UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:	Docket Number:
Peter Pan Seafoods, Inc. Seven Seas Fishing Company	AK0401011
Respondents.	Hon. Parlen L. McKenna

ORDER TO SHOW CAUSE FOLLOWING RELEASE OF SPECIAL MASTER SWARTWOOD'S REPORT

On May 17, 2011, the Secretary of Commerce issued a Secretarial Decision Memorandum, which addressed and responded to a Report submitted by Judge Charles B. Swartwood, III (ret.), whom the Secretary had appointed as a Special Master to review certain NOAA enforcement cases.[1] On that date, the Commerce Department also publically released a partially redacted version of Judge Swartwood's Report.[2] The Report was generated in response to the Secretary of Commerce's referral of thirty-one cases for review by the Special Master.[3]

Judge Swartwood's Report discusses two items that directly relate to the undersigned: (1) the Lobsters Inc./Yacubian case, for which the undersigned served as the presiding judge following remand from the District Court in Massachusetts and (2) the undersigned's participation as a guest lecturer at the U.N.-sponsored Global Fisheries

[1] Judge Swartwood submitted his report to the Secretary on April 14, 2011, approximately thirty-three (33) days before release by the Secretary of Commerce. Secretarial Decision Memorandum at 1.
[2] The full title of the report is "Report and Recommendation of the Special Master Concerning NOAA Enforcement Action of Certain Designated Cases" – a publicly accessible copy of which was made available through NOAA's website. A copy of the Report is attached as Exhibit A.
[3] Judge Swartwood's Report followed a January 2010 report from the Office of Inspector General (OIG), Department of Commerce. See "Review of NOAA Fisheries Enforcement Programs and Operations" – U.S. Department of Commerce, Office of Inspector General, Final Report No. OIG-19887 (January 2010). The OIG's report was generated following a request from the NOAA Administrator that the OIG review the policies and practices of the Office for Law Enforcement within the National Marine Fisheries Service (NMFS), along with NOAA's Office of General Counsel for Enforcement and Litigation.

Enforcement Training Workshop held July 18-22, 2005 in Kuala Lumpur, Malaysia (Conference). The Conference was widely attended by international/government officials from around the world including several NOAA personnel. Judge Swartwood alleges that the undersigned issued an order in violation of a United States District Court Judge's remand order. In addition, Judge Swartwood asserts that the undersigned's attendance at the Conference should have been disclosed to the respondents in the Lobsters Inc./Yacubian case because the Agency's enforcement attorneys for that case also attended the Conference.

Judge Swartwood's discussion is troubling because it impugns the reputation of a sitting United States Administrative Law Judge by asserting that the undersigned's conduct, at the very least, creates an appearance of bias (see Report at 128). As set forth below, Judge Swartwood's statements are not supported by the facts or the law and constitute a reckless disregard for the truth. Indeed, most troubling of all is that Judge Swartwood only obtained information from litigants/persons with a vested interest in the outcome of the administrative hearings he reviewed. Specifically, he did not interview, or request interviews, with anyone at the Department of Homeland Security, the United States Coast Guard, the Coast Guard's Office of the Chief Administrative Law Judge, anyone in the Coast Guard's ALJ Program, or the undersigned concerning the outrageous allegations he leveled. See Report at 4-7 (listing interviewees).[4] Judge Swartwood's one-sided Report is akin to a judge issuing an ex parte Initial Decision and Order without

[4] Judge Swartwood interviewed one current employee of the United States Coast Guard – a former OLE Special Agent – now Coast Guard Agent. See Report at 4. That interview concerned the individual's activities as a NOAA Special Agent. See Report at 78-89.

giving one side the opportunity to make argument or present any evidence in support of its case.

Importantly, the undersigned was a former Chief Counsel (International) of the Civil Aeronautics Board, Vice President and General Counsel of an Airline Holding Company, and Senior Trial Counsel for AT&T prior to becoming a judge twenty-five (25) years ago. The undersigned was also the Conference Chair of the Judicial Division of the American Bar Association, Secretary of the Judicial Division, and an Appointed Member of the Administrative Conference of the United States. In addition, the undersigned also served as the Conference Chair of the Ethics Committee within the ABA. The undersigned has never heard of a judicial officer issuing an ex parte report implying inappropriate judicial conduct without affording the judge in question any opportunity to provide factual information. This method of producing such a report is inconsistent with any judicial practice in the United States. An inquiry with the Coast Guard or Department of Homeland Security would have developed objective facts about the undersigned's participation in the Global Fisheries Workshop. Most importantly, it would have shown that the undersigned complied with all federal government ethical requirements and was consistent with judicial activities under the ABA Model Code of Judicial Conduct.

As the parties are aware, the Peter Pan case is ripe for decision. A tremendous amount of time and effort has been expended by all parties in litigating this case. The undersigned believes the parties should have input into the undersigned's continued involvement in this case. See 15 C.F.R. § 904.204(k) (the judge may "[r]equire a party or

witness at any time during the proceeding to state his or her position concerning any issue or his or her theory in support of such position").

Obtaining the parties' position is consistent with undersigned's efforts throughout these proceedings to be fair to each side and decide the case according to principles of due process. Each party is therefore given 10 calendar days from receipt of this Order to state whether it has any objections to the undersigned rendering the Initial Decision and Order in this case. Under 15 C.F.R. § 904.205(a) and (b), the regulations provide:

> (a) The Judge may withdraw voluntarily from an administrative proceeding when the Judge deems himself/herself disqualified.
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> (b) A party may in good faith request the Judge to withdraw on the grounds of personal bias or other disqualification. The party seeking the disqualification must file with the Judge a timely affidavit or statement setting forth in detail the facts alleged to constitute the grounds for disqualification, and the Judge will rule on the matter. If the Judge rules against disqualification, the Judge will place all matters relating to such claims of disqualification in the record.

The Lobsters Inc./Yacubian Case

A. Judge Bladen's Initial Decision and Order

On December 5, 2001, United States Coast Guard Administrative Law Judge Edwin M. Bladen issued an Initial Decision and Order in which he found proved three counts against Lobsters, Inc. and Lawrence M. Yacubian. See In re Lobsters Inc., et al., 2001 WL 1632538 (NOAA 2001). Judge Bladen determined that the respondents had committed three 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)). This case was important because it was one of the first judicial evaluations

of the then-recently implemented Vessel Monitoring System (VMS) that electronically tracked the position of licensed fishing vessels.[5]

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. In its Notice of Violation and Assessment (NOVA) and Notice of Permit Sanction (NOPS), the Agency sought a $250,000 civil monetary penalty and a revocation of the fishing permit for the respondents' vessel, the F/V Independence and the vessel operator permit of Mr. Yacubian for these violations. Id.[6]

Judge Bladen evaluated the required statutory and regulatory factors in considering the penalty 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. This result was consistent with the Agency's regulations in effect at that time at 15 C.F.R. § 904.204(m) and Agency precedent that made the Agency's assessed penalty presumptively correct with deviations by the judge only available with good cause shown. Judge Bladen based this assessment in part on the respondents' entry being intentional and repeated for fishing purposes and the fact that respondents had a long history of prior violation (five incidents that dated back to 1989). Id. The Initial Decision and Order also rejected the respondents' inability to pay arguments. Id.

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[5] Importantly, the case did not rest entirely on the use of VMS data. A United States Coast Guard cutter was dispatched to the scene and recorded multiple incursions by the F/V Independence into the closed area consistent with fishing activities. In re Lobsters Inc., et al., 2001 WL 1632538 (NOAA 2001).

[6] The monetary penalty the Agency sought was the maximum allowed under the statute for the two closed area violations at the time (i.e., $110,000 for each), plus $30,000 for making a false statement.

B. Respondents' Appeal to the NOAA Administrator

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 supported by substantial evidence and no basis for discretionary review existed. See In re Lobsters, Inc. et al., 2003 WL 22000640 (NOAA 2003). The only criticism the NOAA Administrator made of Judge Bladen's decision concerned the judge's characterization of the standard of review for considering expert witness testimony, which the Administrator found to be harmless error. Id. The Order Denying Discretionary Review thus became the final administrative decision. Id.

C. Remand from the District Court

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's Order was in response to Lobsters Inc.'s and Mr. Yacubian's summary judgment motion that asked the court to vacate the findings of liability and assessment of civil penalty and permit sanctions and the Agency's cross-motion for summary judgment. Id. at 343. First, Judge Groton dismissed plaintiffs' allegation that

Judge Bladen committed error by allowing the VMS data into evidence and found that Judge Bladen's decision on this subject was proper. Id. at 345.

Second, Judge Groton unequivocally rejected plaintiffs' argument that there was no substantial evidence of the incursions. Id. The court declined "to overturn the Agency's finding that plaintiffs entered Closed Area II and thereby violated the Magnuson-Stevens Act as alleged." Id. Judge Groton thus left the Agency's findings regarding the fact of violation on the two closed area incursions undisturbed and they were not at issue in the remanded case.

Third, Judge Groton found the evidence did not support the finding that Mr. Yacubian had made a false statement. Id. at 345-347. The court determined that the particular words Mr. Yacubian used in the two alleged false statements leading to the charge did not rise to a level sufficient to equate with making an unlawful false statement. Id. (finding that Mr. Yacubian's estimates of how many bushels of scallops he had on deck and how many pounds of scallops he had in the vessel's hold were matters of opinion or approximation – not intended to be statements of fact). The Agency's finding of violation as to Count III was therefore vacated. Id. at 347.

Finally, Judge Groton considered the penalties the Agency assessed. Id. at 347-349. The court acknowledged that Judge Bladen recognized and considered all the required statutory and regulatory factors in determining the civil penalty. Id. at 347. However, Judge Groton determined that Judge Bladen's consideration of several of the plaintiffs' prior violations was in error. Id. at 347-349. Specifically, the court found that consideration of respondents' 1998 violation was precluded from being considered by the terms of the settlement agreement resolving that violation. Id. at 347.

The court also analyzed Judge Bladen's consideration of violations occurring more than five years prior to the offense under consideration. Id. at 348-349. The court indicated that a 1995 policy memorandum from NOAA's Assistant General Counsel for Enforcement and Litigation indicated that it was NOAA's practice to consider 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.[7] Judge Groton 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. Therefore, Judge Groton mandated on remand that only the March 19 and April 10, 1994 prior offenses be considered in accessing a penalty or that the Agency explain its deviation from the "look back" policy. Id.

Judge Groton concluded his order by addressing the plaintiffs' allegations that Judge Bladen also 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. Importantly, at the time of the remand and up until my June 15, 2005 Order granting the Agency's Motion for Expedited Hearing, Agency counsel's proposed penalty of $220,000 for both Counts was presumed reasonable pursuant to 15 C.F.R. Section 904.204(m) and Agency precedent.[8] Nevertheless, Judge Groton's determination that the

[7] NOAA also did not refute that it had such a policy in effect. Id.
[8] According to the Agency's now-superseded penalty schedule (as revised in May 2002), the range of penalties for a closed area violation depended upon the violation history of the offender as follows: "All

permanent revocation of the permits and statutory maximum was excessive certainly would have been taken into account when considering the penalty de novo on remand.

Judge Groton therefore ordered the findings of liability as to Counts I and II sustained, vacated liability as to Count III, and vacated the civil penalties and permit sanctions. The specific remand language was the following:

> This case is **REMANDED** to NOAA for *de novo* reconsideration of civil penalties and permit sanctions. NOAA is directed to assess an appropriate penalty for plaintiffs based on their violations of Count I and II and, when considering plaintiffs' history of prior offenses, should recognize only two prior offenses, a) the March 19, 1994 landing of Atlantic sea scallops and b) the April 10, 1994 failure to comply with scallop average meat count, or, in the alternative, should explain its departure from the Agency's five year "look back" policy. Moreover, the penalty assessed by NOAA should comport with relevant Agency precedent and guidelines or the Agency should explain its reasons for departure therefrom.

Id. at 349.

D. The Undersigned's Order Complying with the District Court's Remand

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 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 the undersigned for disposition by order of the Coast Guard's Chief Administrative Law Judge (CALJ). The undersigned was assigned because Judge Bladen had retired in the interim and therefore the case could not be assigned to him following remand.

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violations including, but not limited to: exemption areas, closed fisheries, area closures, closed seasons, restricted gear/management areas and Days at Sea violations. $5,000 - $50,000 (and/or up to 90 day permit sanction or denial) [for first time offenders]; $30,000 - $80,000 (and/or up to 365 day permit sanction or denial) [for second time offenders]; $35,000 – Statutory Maximum (and/or up to permit revocation or denial) [for third time offenders]." See http://www.gc.noaa.gov/schedules/2-USFisheries/NortheastCAPS.pdf.

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, the undersigned 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.[9] 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, the undersigned found that these arguments should be rejected.

The NOVA and NOPS are akin to complaints, i.e., the initial pleadings by which the Agency's administrative action against respondents are commenced. See 15 C.F.R. §§ 904.101 and 904.302. The undersigned determined that the NOVA and NOPS initially filed in the case provided the factual and legal basis upon which the Agency proceeded against respondents and controlled the hearing on remand unless the Agency chose to amend those filings. Order at 4-5.[10] The undersigned reiterated, however, that

[9] A copy of the Order is attached as Exhibit B.

[10] Requiring the Agency to file a new NOVA and NOPS would be akin to requiring a United States Attorney to file a new indictment in a criminal case where the only issue to be determined following a remand from a higher court is correction of a sentencing error. Nothing in the Agency's regulations or case law requires or even suggests that such action is necessary or appropriate following remand from a district court where the only issue is the amount of sanction to be imposed for violations upheld on appeal.

the Agency still bore the burden of proving the statutory factors upon which any penalty assessed would be based. Id. at 5.

The undersigned also rejected respondents' arguments that discovery into the penalty the Agency would request following remand required a delay in the proceedings and rejection of the Agency's motion for expedited proceedings. Id. at 5-7. In accordance with Agency policy and regulations, discovery in Agency proceedings is limited and any additional discovery, apart from the parties' PPIPs, is not to be allowed absent a showing of relevance, need, and reasonable scope of evidence sought. See 15 C.F.R. §§ 904.240(a) and (b).

As discussed above, the remand from the District Court upheld the fact of violation as to Counts I and II and merely ordered the de novo consideration of the penalty and permit sanction. The hearing on remand was expressly limited in scope – i.e., consideration of what penalty was appropriate for the two violations sustained by the District Court. Nowhere in the Order did the undersigned reinstate the penalty and permit sanction expressly vacated by the District Court.

The undersigned granted the Agency's motion for an expedited hearing and scheduled that hearing for August 25, 2005. The Order further called for extensive discovery by the parties in the form of PPIPs that would specifically address the following subjects in accordance with a de novo review of the penalties and permit sanctions the Agency sought:

> IT IS HEREBY FURTHER ORDERED that the Agency shall file **on or before July 6 2005**, by mail, fax or personal delivery a Preliminary Position on Issues and Procedures (PPIP), stating its good faith response to the questions below:
>
> 1. In light of the District Court's decision, what penalty and/or permit sanction is being sought by the Agency?

2. What factors were taken into consideration in assessing the penalty and/or permit sanction?

3. How many, and what type of, exhibits do you plan to offer in support of the penalty and/or permit sanction being sought? Please list all proposed exhibits and provide a brief description of each, including which penalty and/or permit sanction factor(s) the exhibit establishes.

4. What are the names of your witnesses, the approximate length of their sworn testimony, and the nature of the testimony they will provide?

5. Are there any other legal issues in dispute concerning the penalty/permit sanction? If so, discuss the legal issues and any arguments in support thereof.

6. Are there any factual issues in dispute concerning the penalty/permit sanction? If so, discuss the factual issues in contention?

7. Are there any extraordinary requirements concerning the circumstances and/or facilities at any hearing?

8. Are there any other matters that Agency counsel wishes to present?

IT IS HEREBY FURTHER ORDERED that Respondents shall file **on or before July 19, 2005,** by mail, fax or personal delivery a Preliminary Position on Issues and Procedures (PPIP), stating its good faith response to the questions below:

1. Do Respondents contest the amount of the penalty and/or permit sanction proposed by the Agency? If so, state the bases for challenging the penalty and/or permit sanction. (Please note: If inability to pay is being asserted, materials in support of inability to pay must be submitted by Respondents to the assigned ALJ, and the Agency, no later than thirty (30) days prior to the hearing).

2. Are there any legal issues in dispute concerning the penalty/permit sanction? If so, discuss the legal issues and any arguments in support thereof.

3. Are there any factual issues in dispute concerning the penalty/permit sanction? If so, discuss the factual issues in contention?

4. What are the names of your witnesses, the approximate length of their sworn testimony, and the nature of the testimony they will provide?

5. How many, and what type of, exhibits do you plan to offer in support of the penalty and/or permit sanction being sought? Please list all proposed exhibits and provide a brief description of each, including which penalty and/or permit sanction factor(s) the exhibit establishes.

6. Are there any extraordinary requirements concerning the circumstances and/or facilities at any hearing?

7. Are there any other matters that Respondents counsel wishes to present?

Order at 7-8.

The Order also made it absolutely clear that the Agency had the burden of establishing by a preponderance of the evidence that all of the statutorily mandated factors have been considered in assessing the penalty and/or permit sanction and that the undersigned "will independently determine whether the burden has been satisfied and, where appropriate, assess a de novo penalty and/or permit sanction." Id. at 8. Respondents were thus provided with all the due process protections required for determining an appropriate penalty for the two violations that the District Court upheld on appeal. The Order was procedural – not substantive in nature – and set the parameters under which the hearing for a de novo determination of the civil penalty and permit sanctions would occur. Respondents lost nothing substantive by this Order, as the undersigned merely found that filing new NOVA/NOPS was not necessary for conducting such a de novo review and would have been inconsistent with the District Court Remand.

E. Judge Swartwood's Inaccurate Characterization/Legal Analysis of the Lobsters Inc./Yacubian Case

Judge Swartwood's Report discusses the Lobsters Inc./Yacubian case in selective detail (see Report at 122-132); and made various statements including the unfounded allegation that the undersigned "completely ignored the District Court Judgment". Id. at 127. Judge Swartwood provides no basis to support this conclusion. Judge Swartwood's conclusion is not supported by the facts in the record and completely ignores the language and rationale of the undersigned's Order.

In this regard, the case was remanded to NOAA and the Agency made the determination that the case should be sent to the United States Coast Guard ALJ Program for disposition. The scope of remand was limited to consideration of only the appropriate

penalty and permit sanction for the proven violations. The remand did not call for an entirely new administrative adjudication to be initiated as Judge Swartwood seems to indicate would have been the proper course.

Judge Swartwood also alleges that "[a]fter 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." Id. at 129-130 (emphasis added). As fully provided in the undersigned's Order, Mr. Yacubian was given the opportunity for a de novo determination of the penalty amounts in strict accordance with the Agency's regulations and through the ordinary processes available to litigants in Agency actions.

A claim that Mr. Yacubian would be unable to obtain a proper application of the law is not supported by the history of his case. The respondents had the opportunity to raise any issues and contest the matter in keeping with the Agency's regulations. Hindsight assertions regarding the supposed basis of Mr. Yacubian's decision to settle is inconsistent with the judge's position in the process. The judge issues decisions on the matters presented in the case. When the parties reach a settlement, the judge's only

function is ministerial in issuing an order to remove the case from the docket as required by 15 C.F.R. § 904.213.

In view of the procedural background of this matter, logic suggests that the case was settled because (1) two of the violations were affirmed on appeal by the U.S. District Court; (2) the penalty sought by the Agency would be presumed reasonable pursuant to 15 C.F.R. § 904.204(m) and Agency precedent;[11] (3) two prior violations would be used as aggravating factors; and (4) the costs to litigate the case a second time would not be a smart decision after completing a cost benefit analysis. Given these facts, Judge Swartwood's stated justification for returning the sanction to a recidivist fisherman is puzzling.

Furthermore, there is absolutely no basis for the statement by Judge Swartwood that Mr. Yacubian would have received a "predictable adverse result". The District Court had already found Charges I and II proved. Judge Swartwood failed to understand that affirming an agency's findings as to violation does not require the agency to re-litigate those findings. A de novo hearing on the penalties is not the same as a de novo hearing on the entire case. The undersigned's Order unequivocally stated that the penalties would be considered de novo following a hearing. The undersigned never reinstated the same penalty in that case as before the remand – nor gave any indication that this would be the case following the hearing.

As noted above, Judge Swartwood fails to recognize that two (2) of the violations were affirmed on appeal and that Mr. Yacubian almost certainly would have faced some

[11] The actual amount the Agency would have sought following remand is unknown. As indicated in the Order, the Agency was required to file in its PPIP the amount of sanction it was seeking. However, the case settled – again without the undersigned's involvement or knowledge. Nevertheless, under Agency precedent and regulations, the undersigned would have only been able to deviate from the Agency's penalty assessment for good cause.

penalty in accordance with the Agency's policies and precedent for the two closed area violations given his repeat offender status. Indeed, the undersigned would have had to consider the two prior violations upheld by the District Court under both the Magnuson-Stevens Act and Agency regulations, along with the nature of the proven closed area violations, which the District Court left undisturbed.[12] If that is what Judge Swartwood meant by a "predicable adverse result" – there might be some truth to Judge Swartwood's statement, but the outcome for Mr. Yacubian was not predetermined. Oddly, this is the first time that the undersigned has ever heard of a judge being criticized for attempting to timely handle his docket. Judge Swartwood's statements are based on his adopting Mr. Yacubian's story as a proven fact without further investigation or corroboration.

Even a casual review of the undersigned's dispositions in NOAA cases since 1995 reveals that the undersigned has reviewed and adjusted the Agency's proposed penalty downwards on approximately half of such dispositions based on the particular facts and circumstances of those cases.[13] See, e.g., In re Paasch and Churchman, Docket No. SW0703629 (Feb. 18, 2011) (imposing sanctions of $8,754 and $21,786 against two separate respondents in a consolidated case where the Agency sought $13,754 and

[12] Both the Magnuson-Stevens Act and Agency regulations direct the undersigned to consider such past violations. See 16 U.S.C. § 1858(a); 15 CFR § 904.108(a). Critically, the District Court did not erase Mr. Yacubian's prior record of offenses but merely ordered that only two of Mr. Yacubian's extensive prior violations should be considered in assessing a penalty de novo or, if other prior violations were to be considered, to explain the variation from the Agency's five year "look back" policy. In re Lobsters Inc., et al., 346 F. Supp. 2d at 349. Similarly, the District Court ordered that any assessed penalty be in accordance with Agency guidelines and policy and that any deviation from such guidelines or policy be explained. Id. Agency guidelines and policy directed that a significant penalty be assessed for the two closed area violations.

[13] One must also recall that most of these decisions were rendered under an Agency regime for which the Agency's proposed penalty was presumed by force of Agency regulation and precedent to be correct and the judge could only depart from the Agency's assessment for good cause. See 75 Fed. Reg. 35631 (June 23, 2010) (Revising 15 C.F.R. § 904.204(m) and stating, "[t]he principal change removes the requirement that an Administrative Law Judge state good reason(s) for departing from the civil penalty or permit sanction assessed by NOAA in its charging document. This revision eliminates any presumption in favor of the civil penalty or permit sanction assessed by NOAA").

$35,786, respectively); In re Cordeiro and Etheridge, Docket No. SE040289 (Jan. 5, 2011) (finding five of the eighteen charges not proven and imposing sanction of $19,500 where Agency sought $180,000); In re Watson, 2010 WL 3524743 (NOAA 2010) (imposing sanction of $1,000 where Agency sought $2,000); In re Martuna, S.A. de C.V., 2010 WL 1676737 (NOAA 2010) (imposing sanction of $85,000 where Agency sought $130,000); In re Rundle, 2009 WL 2053601 (NOAA 2009) (imposing a $700 sanction where Agency sought $1,500); In re Flores and Astara Co., LLC, 2009 WL 2053602 (NOAA 2009) (rejecting joint and several liability and imposing on respondent appearing at hearing only $7,000 of an overall $61,000 penalty); In re Purviance, 2008 WL 4968368 (NOAA 2008) (imposing sanction of $200 where Agency sought $1,000); In re Millman, 2007 WL 5083484 (NOAA 2007) (imposing sanction of $18,000 where Agency sought $30,000). Therefore, there is absolutely no credible evidence to believe any allegations that the undersigned is merely an Agency "apparatchik" as Judge Swartwood's statements indicate. Judge Swartwood also did not discuss the fact that the APA and the Office of Personnel Management regulations[14] provide judicial independence for Administrative Law Judges and the Coast Guard ALJ Program is an entirely separate organization from the Department of Commerce.

The undersigned considered the Remand, made a reasoned legal determination on the matter, and issued the appropriate Order. In view of the foregoing, Judge

[14] See 5 C.F.R. § 930.206 (ALJ's cannot receive monetary awards or bonuses from an agency) and 5 C.F.R. § 930.211 (ALJ's cannot be removed by an agency except for good cause shown with an opportunity for a hearing before the Merit Systems Protection Board); see also Butz v. Economou, 438 U.S. 478, 512-514 (1978) (recognizing that the APA contains a number of provisions that are designed to guarantee the independence of hearing examiners in rendering judgments on the evidence, free from pressure by the parties or other officials within the agency).

Swartwood's allegation that the undersigned completely ignored the District Court's order is not supported by the facts.

The Global Fisheries Enforcement Training Workshop

In connection with his discussion of the Lobsters Inc./Yacubian case, Judge Swartwood raises the undersigned's attendance at the Global Fisheries Enforcement Training Workshop held in Kuala Lumpur, Malaysia on July 18-22, 2005 (Conference) as problematic. Judge Swartwood's assertions on this subject are similarly faulty as his depiction of the Order following remand. The table below presents the following facts about the Conference based on the documents in the possession of the Office of the Chief Administrative Law Judge:

Date	Action/Event
May 9, 2005	Lobsters Inc./Yacubian case assigned to the undersigned following remand
June 3, 2005	CALJ Ingolia told the undersigned he could not go to the Conference due to scheduling conflict and asked the undersigned to go in his place
Between June 6-9, 2005	The undersigned agreed to represent the ALJ Program at the Conference
June 15, 2005	Procedural Order issued setting hearing date, ordering prehearing discovery and disclosure, and denying respondents' motion that new NOVA/NOPS had to be filed to commence de novo review of penalties for violations upheld
June 16, 2005	The undersigned submits formal request for approval to attend Conference to the Coast Guard's Vice Commandant's Office
June 24, 2005	Respondents sign settlement agreement with NOAA (executed by NOAA on June 27, 2005)
July 1, 2005	U.S. State Department provides list of U.S. attendees to Conference to U.S. Embassy in Malaysia
July 6, 2005	Undersigned receives a copy of the U.S. State Department list – this is the first time the fact that Messrs. Juliand and MacDonald are Conference attendees is disclosed to the undersigned
July 18-22, 2005	Conference held in Kuala Lumpur, Malaysia

The facts of the undersigned's attendance at the Conference thus completely refute Judge Swartwood's allegations of unethical behavior. On May 5, 2005, NOAA's Assistant General Counsel for Enforcement and Litigation, Ms. Michelle Kuruc, Esq., wrote a letter to the CALJ about the Conference. The CALJ received this letter on May 9, 2005. Ms. Kuruc's letter inquired about the CALJ's availability to serve as a panelist on a session entitled "A view from the Bench: A Judge's Perspective" at the Conference. Ms. Kuruc also requested the CALJ to "select a judge who would be an appropriate presenter to an international audience" in the event he could not attend. Ms. Kuruc's involvement with the Conference was due to her role as the Chairperson for the Monitoring, Control and Surveillance (MCS) Network – as the Conference was being sponsored by the International MCS Network, FAO FISHCode Programme (a U.N. organization), and the European Commission.

On June 6, 2005, the United States Coast Guard CALJ received an invitation from the Director General, Department of Fisheries in Malaysia to attend the Conference. This invitation was forwarded to the CALJ via facsimile from Ms. Kuruc. The CALJ was not available to attend the Conference, but agreed that a judge from the ALJ Program should represent the program.[15]

The undersigned was officially selected to participate on or about June 9, 2005. On June 16, 2005, the undersigned submitted a Request for Foreign Travel to the Coast

[15] The events surrounding the Conference took place approximately six years ago. It is not possible for the undersigned to recall many aspects of the chronology of events. However, this recitation is based on the undersigned's recollection and documents retained by the Office of the Chief Administrative Law Judge. Even assuming that Judge Swartwood's assertion is correct that the undersigned knew about the Conference before the July 18, 2005 date (an assertion that is not supported by any documents in possession of the Office of the Chief Administrative Law Judge), such fact would not be relevant given the chronology of events in the Lobsters, Inc./Yacubian case set forth above.

Guard Vice Commandant. This request for foreign travel was formally approved, and the undersigned made preparations to travel to the Conference.[16]

As of June 16, 2005, the ALJ Program only knew that Ms. Kuruc and the Enforcement Attorney for the NOAA Southwest Region, Mr. Paul Ortiz, Esq., were definitely attending.[17] The ALJ Program understood that other NOAA enforcement counsel and agents would be attending, but the ALJ Program did not have these other attendees' names. It was not until a July 1, 2005 (note – the undersigned actually received this document on July 6, 2005) that an unclassified telegram from the Secretary of State's Office to the American Embassy in Kuala Lumpur provided the list of NOAA participants. Attendees from NOAA's General Counsel's Office included: Ms. Kuruc, Mr. Charles Juliand, Mr. Ortiz, Ms. Amanda Whelland, Mr. J. Mitch MacDonald, Mr. Robin Jung, Mr. Robert Hogan, Ms. Monia Williams, Ms. Meggan Engelke-Ros, and Ms. Alexa Cole.

The undersigned was not told how the trip would be funded and had no knowledge of the particular source of such funding within the Agency. Recently, however, the undersigned was told by the Office of the CALJ that Ms. Kuruc explained via email before the Conference that "[f]unding [for the Conference] had been provided by the European Commission and the US State Department."[18]

[16] The undersigned could not have attended the Conference in any official capacity without such Coast Guard approval.
[17] Note that the undersigned's Order in the Lobsters Inc./Yacubian case setting the matter for hearing and requiring discovery and briefing on the <u>de novo</u> penalty was issued prior to this date on June 15, 2011.
[18] The Magnuson-Stevens Act at 16 U.S.C. § 1861(e)(1)(C) provides that fines, penalties, and forfeitures of property for violations of the Act may be used for "any expenses directly related to investigations and civil or criminal enforcement proceedings, including any necessary expenses for equipment, training, travel, witnesses, and contracting services directly related to such investigations or proceedings[.]"

The undersigned made preparations for travel to Malaysia for the Conference, including obtaining a passport on an expedited basis, and prepared remarks for the lecture. The undersigned attended the Conference as scheduled and gave the prepared remarks. No NOAA personnel were part of the undersigned's lecture and interactions with NOAA personnel during the question and answer period were limited.

Mr. Juliand and/or Mr. MacDonald were co-passengers on one leg of the undersigned's trip. The undersigned did not coordinate travel with any NOAA personnel. Importantly, the Lobsters Inc./Yacubian matter was no longer a pending case at this time because Mr. Yacubian had entered into a settlement agreement with the Agency on June 24, 2005, which the Agency signed on June 27, 2005.

Judge Swartwood claims that the fact of the undersigned's attendance at the Kuala Lumpur conference "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." Report at 128 (emphasis added). For the reasons discussed above, Judge Swartwood's depiction of the undersigned's Order as "completely inconsistent" with the remand is clearly wrong and at best creates a false impression. This statement rings more like ex post facto reasoning on the part of Mr. Yacubian and his counsel than any statement of fact about why Mr. Yacubian might have entered into a settlement with the Agency.

Judge Swartwood concludes in a sweeping condemnation of the undersigned's actions that "[i]f these circumstances do not present an actual conflict of interest, they certainly create the appearance of a conflict." Id. Judge Swartwood also makes an

unfounded ethics determination that "[a]t 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." Id. This opinion is totally speculative and unsupported by the facts. Judge Swartwood provides no rationale for this call for disclosure, and under the facts, such disclosure would have been impossible given that the undersigned only received approval to attend the Conference well after issuing the Order and did not know that Messrs. Juliand and MacDonald would also be attending until after the case had settled.

Judge Swartwood erroneously states in his Report that the trip to the Conference "was planned many months prior to the Yacubian/Lobsters Inc. case being assigned to ALJ McKenna." Id. Judge Swartwood obviously assumes that the planning for the Conference and information about who exactly would be attending were common knowledge to the Coast Guard ALJ Program and the undersigned specifically. The undersigned does not know when NOAA personnel planned their respective trips to the Conference or knew they would be attending, but the Coast Guard ALJ Program did not receive the formal invitation to the Conference from the Malaysian Government until June 6, 2005. The undersigned was not tasked with representing the ALJ Program until approximately a week after that date. Final approval to attend from the Coast Guard's Vice Commandant was not received until sometime after that date. Therefore, until the Coast Guard formally approved travel orders, any travel to the Conference was pure speculation.

Again, at what point exactly was the undersigned ethically required to disclose to Mr. Yacubian's counsel the fact of this trip, particularly given that the undersigned had

no knowledge that those involved in the case would also be present at the Conference until July 1, 2005 at the earliest – which was after the case settled? Judge Swartwood does not answer this question but merely assumes, based on an incomplete/incorrect understanding of the facts, that something untoward happened or could possibly appear to have happened.

In doing so, Judge Swartwood applies the incorrect legal standard with respect to administrative law judges. See Bunnell v. Barnhart, 336 F.3d 1112, 1115 (9th Cir. 2003) (holding that actual bias must be shown to disqualify an administrative law judge). An appearance of impropriety standard cannot form the basis of a recusal in administrative proceedings because administrative law judges work for the agency whose action they review and an "appearance of impropriety" standard would require recusal in every case. Id. at 1114-15; see also Greenberg v. Bd. Of Governors of Fed. Reserve Sys., 968 F.2d 164, 166-67 (2d Cir. 1992) and Harline v. Drug Enforcement Admin., 148 F.3d 1199, 1204 (10th Cir. 1998).

Furthermore, much of Judge Swartwood's discussion of the Lobsters Inc./Yacubian case centers on the Agency's settlement discussions with Mr. Yacubian and his counsel. The undersigned was never part of any such discussions, was never aware of the substance of any settlement discussions, and under Agency regulations had no role in reviewing or approving any settlement agreement the parties executed. Indeed, pursuant to Agency regulations, NOAA does not inform the judge of the terms of its settlements. See 15 C.F.R. § 904.213.

Judge Swartwood compounds these errors by making a statement about how 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 Julian and MacDonald". Report at 128 (emphasis added). Apart from being utterly false, from whom did Mr. Yacubian and his counsel learn such a "fact", or is this just mere innuendo and assumption based on demonstrably incorrect information? Mr. Yacubian and his counsel surely would be upset about such a fact – if it were TRUE – but the underlying facts of this statement are FALSE. As definitively demonstrated herein, when the undersigned was assigned to the Lobsters Inc./Yacubian case, no approvals for the undersigned to attend the Conference had been made.

As Judge Swartwood undoubtedly must know, judges regularly attend conferences like the one at issue here, both nationally and internationally.[19] Such extrajudicial activities by judges occur on so many occasions that the undersigned cannot mention them here in any exhaustive fashion. However, just two examples (found by the undersigned with very little effort) should suffice to disabuse a reasonable person that the undersigned's participation in the Conference was improper. For example, at the 2010 Insolvency Law Conference, which was sponsored in part by the Argentine Institute of Commercial Law, a panel was held entitled "Cross Border Issues: Madoff Goes Offshore." Participants in that panel included practitioners and a sitting U.S. Bankruptcy Judge.[20]

A second example should drive this point home further. The American Conference Institute's 3rd Expert Forum on ITC Litigation and Enforcement represents another prime example of these kinds of events. This conference was held February 23-

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[19] See Exhibit C –which contains a sample of brochures from such conferences.
[20] See www.solomonharris.com/html/InsolvencyConference2010.html.

24, 2011 in New York. Much like the Conference in question, senior government regulatory officials (from the International Trade Commission (ITC)) and members of the ITC bench and Federal Circuit judges were scheduled to attend. Several of the ITC's administrative law judges participated in a panel much like the undersigned's at the Conference, which provided "views from the bench" to the attendees. Indeed, the Model Code of Judicial Conduct recognizes that "[j]udges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects." Model Code of Judicial Conduct R. 3.1, Comment [1].

Such conferences are an accepted mechanism by which judges can participate in appropriate and valuable extrajudicial activities that benefit law enforcement, the public, and the legal profession. The mere fact of the undersigned's participation in the Conference is not enough to raise the specter of impropriety. The undersigned's participation at the Conference was unconnected to any particular NOAA enforcement action. There was absolutely no basis or any reason to disclose such trip to respondents in the Lobsters Inc./Yacubian case. Indeed, it would have been impossible, given the timing of the undersigned's involvement in the Lobsters Inc./Yacubian case, the settlement of that case, and the logistics of the Conference to have disclosed anything to the respondents about the undersigned's attendance.

Judge Swartwood could have obtained the relevant facts by simply contacting the Coast Guard ALJ Program or the undersigned directly. However, for whatever reason, neither he nor the Department of Commerce chose to fully investigate the matter with the kind of thoroughness required before leveling/adopting such unfounded allegations.

Either way, Judge Swartwood's reckless disregard for the truth in his discussion of the undersigned's participation in the Lobsters Inc. case and the Conference is inexcusable and has resulted in significant and lasting damage to the Administrative Judiciary, the reputation of the entire Coast Guard's adjudicative programs, and the undersigned judge's professional reputation.

Congress, the Agency, and the Administrative Process

In 1976, Congress passed the Magnuson-Stevens Fishery Conservation Management Act (16 U.S.C. §§ 1801-1884) for the purpose of "promot[ing] domestic, commercial, and recreational fishing" while conserving fishing resources endangered by overfishing. 16 U.S.C. §§ 1801(b)(1) and (3).[21] The Act was passed in large part in response to the dire state of the United States fisheries. See, e.g., 16 U.S.C. § 1801(a)(2) (Congressional findings that certain fish stocks had declined to the point where their survival was threatened and others similarly reduced to the point where they could become threatened).[22] Given the dire situation, the Act mandated draconian measures to stave off the destruction of the U.S. fishery stocks.

The Act created eight Regional Fishery Management Councils, which were given responsibility for preparing, monitoring, and revising fishery management plans (FMPs) to effectuate the Act's goals by regulating and managing commercial and recreational

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[21] A primary reason for the Magnuson-Stevens Act was to extend the U.S. Exclusive Economic Zone out to 200 miles and limit foreign fishing fleets from depleting national resources in that zone.

[22] The Magnuson-Stevens Act underwent significant amendments in 1996 and 2007, with the 1996 amendments focused in large part on correcting increased overfishing resulting from the Americanization of the fishing fleet and advancements in fishing technologies. See generally R. Fleming & J. D. Crawford, *Habitat Protection under the Magnuson-Stevens Act: Can it Really Contribute to Ecosystem Health in the Norwest Atlantic?*, 12 OCEAN AND COASTAL LAW JOURNAL 43 (2006). The 2007 amendments installed, in part, a timeline for achieving results, and "mandated – for the first time – annual catch limits and accountability measures to end overfishing. These changes have resulted in NOAA's tightening regulation and enforcement of an industry with significant elements already struggling, particularly in the Northeast." "Review of NOAA Fisheries Enforcement Programs and Operations" – U.S. Department of Commerce, Office of Inspector General, Final Report No. OIG-19887 (January 2010) at 12.

fishing. See 16 U.S.C. §§ 1852(a)(1)(A)-(H). The National Marine Fisheries Service (NMFS) works with the Councils, under the supervision of the Secretary of Commerce, to implement the Act through the FMPs and regulations. See 16 U.S.C. §§ 1854(a) and (b).

In passing the Act, Congress was concerned that if extraordinary measures were not taken immediately, the U.S. fisheries could be depleted to a point of no return. As such, the Act was passed by Congress with high maximum penalties (at time of passage $25,000, raised in 1990 to $100,000 and now standing at $140,000, a figure adjusted for inflation on a periodic basis). See 16 U.S.C. § 1858. Furthermore, Congress made the Act a strict liability statute with respect to the fact of violation – i.e., it does not matter if a respondent intended to violate the law – such a fact, if established, only went to possible mitigation of any assessed penalty. See, e.g., Northern Wind, Inc. v. Daley, 200 F.3d 13 (1st Cir. 1999).

Thereafter, Congress delegated authority to NOAA and NMFS, through the Department of Commerce and the department in which the United States Coast Guard operates, to establish an all-encompassing enforcement regime that would regulate fishery stocks to stop overfishing. See 16 U.S.C. § 1861. To carry out these enforcement duties those Secretaries may "utilize the personnel, services, equipment (including aircraft and vessels), and facilities of any other Federal agency, including all elements of the Department of Defense, and of any State agency . . . ." Id. Officers authorized to enforce the Act's provisions were given broad authority to carry out their duties, including the ability to execute warrants, make arrests, board and search vessels, seize fish and other evidence, and issue citations. Id.

The Agency created law enforcement and prosecutorial arms to fully implement the Act under this authority. The Agency established a comprehensive enforcement system designed to stop unlawful fishing through the Agency's law enforcement and prosecutorial staff. With approval of the Secretary of Commerce and the NOAA Administrator, the General Counsel's Office prepared and published penalty schedules regarding what penalty would be appropriate for a range of violations, depending upon the fishery in question and the past violation history of the violator.[23] As discussed above, the Agency's regulations and precedent made such penalties presumptively correct from which the judge could only deviate with good cause shown. See 75 Fed. Reg. 35631 (June 23, 2010) (Revising 15 C.F.R. § 904.204(m) and stating, "[t]he principal change removes the requirement that an Administrative Law Judge state good reason(s) for departing from the civil penalty or permit sanction assessed by NOAA in its charging documents. This revision eliminates any presumption in favor of the civil penalty or permit sanction assessed by NOAA").

The Agency's offices of law enforcement and general counsel were successful in the sense of effectuating Congress' mandate under the Act. For example, a NMFS 2009 report to Congress on the status of U.S. fisheries reported that for 2009, 38 fish stocks (15%) were subject to overfishing; whereas 46 (23%) were overfished.[24] See "The Status of U.S. Fisheries of the United States: A Report to Congress." National Marine Fisheries Service (2010). This report also showed that the Fish Stock Sustainability Index (FSSI)

[23] NOAA recently announced revisions to its penalty policy and penalty schedules, which in part do away with area/region specific penalty schedules. See http://www.gc.noaa.gov/enforce-office3.html.
[24] Threatened fish stocks are classified as: (1) subject to overfishing and (2) overfished. A stock that is subject to overfishing has a fishing mortality (harvest) rate above the level that provides for the maximum sustainable yield. A stock that is overfished has a biomass level below a biological threshold specified in its fishery management plan. NMFS 2009 Report to Congress at 1.

increased from 357.5 in 2000 to 573 in 2009, which NMFS characterized as representing "significant progress in improving our knowledge of stock status and sustainably managing our fisheries." Id. at 2.[25]

A 2003 NMFS report reviewed achievements of the effects of the Magnuson-Stevens Act and its revision in 1996, finding that progress had been made and that "over the period 1997 to 2002 overfishing has been corrected a total of 26 times and stocks have been rebuilt above their biomass thresholds a total of 20 times". "Implementing the Sustainable Fisheries Act: Achievements from 1996 to Present" at 2, National Marine Fisheries Service (2003). As the NMFS's Director recently stated, in evaluating the 35th Anniversary of the Act, "[w]e're on track to have annual catch limits and accountability measures in place for all 528 federally managed fish stocks and complexes by the end of 2011. The dynamic, science-based management process Congress envisioned is now in place, the rebuilding of our fisheries is underway, and we're beginning to see real benefits for fishermen, fishing communities, and our commercial and recreational fishing industries." "Marking Magnuson Act's 35th year" National Fisherman, vol. 92, no. 2 at 13 (June 2011).

With the great improvement in the health of the U.S. fisheries in general (especially the Northeast fisheries), the Act's draconian measures imposed by Congress and implemented by the Agency are not viewed with the sense of urgency that they once were.

[25] The FSSI measures the performance of 230 key stocks and increases as additional assessments are conducted, overfishing is ended and stocks rebuild to the level that provides maximum sustainable yield. Id. at 2.

Concomitant with these efforts, a number of fishermen, particularly in the Northeast, were being squeezed financially from all sides by (1) the reduction in fishing days at sea; (2) closure of certain fisheries and habitats; (3) direct out-of-pocket expenses to purchase mandated tracking equipment; and (4) ever decreasing revenue as a result of less fish being caught. The confluence of these events had a devastating impact, not only on the fishermen's business, but also on their families and their communities. Because of this, some fishermen had to make the choice to either break the rules in varying degrees or possibly lose their fishing boats and their livelihood. For those that made the only choice they believed was available to them to save their businesses, the Act authorized NOAA to unleash law enforcement officers to catch these fisherman who were in a desperate situations. In addition, a cadre of enforcement attorneys was assembled to prosecute these fishermen.

The fishermen subject to NOAA's prosecution, whether they in fact violated the law, became extremely upset and complained to their Members in Congress so that Agency law enforcement and attorneys might be reined in.

These efforts have resulted in taking attention away from the statutes enacted by Congress and the regulations issued by the Agency (which have been upheld by the courts). Blame, whether rightfully or not, has thus been placed at the feet of those tasked with this mission by Congress and the Agency. Given this background, one can only wonder if these recriminations based on fishermen complaints would have been acted upon if the Northeast fisheries had not recovered significantly.

In this regard, if Congress does not change the Act, how does it help the fishermen by changing the judges who are duty bound to follow the law and Agency

regulations? The Agency Administrator, who is the ultimate decider for the Agency, will still control the rules and regulations and will set precedent the judges must follow. The law will still be a strict liability statute such that it is irrelevant, for example, why a fishermen is in a closed area, and the fact that the fishermen was in a closed area is all that is necessary to prove a violation of the Act.

In addition, the law, regulations, and Agency precedent will still contain presumptions disfavoring the fishermen. For example, if the Agency can show that a fishermen had gear in the water, it is presumed that he was fishing, and the fishermen is left with the difficult task of disproving the negative. See also 16 U.S.C. § 1860(e)(1) (providing a presumption that all fish found on board a vessel deemed to be committing a violation of the Act will be presumed to have been taken in violation of the Act).

Finally, one of the more onerous presumptions in effect until June 23, 2010 involved the presumption that the Agency's assessed penalty was reasonable, and the judge was limited in the ability to deviate from such penalty.[26] The Agency thus did not allow the presiding judge to have any significant latitude in setting the sanction. This particular presumption has now been removed but could be reinstated at some later date.

Nevertheless, the crosshairs are now placed on the Coast Guard Judges. The Department of Commerce directed NOAA to terminate the Coast Guard administrative law judge contract in order to reset NOAA's relationship with the regulated community. See Secretarial Decision Memorandum, dated May 17, 2011, page 3. Judge Swartwood reported "[i]n every interview I conducted with fishermen, fish dealers and their lawyers,

[26] Importantly, the Agency Administrator is the ultimate decider of these cases. The judges only have the authority that is delegated to them via Agency. Furthermore, the judges' authority is further limited by Agency regulations, caselaw and policy pronouncements.

questions were raised concerning the perceived bias in favor of NOAA by the Coast Guard ALJs" and that the undersigned's actions with respect to the Kuala Lumpur Conference and the Lobsters Inc./Yacubian case lends credence to the perception of such alleged bias. Report at 128.

On the basis of an ex parte review of only a few cases (i.e., thirty-one – see Report at 3), Judge Swartwood then makes the following sweepingly broad statement:[27]

> 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.

Report at 235.

As thoroughly discussed above, Judge Swartwood's characterization of the undersigned's Order is false – the undersigned never "reinstated" the Agency's assessed penalty in that case. Additionally, as set forth above, a complete review of the undersigned's dispositions in NOAA cases counters this assertion. Even under the prior regulatory regime, respondents received an independent review and analysis (and often adjustment) of the Agency's requested penalties to the extent permitted by Congress and the Agency Administrator.

[27] Notably, the undersigned was involved in only one of these 31 cases, i.e., the Lobsters Inc./Yacubian case.

Given the allegations in the Swartwood Report and this response, the undersigned feels compelled to obtain the parties' position on whether my continued involvement is warranted pursuant to 15 C.F.R. § 904.205(b).

WHEREFORE:

ORDER

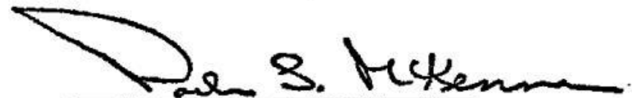
IT IS HEREBY ORDERED that each party has 10 calendar days from receipt of this Order to file a response to this Order regarding the undersigned's continued presiding over this case.

IT IS HEREBY FURTHER ORDERED that the parties' responses address the following issue:

1. After reading this Order, which contains the allegations of the Special Master and my responses thereto, any party may present a Motion for Disqualification including a statement setting forth the facts alleged to constitute the basis for disqualification pursuant to 15 C.F.R. § 904.205(b).

IT IS HEREBY FURTHER ORDERED that upon the receipt of any such filings, the undersigned will consider whether a recusal is warranted under 15 C.F.R. § 905.205(a) or (b).

Done and dated this 26th day of May, 2011 at
Alameda, CA.



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

CERTIFICATE OF SERVICE

I hereby certify that I served the attached **<u>ORDER TO SHOW CAUSE FOLLOWING RELEASE OF SPECIAL MASTER SWARTWOOD'S REPORT</u>** upon the following parties (or designated representatives) and entities in this proceeding in the manner indicated as follows:

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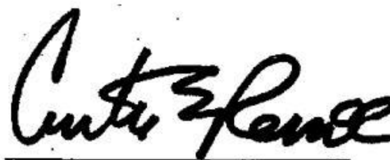
Done and dated this 26th day of May 2011 at Alameda, CA.



Curtis E. Renoe
Attorney Advisor to the
HON. PARLEN L. MCKENNA