



May 17, 2011

SECRETARIAL DECISION MEMORANDUM

Subject: Decisions regarding Certain NOAA Fisheries Enforcement Cases Based on Special Master Swartwood's Report and Recommendations

On April 14, 2011 Special Master Swartwood submitted to me his report and recommendations on 30 of the first 31¹ of the complaints I referred to him for review. These 30 complaints arise from those collected by the Department of Commerce Office of Inspector General (OIG) during its investigation into the enforcement practices of NOAA's Office of Law Enforcement (OLE) and General Counsel for Enforcement Litigation (GCEL). Eighteen of these complaints were specifically addressed in the OIG's September 23, 2010 Report; the remaining eleven are complaints that were submitted to the OIG but not discussed in the Report.

I appointed Judge Swartwood because of his reputation as a fair and practical federal magistrate judge, and his familiarity with the communities most involved in the complaints under review. Judge Swartwood met the challenge I gave him. For the past six months, he has devoted 100% of his time to this task. With the help of two lawyers hired for the task, he met with and/or interviewed 75 individuals and reviewed over 100,000 documents. His 236-page report is carefully and clearly documented and reflects a thorough understanding of the issues encountered by both the regulated and the regulators in this challenging environment.

I began my career in public service as a criminal prosecutor. I believe strongly in law enforcement as one of the vital functions of government. Laws that are not enforced undermine not only an orderly society, but public faith in a government of laws. But enforcement that is not fair and consistent undermines faith in the rule of law no less than the lack of enforcement. Thus, I expect law enforcement officials in the Department of Commerce to act according to the highest standards of conduct and judgment.

Judge Swartwood's report identifies 13 complaints affected by conduct that fell short of the standards I set for his review and recommends remission of penalties and/or sanctions imposed in connection with 11 of these complaints.² He concludes with respect to these complaints that the conduct in question "overstepped the bounds of propriety and fairness"

¹ Judge Swartwood was unable to interview one complainant and so has deferred the review of that case until the next phase of the review process.

² Civil penalties were not imposed with respect to two of the complaints and thus Judge Swartwood concluded that he lacked authority to act. He did, however, recommend that I consider additional training opportunities for the employees involved in these complaints.

that should be expected of law enforcement officials in ways that had a material impact on the outcome of specific cases. (See Secretarial Decision Memorandum dated September 23, 2011 at p. 4.) In particular, he finds a pattern of unreasonable penalty amounts in initial charges made in Notices of Violation and Assessment (NOVAs) that, coupled with lack of faith in the opportunity to obtain a fair hearing before an Administrative Law Judge (ALJ), coerced fishermen into unreasonable outcomes.

With respect to the remaining 17 complaints, Judge Swartwood recommends that I take no action. In several instances, Judge Swartwood recommends no action because his investigation exonerated the NOAA employees whose conduct was called into question in the OIG's report or concluded that the fine was not excessive given the totality of circumstances. In still others, he determines that while the initial proposed fine may have been high or excessive, the amount ultimately paid was reasonable and fair.

For all the complaints for which Judge Swartwood found overly aggressive or unfair enforcement conduct, the facts presented demonstrate a lack of supervision, oversight, and standards in the work of NOAA law enforcement. OLE agents and GCEL lawyers were left on their own with unbridled discretion and insufficient guidance. In almost every instance in which Judge Swartwood finds overly aggressive or unfair enforcement conduct, there was little meaningful management or supervision.

In light of this systemic failing, I find after legal review that none of the conduct described in the report undertaken by any individual NOAA lawyer or law enforcement officer warrants disciplinary action against any employee mentioned in Judge Swartwood's report. At bottom, these problems were not the product of individual bad acts, but rather the result of conduct enabled and even encouraged by the management and enforcement culture in place at the time.

From the beginning of this Administration, NOAA Under Secretary and Administrator Jane Lubchenco and her team have worked to change the culture and environment of OLE and GCEL. There have been changes in fisheries enforcement leadership at virtually every level and there have been wholesale changes to policies that govern the way enforcement cases are investigated, charged, and resolved.

Among other things, in February 2010, Under Secretary Lubchenco ordered that the authority to issue charges and settle cases previously delegated to individual attorneys in the field be withdrawn and placed in the hands of supervisors in headquarters. In addition, in March 2011 NOAA implemented a nationwide penalty policy that is more transparent and provides greater clarity for the regulated community. As a matter of practice starting in February 2010, and by formally adopted regulation in June 2010, NOAA also revised its regulations to place the burden on NOAA to justify its proposed penalty and permit sanctions. See 15 C.F.R. 904.204(m). In light of these two important changes in how penalties and permit sanctions are assessed, I have determined that it is unnecessary to implement Judge Swartwood's suggestion that enforcement attorneys be required to testify regarding the basis of penalties.

Such changes are crucial steps toward restoring the public's confidence in NOAA's law enforcement efforts. But more changes are necessary. I have met with NOAA leadership to discuss additional steps that NOAA will announce following this decision.

These include plans for addressing what Judge Swartwood described as a perception (predominantly in the Northeast) that the Coast Guard Administrative Law Judges (ALJs) used by NOAA lack impartiality. Although Judge Swartwood did not find that any cases in which ALJs demonstrated actual bias, he does conclude that this perception has deterred the regulated community's pursuit of its due process rights. A strong and fair enforcement program requires faith in the basic fairness of the process. Therefore, I have directed NOAA to terminate the Coast Guard ALJ contract in order to reset NOAA's relationship with the regulated community.

Judge Swartwood recommended that GCEL and OLE lawyers assist with the training being provided in fishing communities regarding compliance with fisheries laws and regulations. I have asked NMFS Administrator Eric Schwaab to incorporate this recommendation into the compliance training NMFS is now providing to fishermen. NOAA has made great strides in changing its relationship with the communities it regulates, and engaging law enforcement personnel in that work will help.

Set forth below are my decisions regarding each of Judge Swartwood's recommendations. In summary, I am directing NOAA to remit a total of \$649,527 to eleven individual complainants. I further direct NOAA to take all necessary steps to ensure that payment is made to these individuals within 30 days of the date of this Memorandum.

By ordering the remission of penalties as described below, I want to make it clear that fisheries enforcement serves fisheries, fishermen, and fishing communities. The primary goal of the enforcement program is compliance that makes fisheries sustainable. NOAA law enforcement personnel should act strongly to enforce marine resource laws, and act prudently to serve those whose livelihoods depend on the marine resources these laws protect. NOAA has worked to refocus its fisheries management, enforcement and compliance programs to be consistent with these goals. This decision is one more step in that process.

Complaint No. 1: Affidavit in Support of Administrative Search Warrant

Gloucester Seafood Display Auction (GSDA), a fish display auction business, alleged that an Office for Law Enforcement (OLE) agent's affidavit for issuance of an Administrative Inspection Warrant for GSDA's records contained false information.

Special Master Finding: The OLE agent and GCEL attorney involved in the preparation of the affidavit did not deliberately omit information in a willful attempt to mislead, but should have exercised greater due diligence to ensure that the affidavit was accurate.

Special Master Recommendation: As no civil penalty was imposed in connection with this complaint, Judge Swartwood recognized that action in this case was beyond his authority. Nonetheless, he recommended that I consider additional training to address this issue.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to ensure that appropriate training regarding the preparation of search warrants is provided to both OLE and GCEL personnel.

Complaint No. 2: Warrantless Entry on GSDA Premises

GSDA alleged that OLE agents accessed and entered its premises without authorization or permission.

Special Master Finding: OLE agents exceeded their authority by entering the premises without a warrant.

Special Master Recommendation: As no civil penalty was imposed in connection with this complaint, Judge Swartwood recognized that action in his case was beyond his authority. Nonetheless, he recommended that I consider additional training to address this issue.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to ensure that appropriate training regarding procedures for conducting appropriate and effective searches and inspections is provided to both OLE and GCEL personnel.

Complaint No. 3: GSDA

GSDA alleged that it was assessed an excessive penalty as a result of subject of numerous sanctions and monetary penalties arising from allegations by NOAA that GSDA falsified dealer reports, hid overages, and violated Yellowtail Flounder Letter of Authorization (YTF LOA) requirements. On March 1, 2010, GSDA settled multiple cases for \$85,000 and a 35-day permit sanction.

Special Master Finding: GSDA was the subject of selective enforcement by NOAA and there was little, if any, credible evidence to demonstrate that GSDA was engaged in any pattern of intentional illegal behavior.

Special Master Recommendation: Cancellation of the \$85,000 monetary obligation due from GSDA in connection with the settlement agreement dated March 1, 2010 except for \$10,000 (for a total net cancellation of \$75,000); also that the permit sanction penalty from the March 1, 2010 settlement be vacated and that the original 10-day sanction be reinstated less any days previously served.

Secretarial Decision: Based on the Special Master's recommendation, and taking into account the extent and persistence of the investigation aimed at finding evidence to support

suspensions that proved unsupported, I direct NOAA to cancel the \$85,000 payment obligation arising from the March 1, 2010 settlement in its entirety and return the \$16,515 GSDA has paid to date on this settlement.

Because the Magnuson Stevens Act does not give me the authority to modify permit sanctions,³ I am unable to implement Judge Swartwood's sanction recommendation. However, I direct NOAA to disregard this permit sanction when assessing penalties for any future violations by this company.

Complaint No. 4: Yellowtail Flounder Letters of Authorization

Fishermen who offloaded fish at GSDA alleged that they were assessed penalties for failing to have a YTF LOA while others were not penalized for the same violation.

Special Master Finding: NOAA targeted GSDA for an ongoing investigation of overages and OLE agents attempted to leverage YTF LOA violations to obtain information of alleged illegal business practices by GSDA.

Special Master Recommendation: Remission of penalties paid by Paul Theriault, Edward Smith, and Joel Carreiro and return of monetary value associated with the DAS sanctions imposed on Mark Carroll (\$2,000), Richard Burgess (\$3,600), and Billie Lee (\$2,000). No action for Marc Gonsalves because he has not paid the fine imposed against him.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to return the amounts paid by Msrs. Theriault (\$1,050), Smith (\$3,100), and Carreiro (\$900). In addition, I direct NOAA to withdraw the NOVA issued to Marc Gonsalves on April 16, 2009.

Because the Magnuson Stevens Act does not give me the authority to modify permit sanctions, I am unable to implement Judge Swartwood's sanction recommendations for Msrs. Carroll, Burgess, and Lee. However, I direct NOAA to disregard these violations when assessing penalties for any future violations by these individuals.

Complaint No. 6: Edward Smith

Edward Smith installed a 300 HP engine on his vessel, which exceeded the permissible horsepower on his boat. Mr. Smith was issued an Enforcement Action Report (EAR) and NOVA and was charged with a penalty of \$150,000 and a permit sanction of 270 DAS.

Special Master Finding: Mr. Smith was coerced into paying an excessive penalty of \$50,000.

³ Section 308(e) of the MSA, 16 U.S.C. § 1858(e), provides the Secretary of Commerce with authority to "comprise, modify, or remit, with or without conditions, any civil penalty." Section 308(g), which pertains to permit sanctions, does not provide authority to modify or remit permit sanctions.

Special Master Recommendation: Remission of \$25,000.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to return \$25,000 to Mr. Smith.

Complaint No. 16: Edward E. Smith

Edward Smith alleged that when he requested that an attorney be present during an interview with an OLE agent, the agent responded that "he just made it harder on himself." Mr. Smith further alleged that an OLE agent made inappropriate or threatening remarks to him when he requested that the agent contact his lawyer for answers to the agent's inquiries concerning and engine upgrade of his fishing vessel.

Special Master Finding: Judge Swartwood could not confirm whether the remarks were actually made but confirmed that whatever was actually said did not deter Mr. Smith from engaging counsel.

Special Master Recommendation: No action.

Secretarial Decision: Based on the Special Master's recommendation, I am not taking any action with respect to this complaint.

Complaint No. 7: Allyson Jordan

Allyson Jordan's vessel suffered mechanical difficulties and was forced to return to a port other than her homeport. Because Ms. Jordan's vessel was forced to cross a demarcation line during this trip, she was charged .7181 DAS.

Special Master Finding: OLE's refusal to credit DAS for breakdowns was unfair and was an example of rigidity in regulation enforcement.

Special Master Recommendation: Return \$430.86 to Ms. Jordan as the equivalent of credit of .7181 DAS at the rate of \$600/day.

Secretarial Decision: Because the Magnuson Stevens Act does not give me authority to modify permit sanctions, I am unable to implement Judge Swartwood's recommendation in this instance. However, I direct NOAA regard to disregard this violation when assessing penalties for any future violations by this individual.

Complaint No. 8: Billie Lee

Billie Lee alleged 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.

Special Master Finding: Mr. Lee's claim is without merit given that the General Counsel for Enforcement and Litigation (GCEL) had limited resources to pursue such a large number of violations and that Mr. Lee did not admit his violation until two years after he committed the violation.

Special Master Recommendation: No action.

Secretarial Decision: Based on the Special Master's recommendation, I am not taking any action with respect to this complaint.

Complaint No. 9: Richard Burgess

Richard Burgess was served with an EAR charging him with exceeding his northeast multispecies DAS. Mr. Burgess challenged his violation and alleged that he was informed by GCEL that if he challenged his fine it could be increased.

Special Master Finding: Mr. Burgess had a negative DAS balance at the time of his inquiry and a denial letter in response to his lease application was sent to him. The penalty paid by Mr. Burgess was fair and reasonable under the circumstances of the case.

Special Master Recommendation: No action.

Secretarial Decision: Based on the Special Master's recommendation, I am not taking any action with respect to this complaint.

Complaint No. 20: Richard Burgess

Mr. Burgess alleged that he was charged with a permit violation after having timely corrected a paperwork error after being notified of the error by the National Marine Fisheries Service.

Special Master Finding: The issuance of two EARs in a case that involved an innocent paperwork error was overly aggressive enforcement. However, since Mr. Burgess was never charged with this violation and no monetary or sanction penalty was assessed or paid, the matter was satisfactorily resolved.

Special Master Recommendation: No action.

Secretarial Decision: Based on the Special Master's recommendation, I am not taking any action with respect to this complaint.

Complaint No. 15: Scott Swicker, James Ansara, Richard Burgess

Scott Swicker, James Ansara, and Richard Burgess alleged that OLE agents cited them for violations and then questioned them about GSDA's alleged illegal practices, using the citations as leverage.

Special Master Finding: While there was a factual dispute concerning the exact wording of what the Special Agents said during these and other interviews, the implication was that the Special Agents offered leniency in return for any information about the alleged illegal activity at GSDA.

Special Master Recommendation: No action.

Secretarial Decision: Based on the Special Master's recommendation, I am not taking any action with respect to this complaint.

Complaint No. 17: Peter Hanlon

Peter Hanlon alleged that he was threatened with termination by his supervisor if he testified on behalf of a fisherman (Lawrence Yacubian), and that OLE agents pushed supervisors to take action.

Special Master Finding: OLE agent's actions put enough pressure on Hanlon to request he be excused from testifying, and the OLE agent's conduct was inappropriate.

Special Master Recommendation: No action because Mr. Hanlon does not seek relief and the OLE agent has retired.

Secretarial Decision: Based on the Special Master's recommendation, I am not taking any action with respect to this complaint.

Complaint No. 21: Lawrence M. Yacubian

Lawrence Yacubian was charged with two counts of incursions into a restricted area and one count of making a false oral statement to an authorized officer, for which he was assessed a penalty of \$250,000 and his permit was revoked. He appealed his case to an ALJ, who upheld the penalties and sanctions. Mr. Yacubian subsequently appealed the ALJ's decision to Federal District Court, which vacated a part of the ALJ's decision and remanded the case back to NOAA for *de novo* review. Instead, the attorneys sought an expedited hearing at which time the case was assigned to another ALJ who did not undertake a *de novo* review. Mr. Yacubian alleged

that GCEL unfairly delayed the sale of his vessel and release of the vessel's permit for a period of two years, causing undue financial hardship. Mr. Yacubian signed a settlement agreement that provided for a \$430,000 penalty, forfeiture of catch proceeds totaling \$25,972.26, and revocation of his permits.

Special Master Finding: NOAA's extraction of an additional \$210,000 for the sale of Mr. Yacubian's permit was unjustified and contrary to the direction of a federal district court judge. Further, the penalty of \$220,000 levied against Mr. Yacubian was excessive and unfair, as originally found by the federal judge.

Special Master Recommendation: Remission of \$330,000 to Mr. Yacubian.

Secretarial Decision: A strong and effective law enforcement program requires that absolute confidence in the ability of litigants to impartiality and fairness. Legal advocates must be vigorous, but adherence to court judgments is essential to due process. In light of the totality of the circumstances and the impact of those circumstances on the outcome of this matter, I direct NOAA to remit \$400,000 to Mr. Yacubian.

Complaint No. 19: Thomas Morrison:

Thomas Morrison alleged that he was inappropriately fined \$75,000 for fishing in a closed area on four separate occasions over a three-day period.

Special Master Finding: The penalty levied against Mr. Morrison was excessive for a first time offense, especially given that Mr. Morrison either self reported the incursions or, at a minimum, fully cooperated with the investigation.

Special Master Recommendation: Remission of \$10,000 not to be paid until Mr. Morrison's pending cases are resolved.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to return \$10,000 to Mr. Morrison no later than 60 days after the cases pending against him are finally resolved.

Complaint No. 22: James Fletcher/Fisherman's Wharf Fillet Inc.

James Fletcher, as representative of Fisherman's Wharf Fillet Inc., alleged that a NOVA issued to Fisherman's Wharf Fillet Inc. in the amount of \$38,000 for failing to submit Fishing Vessel Trip Reports (FVTR) and for subsequently filing inaccurate FVTRs was excessive and unfair.

Special Master Finding: Both the imposed penalty and settlement were excessive but two of the four counts were settled for an appropriate amount.

Special Master Recommendation: Remission of \$7,000 to Fisherman's Wharf Fillet Inc.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to return \$7,000 to Fisherman's Wharf Fillet Inc.

Complaint No. 24: Ethics Complaint Against Deirdre Casey by Richard Burgess

Richard Burgess complained that during the course of his NOVA proceedings (see Cases 4, 9, 15, and 20) GCEL attorney Deirdre Casey threatened his counsel with charges of ethics violations for failing to inform clients of settlement offers and representing multiple parties in similar matters in such a way as to compromise their cases.

Special Master Finding: EA Casey did not violate any ethical rules in her interactions with Mr. Burgess' counsel.

Special Master Recommendation: As no civil penalty was imposed in connection with this complaint, Judge Swartwood recognized that action in this case was beyond his authority. Nonetheless, he recommended that I consider additional training to address this issue.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to ensure that GCEL personnel receive appropriate training on professional responsibility.

Complaint No. 26: Michael J. Anderson

Michael Anderson was issued a NOVA on August 12, 2004 for failing to obtain the required DAS number before leaving port. Mr. Anderson alleges that, during the course of negotiating a settlement to his NOVA, NOAA enforcement personnel threatened to increase his \$10,000 fine to \$110,000 should Mr. Anderson decide to pursue his case before an ALJ.

Special Master Finding: The initially proposed fine of \$10,000 and seven DAS was excessive. However, the eventual settlement, a sanction of six DAS with no fine, was reasonable.

Special Master Recommendation: No action.

Secretarial Decision: Based on the Special Master's recommendation, I am not taking action with respect to this complaint.

Complaint No. 27: James D. Gillikin

James Gillikin alleged that a GCEL attorney informed him that any request for an extension to pay his fine would result in increasing the penalty from \$483,000 to \$685,000.

Special Master Finding: The allegations are unfounded.

Special Master Recommendation: No action.

Secretarial Decision: Based on the Special Master's recommendation, I am not taking any action with respect to this complaint.

Complaint No. 28: Peter Schumann and Jeffrey Aiken

Peter Schumann and Jeffrey Aiken were issued NOVAs for possessing shark fins exceeding the legal 5% fin-to-carcass ratio, exceeding the commercial trip limit for shark, and falsifying or failing to file the required Fishing Vessel Trip Reports (FVTR). Both respondents challenged the validity of the NOVAs. In addition, Mr. Aiken argued that he was not involved in the actions giving rise to the NOVAs and therefore should be shielded from sanctions.

Special Master Finding: Both Mr. Schumann and Mr. Aiken committed violations sufficient to warrant a NOVA, but Mr. Aiken's involvement in Mr. Schumann's wrongdoing was not sufficient to warrant a penalty that was double Mr. Schumann's.

Special Master Recommendation: Remission of \$15,000 to Mr. Aiken.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to return \$15,000 to Mr. Aiken.

Complaint No. 29: William F. Callaway

William Callaway alleged that he was improperly forced to choose between a scallop permit and a multi-species permit while others were allowed to have both. He also complained that a NOVA he received for fishing with nets that did not have the proper mesh size was based on improper measurements.

Special Master Finding: There was no improper conduct by any NOAA employee involved with complaint.

Special Master Recommendation: NOAA should provide Mr. Callaway with a copy of his vessel history so that he can reapply for a scallop permit.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to provide Mr. Callaway with a copy of his vessel history report.

Complaint No. 32: E. Sherrill Styron

Sherrill Styron complained that he was told incorrectly by a NOAA employee that he had to choose between a scallop and a multi-species permit. He also complained that an enforcement action against him was unfair because it held him responsible for the actions of his captain/operator.

Special Master Finding: The penalty imposed on Mr. Styron was excessive and that the use of a prior violation to enhance the penalty was improper.

Special Master Recommendation: Remission of \$5,000 to Mr. Styron.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to return \$5,000 to Mr. Styron.

Complaint No. 34: James A. Ruhle

James Ruhle alleged that the fine imposed on him for failing to file a proper FVTR was excessive.

Special Master Finding: The penalty was not excessive.

Special Master Recommendation: No action.

Secretarial Decision: Based on the Special Master's recommendation, I am not taking any action with respect to this complaint.

Complaint No. 37: Victor J. Lubiejewski

Victor Lubiejewski alleged that the penalty imposed NOVAs issued against him and fines he paid were excessive and forced him out of business.

Special Master Finding: The penalties were fair and reasonable.

Special Master Recommendation: No action.

Secretarial Decision: Based on the Special Master's recommendation, I am not taking any action with respect to this complaint.

Complaint No. 38: Terence J. Mulvey

I agree with the Special Master's recommendation that this complaint be considered in the second phase of investigation in light of the scheduling difficulties that prevented Judge Swartwood from meeting with the complainant during the first phase.

Complaint No. 43: Bruce Stiller

Bruce Stiller alleged that the penalties assessed against him in connection with two NOVAs issued against him were excessive because in each case, the illegal actions were taken not by him but by members of his crew.

Special Master Finding: Mr. Stiller was ultimately responsible for the actions of his crew.

Special Master Recommendation: No action.

Secretarial Decision: Based on the Special Master's recommendation, I am not taking any action with respect to this complaint.

Complaint No. 46: Arthur Sawyer

Arthur Sawyer complained that the penalty assessed against him was excessive and unfair, in that others with the same violation were not charged the same amount.

Special Master Finding: While the initial fine was excessive, the amount the parties settled for was fair and reasonable.

Special Master Recommendation: No action.

Secretarial Decision: Based on the Special Master's recommendation, I am not taking action with respect to this complaint.

Complaint No. 47: Agger Fish Company, Inc.

Agger Fish Company, Inc. was charged for possessing shark fins over a 46-month period in 2000-03 while the company did not have a permit. Mr. Agger, the owner of the company, alleged that he was coerced into settling the matter because the proposed penalty was excessive.

Special Master Finding: Mr. Agger's failure to obtain a shark permit was a result of a lack of diligence on Mr. Agger's part rather than a deliberate effort to avoid regulations. Mr. Agger had no confidence that he would win an appeal before an ALJ and that defaulting on a

settlement, thus incurring a \$3.4 million penalty, would destroy his business. As a result, Mr. Agger was coerced into settling the case.

Special Master Recommendation: Cancel all ongoing payment obligations and remit \$160,000 to Mr. Agger.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to cancel the payment obligations arising from the settlement agreement and to return \$160,962 to Agger Fish Company, Inc.

Complaint No. 48: James M. Kendall

James Kendall complained that a penalty imposed in a 1985 NOVA issued to him and his employer, Eastern Fisheries, for exceeding a meat count by one scallop was excessive.

Special Master Finding: Both Mr. Kendall and NOAA's records regarding this case were unavailable due to the passage of time, preventing a full investigation of Mr. Kendall's allegations. The alleged penalty of \$14,070.71 was excessive for an overage of one scallop.

Special Master Recommendation: No action in light of the absence of documentary evidence and the fact that the penalty was not paid by Mr. Kendall.

Secretarial Decision: Based on the Special Master's recommendation, I am not taking any action with respect to this complaint.

Complaint No. 49: Rodney Avila

Rodney Avila complained that a penalty imposed against him because a vessel owned by him was fishing in a closed area was unfair and excessive.

Special Master Finding: The initially assessed penalty was excessive; however the eventual settlement was reasonable.

Special Master Recommendation: No action.

Secretarial Decision: Based on the Special Master's recommendation, I am not taking any action with respect to this complaint.

Complaint No. 52: David Fryberg

David Fryberg complained of being charged with violating regulations that were confusing, and with the actions of a rogue captain.

Special Master Finding: The regulations in effect at the time the NOVA was issued were confusing and difficult to follow.

Special Master Recommendation: Remission of \$5,000 to Mr. Fryberg.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to return \$5000 to Mr. Fryberg.

Complaint No. 53: Thomas Kokell

Thomas Kokell was issued a NOVA on February 12, 2007 alleging that he hid fish in a secret compartment on his fishing vessel, fished with improperly-sized nets, landed 1,050 pounds over the limit of summer flounder, and failed to maintain a fishing log report. He complained that the charges were unfair and that the penalty was excessive.

Special Master Finding: The ultimate penalty, \$35,000 in fines paid with \$30,000 forgiven, was fair and reasonable.

Special Master Recommendation: No action.

Secretarial Decision: Based on the Special Master's recommendation, I am not taking any action with respect to this complaint.

I hereby instruct all officers of the Department of Commerce and the National Oceanic and Atmospheric Administration to take all steps necessary to implement these decisions.


Secretary Gary Locke