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June 26, 2012

Dr. Jane Lubchenco, Administrator
National Oceanic and Atmospheric Administration
1401 Constitution Avenue, N.W.
Suite 5128
Washington, D.C. 20230

Re: Petition for Rulemaking; Amendments to NOAA Civil Penalty Procedures; 50 C.F.R. Part 904

Dear Dr. Lubchenco:

Pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e), we hereby request that the National Oceanic and Atmospheric Administration (NOAA) accept this Petition for Rulemaking and initiate a rulemaking aimed at amending the agency's civil penalty procedural regulations so as to make them more fair and balanced for those who are charged with civil penalty violations pursuant to the various statutes administered by NOAA. We are joined in this Petition by: Eldon V.C. Greenberg, Garvey Schubert Barer (former General Counsel of NOAA); and Michael Stanley, Esq. (former NOAA enforcement attorney). Each of us has extensive experience in representing Respondents who have been issued Notices of Violation and Assessment (NOVA) by enforcement attorneys in the Enforcement Division of NOAA's General Counsel's Office.

Based on that experience and in light of the enforcement failings identified in the April 2011 Report and Recommendation of Special Master Charles B. Swartwood, III and the findings of the Commerce Department's Office of Inspector General after review of NOAA's fishery enforcement operations in 2010, we strongly believe it is time that NOAA's civil penalty procedural regulations were significantly changed to provide more balance to the process and a greater degree of fairness for those charged with civil violations. The previous steps taken by you to address the serious issues in NOAA's law enforcement program have not been adequate and should include amendment of the agency's procedural regulations. These regulations give inordinate power to NOAA's enforcement attorneys, particularly when compared to other Federal agency practices, such as the Environmental Protection Agency (EPA), the U.S. Coast Guard, and the Federal Maritime Commission, to cite a few we have reviewed.

In this Petition for Rulemaking, we set forth some amendments we believe essential to make NOAA's regulations provide greater fairness to the accused and less susceptible to improper use of prosecutorial power during the process. All of these recommended changes are within your discretion to adopt. If our Petition is accepted, it may also be appropriate for the agency to seek further suggestions for changes from other members of the public.

The NOAA regulations provide a framework for administrative adjudication of alleged civil penalties within the umbrella guidelines of the Administrative Procedure Act, 5 U.S.C. § 554, where an issue must be decided on the record after an opportunity for an agency hearing. For this purpose, NOAA adopted a single set of procedural guidelines for various statutes administered by the agency. See, 50 C.F.R. § 904.1 (list of 34 separate statutes authorizing administrative proceedings). These regulatory guidelines govern administrative proceedings for assessment of civil penalties; suspension, revocation, modification, or denial of permits; issuance and use of written warnings; and release or forfeiture of seized property. These regulations, along with any relevant provisions of the underlying statutory authorities, the Administrative Procedure Act, and the U.S. Constitution, are the guiding principles and procedures for resolving civil allegations by the agency that a particular law or regulation has been violated.

1. Involvement of Agency Program Officials in the Process

It has been our experience that NOAA's enforcement attorneys and agents operate more or less independently of NOAA's program offices. While there is reason to keep enforcement personnel independent of program officials, we often discover that NOAA enforcement attorneys have no "client" to report to, or receive guidance from, during the proceedings. Lawyers in our legal system do not act for themselves; they act for a client. Lawyers learn early that being your own lawyer is quite dangerous, for any number of reasons, including very real ethical concerns. We have also found that the NOAA enforcement attorneys and agents sometimes simply do not understand the programs they are seeking to enforce. In this regard, we note that the U.S. Coast Guard Commandant Instruction 16200.3A (Civil Penalty Procedures and Administration) makes the filing of civil penalty charges a command responsibility, to be made with the assistance of lawyers. EPA also involves its Regional Administrators in civil penalty proceedings, including settlement discussions. 40 C.F.R. § 22.18. At NOAA, the entire civil penalty process, from start to finish, is almost exclusively the province of NOAA enforcement attorneys, with the exception of the appeals process which goes through your Office. The only time a NOAA program official might get involved is if called as a witness in a proceeding. We believe the process would function much better if NOAA program offices participated as the "client" where their programs are being enforced.

To address this issue, we recommend two changes in the NOAA regulations. First, we suggest that the initial charging document, the Notice of Violation and Assessment (NOVA), be signed by both the NOAA enforcement attorney and a responsible regional program official who has been apprised of the basis of the charges in the NOVA. This is comparable to the signing of a verified complaint in Federal District Court. Second, we recommend that the Preliminary Position on Issues and Procedures, provided for in 50 C.F.R. § 904.240, also be signed by a NOAA program official.

2. Responding to the NOVA

In 50 C.F.R. § 904.102, the agency regulations give a Respondent four options for responding to a NOVA. The second option, addressed in subsections (a)(2) and (b), allows a Respondent to seek an amendment or modification to the NOVA to conform to the facts or law. This option is essentially meaningless because a Respondent must request a hearing within 30 days of being served with a NOVA. We believe the regulations should provide for the ability to have the hearing request stayed while the agency and a Respondent confer on whether an amendment or modification of a NOVA is appropriate. Such a procedure would also be an incentive to a more meaningful settlement dialogue before a case becomes enmeshed in the hearing mode.

3. Application of Federal Rules of Evidence

We believe that formal hearings under the NOAA regulations would benefit from greater predictability as to the rules of evidence. The statement about what rules do apply is vague and uncertain: Formal rules of evidence do not necessarily apply to the administrative proceedings, and hearsay evidence is not inadmissible as such. We think a better formulation with respect to admissible evidence is found in the procedural regulations of the Federal Maritime Commission:

> In any proceeding under the rules in this part, all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative. All other evidence shall be excluded. Unless inconsistent with the requirements of the Administrative Procedure Act and these Rules, the Federal Rules of Evidence will also be applicable. 46 C.F.R. § 502.156.

A copy of the FMC regulation we would like to see NOAA adopt is attached as Exhibit 1.

4. Burdens At the Hearing

It would be useful, by way of apparent balance, to include the language on burden of presentation, burden of persuasion and burden of proof found in the EPA civil penalty regulations at 40 C.F.R. § 22.24. It should be made clear that NOAA bears the responsibility to

establish a violation, and the appropriate sanction, by a preponderance of the evidence. A copy of the EPA regulation is attached as Exhibit 2.

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

The NOAA regulations pose a dilemma for Respondents who may have regulatory and constitutional legal challenges of merit. The Administrative Law Judge (ALJ) may not consider such challenges (50 C.F.R. § 200(b)) but the hearing process before the ALJ is the only way for a Respondent to prepare the record for such a challenge. *See, Adak Fisheries, No. AK035039,* Determination and Order Affirming in Part and Remanding in Part the Initial Decision, at 6-7, n.1. The regulations should be amended to clarify that the Administrative Record (all or part thereof) with regard to the regulation subject to challenge may be made part of the hearing record upon application of the Respondent. In any event, NOAA's regulations should also state that, upon appeal to the Administrator where a Respondent is making a regulatory or constitutional challenge, the Administrative Record should be produced so that both sides may review it prior to filing any briefs during Administrator Review.

6. Summary Adjudication

One of the most unfair provision in NOAA regulation is that relating to "summary decision" found at 50 C.F.R. § 904.210. In our experience, a NOAA enforcement attorney will likely refuse to agree that an issue may be summarily decided by the ALJ prior to a hearing, even if a strong case exists that a charge or charges lack support in law or in fact. There is no way to dismiss an agency charge that has no basis prior to a hearing, forcing time and expense to be devoted to the issue at the hearing. In contrast, in EPA proceedings, a respondent may seek either an accelerated decision or a motion to dismiss from an ALJ, without first seeking approval to do so from the agency. 40 C.F.R. § 22.20. NOAA's regulations in this regard are unjust and regressive. A copy of the relevant EPA regulations is attached as Exhibit 3.

7. Settlement Encouragement

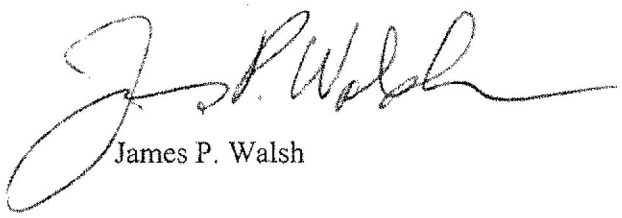
Finally, NOAA's regulations lack robust provisions to provide for alternative dispute resolution, such as those found in EPA's procedural rules at 40 C.F.R. § 22.18 (Exhibit 4). NOAA's process seems to be at least nominally based on a simple formula that favors leverage of the NOAA enforcement attorney. While settlement for a lesser amount is always possible at the intake stage, the NOVA typically offers an all or nothing solution: the Respondent has the ability to either pay, or agree to, the penalty set forth in the NOVA or the entire matter will go to a full-blown hearing, at the discretion of the NOAA attorney. This formulation tends to force settlement simply to avoid the cost of defending a case and does not recognize, let alone

encourage, the use of alternative dispute resolution mechanisms, such as mediation. We recommend NOAA adopt the approach found in EPA's regulations.

All in all, NOAA civil penalty regulations could use updating and balancing, in light of recent criticism of the agency's enforcement program. The above suggestions are certainly not exclusive and others may have ideas for reform as well. We do not believe that the agency's response to public criticism or the Inspector General reports will be complete until the civil penalty procedural regulations are revised and made to provide greater fairness to respondents.

Very truly yours,

DAVIS WRIGHT TREMAINE LLP



James P. Walsh

cc: The Honorable Rebecca Blank, Acting Secretary of Commerce
Cameron F. Kerry, General Counsel. Department of Commerce
Todd J. Zinser, Inspector General, Department of Commerce
Senator Jay Rockefeller, Chairman, U.S. Senate Committee
on Commerce, Science and Transportation
Senator Mark Begich, Chairman, U.S. Senate Subcommittee
on Oceans, Atmosphere, Fisheries and Coast Guard
Senator Olympia Snow, Ranking Member, U.S. Senate Subcommittee
on Oceans, Atmosphere, Fisheries and Coast Guard
Congressman Doc Hastings, Chairman, U.S. House Committee on Natural Resources
Congressman John Fleming, Chairman, U.S. House Subcommittee
on Fisheries, Wildlife, Oceans and Insular Affairs
Congressman Gregorio Sablan, Ranking Member, U.S. House Subcommittee
on Fisheries, Wildlife, Oceans and Insular Affairs

Exhibit 1

Electronic Code of Federal Regulations
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Title 46: Shipping
PART 502—RULES OF PRACTICE AND PROCEDURE
Subpart J—Hearings; Presiding Officers; Evidence

Browse Previous | Browse Next

§ 502.156 Evidence admissible.

In any proceeding under the rules in this part, all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible. All other evidence shall be excluded. Unless inconsistert with the requirements of the Administrative Procedure Act and these Rules, the Federal Rules ofEvidence, Public Law 93–595, effective July 1, 1975, will also be applicable. [Rule 156.]

Browse Previous | Browse Next

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Exhibit 2

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Title 40: Protection of Environment

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS
Subpart D—Hearing Procedures

Browse Previous | Browse Next

§ 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.

(a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

(b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

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Exhibit 3

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Title 40: Protection of Environment

PART 22--CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS
Subpart C—Prehearing Procedures

Browse Previous

§ 22.20 Accelerated decision; decision to dismiss.

(a) *General.* The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

(b) *Effect.* (1) If an accelerated decision or a decision to dismiss is issued as to all issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer, and shall be filed with the Regional Hearing Clerk.

(2) If an accelerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted. The partial accelerated decision or the order dismissing certain counts shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

Browse Previous

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PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS
Subpart C—Prehearing Procedures

Browse Previous | Browse Next

§ 22.18 Quick resolution; settlement; alternative dispute resolution.

(a) *Quick resolution.* (1) A respondent may resolve the proceeding at any time by paying the specific penalty proposed in the complaint or in complainant's prehearing exchange in full as specified by complainant and by filing with the Regional Hearing Clerk a copy of the check or other instrument of payment. If the complaint contains a specific proposed penalty and respondent pays that proposed penalty in full within 30 days after receiving the complaint, then no answer need be filed. This paragraph (a) shall not apply to any complaint which seeks a compliance or corrective action order or Permit Action. In a proceeding subject to the public comment provisions of §22.45, this quick resolution is not available until 10 days after the close of the comment period.

(2) Any respondent who wishes to resolve a proceeding by paying the proposed penalty instead of filing an answer, but who needs additional time to pay the penalty, may file a written statement with the Regional Hearing Clerk within 30 days after receiving the complaint stating that the respondent agrees to pay the proposed penalty in accordance with paragraph (a)(1) of this section. The written statement need not contain any response to, or admission of, the allegations in the complaint. Within 60 days after receiving the complaint, the respondent shall pay the full amount of the proposed penalty. Failure to make such payment within 60 days of receipt of the complaint may subject the respondent to default pursuant to §22.17.

(3) Upon receipt of payment in full, the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, shall issue a final order. Payment by respondent shall constitute a waiver of respondent's rights to contest the allegations and to appeal the final order.

(b) *Settlement.* (1) The Agency encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. The parties may engage in settlement discussions whether or not the respondent requests a hearing. Settlement discussions shall not afect the respondent's obligation to fle a timely answer under §22.15.

(2) *Consent agreement.* Any and all terms and conditions of a settlement shall be recorded in a written consent agreement signed by all parties or their representatives. The consent agreement shall state that, for the purpose of the proceeding, respondent: Admits the jurisdictional allegations of the complaint; admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations contained in the complaint; consents to the assessment of any stated civil penalty, to the issuance of any specified compliance or corrective action order, to any conditions specifed in the consent agreement, and to any stated Permit Action; and waives any right to contest the allegations and its right to appeal the proposed final order accompanying the consent agreement. Where complainant elects to commence a proceeding pursuant to §22.13(b), the consent agreement shall also contain the elements described at §22 14(a)(1)-(3) and (8). The parties shall forward the executed consent agreement and a proposed final order to the Regional Judicial Oficer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board.

(3) *Conclusion of proceeding* No settlement or consent agreement shall dispose of any proceeding under these Consolidated Rules of Practice without a final order from the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, ratifying the parties' consent agreement.

(c) *Scope of resolution or settlement.* Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall only resolve respondent's liability for Federal civil penalties for the violations and facts alleged in the complaint.

(d) *Alternative means of dispute resolution.* (1) The parties may engage in any process within the scope of the Alternative Dispute Resolution Act ("ADRA"), 5 U.S.C. 581 *et seq.*, which may facilitate voluntary settlement efforts. Such process shall be subject to the confidentiality provisions of the ADRA.

(2) Dispute resolution under this paragraph (d) does not divest the Presiding Officer of jurisdiction and does not automatically stay the proceeding. All provisions of these Consolidated Rules of Practice remain in effect notwithstanding any dispute resolution proceeding.

(3) The parties may choose any person to act as a neutral, or may move for the appointment of a neutral. If the Presiding Officer grants a motion for the appointment of a neutral, the Presiding Officer shall forward the motion to the Chief Administrative Law Judge, except in proceedings under subpart I of this part, in which the Presiding Officer shall forward the motion to the Regional Administrator. The Chief Administrative Law Judge or Regional Administrator, as appropriate, shall designate a qualified neutral.

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