C.F.R. §904.209:

In the interests of justice and administrative efficiency, the Judge, on his or her own initiative or upon the application of any party, may expedite the administrative proceeding . . . Upon granting a motion to expedite the scheduling of an administrative proceeding, the Judge may expedite pleading schedules, prehearing conferences and the hearing, as appropriate....”

Current NOAA regulations further provide that the ALJ may at any time prior to a hearing conduct a prehearing conference “upon his or her own initiative, or upon the application of any party” to facilitate an expedited process.² 15 C.F.R. § 904.216. As to dismissing portions of a case, under NOAA’s current regulations, “[t]he Judge may render a summary decision disposing of all or part of the administrative proceeding if: (a) Jointly requested by every party to the administrative proceeding; and (b) There is no genuine issue as to any material fact and a party is entitled to summary decision as a matter of law.” 15 C.F.R. § 904.210. The Agency does not believe that the current regulations prevent either party from expeditiously resolving a case.³

Finally, you recommend that NOAA amend its regulations to encourage the use of alternative dispute resolution (ADR) mechanisms, such as mediation. NOAA already has the authority to

² At such a hearing, the ALJ may consider a number of issues, including simplification or clarification of the issues or settlement of the case by consent; the possibility of obtaining stipulations, admissions, agreements, and rulings on admissibility of documents; understandings on matters already of record; or similar agreements that will avoid unnecessary proof; agreements and rulings to facilitate the discovery process; limitation of the number of expert witnesses or other avoidance of cumulative evidence; and other matters that may aid in the disposition of the administrative proceeding, including the status of settlement discussions. See 15 C.F.R. § 904.216.

³ Notably, prior to 1996, NOAA’s regulations allowed either party to move for, or the ALJ on his or her own motion to grant, a summary decision disposing of all or part of the issues in a case without seeking unanimous concurrence. See, e.g., 52 Fed. Reg. 10324, 10330 (March 31, 1987). In 1996, Congress directed the Coast Guard and the Secretary of Commerce to enter into a Memorandum of Agreement that would provide, at a minimum, “for the opportunity, if timely requested, to appear in person to respond to charges of violation of law or regulation when the opportunity for a hearing is granted by statute.” See Section 5218 of the Oceans Act of 1992, Public Law No. 102-587, 106 Stat. 5039. It is clear from the legislative history of this provision that Congress intended that a hearing request in a NOAA enforcement action be construed as a request for an in-person hearing, even in the absence of disputed facts. Thereafter, NOAA amended its regulations to eliminate the provision allowing for either party to move for a summary decision without concurrence. (See 61 Fed. Reg. 54729).

seek ADR or to consider a respondent's requests for ADR on a case-by-case basis, pursuant to 5 U.S.C. §§ 571 – 584 (Alternative Means of Dispute Resolution in the Administrative Process). Further regulations are not necessary to provide a mechanism for ADR in NOAA's cases.

You seek three additional changes to NOAA's civil procedure regulations that are not addressed under existing law. We address each of these proposals specifically below:

1. Involvement of Agency Program Officials in Enforcement Cases

You request that NOAA modify its civil procedure regulations to require that agency program officials work with NOAA enforcement attorneys in issuing Notices of Violation and Assessment of Administrative Penalty (NOVA's), as well as in the issuance of pre-hearing administrative briefs, known as Preliminary Positions on Issues and Procedures (PPIPs). Your approach is at odds with NOAA's carefully developed separation between program staff and specific enforcement actions in order to insure fairness in enforcement.

As you acknowledge in your petition, there are good reasons to keep enforcement personnel independent from program officials. Keeping the enforcement program independent ensures the integrity and non-politicization of the enforcement process, and protects enforcement personnel and the enforcement process from claims of partiality or bias. Moreover, removing program staff from the enforcement process protects agency relationships with stakeholders by allowing program staff, who often have one-on-one interactions with the regulated community, to avoid enforcement actions in which community members are implicated.

Although program staff do not provide advice in particular cases, they do engage in general enforcement discussions, including deliberations over appropriate civil penalty schedules, priority setting, and approaches to charging. For example, Agency program officials recently provided input into NOAA's new penalty policy. *See* 76 Federal Register 20959 (4/14/2011). Moreover, NOAA enforcement personnel maintain familiarity with the programs they enforce by regularly coordinating with program staff on regulatory actions, providing review and comment on proposed NOAA regulations, and attending fishery management council meetings. Thus, there is significant cooperation between enforcement personnel and program staff on general enforcement issues, but not on specific enforcement cases.

2. Application of the Federal Rules of Evidence

You request that NOAA revise its civil procedure regulations to make the Federal Rules of Evidence applicable to NOAA civil administrative proceedings. Under current regulations:

[a]ll evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing. Formal rules of evidence do not necessarily apply to the administrative proceedings, and hearsay evidence is not inadmissible as such.

15 C.F.R. § 904.251(a)(2).

Administrative hearings are less formal than federal court trials, and unlike the strict evidentiary rules that apply in federal courts NOAA's civil procedure regulations reflect the principle that ALJs should have a wide range of potentially relevant evidence before them when making administrative decisions. NOAA's evidentiary regulations are not unique. For example, the Environmental Protection Agency's (EPA's) civil procedure regulations provide that:

[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible.

40 C.F.R. § 22.22(a).⁴ Notably, EPA Administrative Law Judges (ALJs) presently hear NOAA civil administrative enforcement cases, and are therefore used to applying broad evidentiary standards in the cases before them.

It is particularly important for NOAA to have relaxed evidentiary rules because of the many *pro se* litigants involved in NOAA enforcement cases. NOAA brings a wide range of enforcement actions, both large and small, including against recreational fisherman and small commercial fishing operations. Many of those charged choose not to be represented by counsel, and may have a limited knowledge and understanding of formal legal processes. As such, implementing the Federal Rules of Evidence could well serve as an obstacle to the goal of procedural fairness, unduly favoring trained NOAA attorneys over unrepresented respondents unfamiliar with formal evidentiary rules.

3. Development of the Record for Possible Administrator and Judicial Review

You propose that NOAA amend its civil procedure regulations to require that, in an enforcement action in which a respondent seeks to challenge the regulation he is charged with violating on constitutional or other grounds, NOAA be required to file in the enforcement action the administrative record of the regulation. This proposed approach is inconsistent with the Magnuson-Stevens Act and the Administrative Procedure Act that it incorporates.

Absent a more specific waiver of sovereign immunity, an agency regulation is reviewable for legal or constitutional sufficiency only by a federal judge under the Administrative Procedure Act. *See* 5 USC 702, 704. For most fisheries regulations, challenges are governed by the Magnuson-Stevens Act, Section 305(f)(1), 16 USC 1855(f)(1), which specifies review under the Administrative Procedure Act, and further requires that such challenges be brought within

⁴ Similarly the Commodity Futures Trading Commission has broad rules that provide: "[r]elevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded." 17 C.F.R. § 10.67. Rules for Unfair Labor Practice proceedings go further, and specifically exclude use of the Federal Rules of Evidence, stating that, "the parties shall not be bound by the rules of evidence, whether statutory, common law, or adopted by the court." 22 C.F.R. § 1423.17.

30 days after promulgation of the regulation. One purpose of this rule – similar to rules in many other regulatory programs – is to assure that challenges to regulations are brought promptly so that any legal infirmities in the regulation are identified early and the industry can have certainty about what regulations will be implemented. As you acknowledge, NOAA’s regulations implement this law by providing that ALJs in enforcement proceedings may not rule upon constitutional issues or challenges to the validity of NOAA’s regulations. 15 CFR 904.200(b). Therefore, an ALJ does not have jurisdiction to consider a challenge to a regulation on which an enforcement action is based. Establishing a procedure that would require NOAA to undertake the burden of assembling an administrative record for a matter that is not within the jurisdiction of the ALJ would serve no purpose.⁵

For these reasons, we are denying your petition requesting that NOAA institute rulemaking to amend NOAA’s civil procedure regulations.

Thank you again for your input and your continued interest in improving NOAA’s enforcement program.

Sincerely,



Lois J. Schiffer
General Counsel

⁵ In the case of Adak Fisheries, LLC, et al. (Docket No. AK035059, Decided April 1, 2009), the NOAA Administrator ruled on a challenge to a regulation promulgated under the Magnuson-Stevens Act, determining that “there is nothing limiting the Administrator’s authority to make final administrative decisions with respect to constitutional issues and challenges to the validity of the Agency’s regulations and the statutes administered by the Agency.” (Adak Decision, at 6, f.n. 1). In fact, the NOAA Administrator does not have jurisdiction to rule on a challenge to a NOAA regulation in the context of an enforcement case; such a challenge may be made only within 30 days after promulgation of the regulation, or upon petition to the Agency by a challenger, under the APA. The Administrator’s determination to the contrary in Adak does not affect the Adak decision as published, since the Administrator ruled that the regulation at question in Adak was lawful.