UNITED STATES DEPARTMENT OF COMMERCE
The Secretary of Commerce
Washington, D.C. 20230

December 14, 2012

SECRETARIAL DECISION MEMORANDUM

Subject: Decisions Regarding Additional NOAA Fisheries Enforcement Complaints Based on Special Master Charles B. Swartwood's April 6, 2012 Report and Recommendations

This Decision Memorandum brings to a close the review of past cases involving complaints about the conduct of the National Oceanic & Atmospheric Administration (NOAA) enforcement program that Secretary Gary Locke initiated in September 2010. He initiated this exercise of the Secretary's discretion under the Magnuson-Stevens Act[1] in response to a September 2010 report issued by the Department of Commerce Office of Inspector General (OIG) that examined NOAA enforcement program practices and identified cases it found would benefit from "an independent process for equitable relief or resolution of past enforcement cases meeting appropriate eligibility criteria."[2] Secretary Locke felt compelled to take action "to make clear that conduct by law enforcement officers and attorneys that overstep the bounds of propriety and fairness expected of them is not part of NOAA's law enforcement program."[3]

To carry out this review, Secretary Locke appointed former Federal Magistrate Charles B. Swartwood as a Special Master to examine the 127 complaints made to the OIG during its investigation. He directed the Special Master to "identify those instances in which clear and convincing evidence establishes that NOAA enforcement personnel engaged in conduct that overstepped the bounds of propriety and fairness expected of them, and had a material impact on the outcome of the case."[4] After applying the eligibility criteria established by Secretary Locke in subsequent memoranda, Special Master Swartwood focused on 19 cases identified by the OIG as warranting further review as well as an additional 12 complaints received by the OIG but not pursued in its investigation. He investigated 30 complaints[5] and submitted his 236-page report with accompanying recommendations to Secretary Locke on April 14, 2011. Following careful review and consideration, Secretary Locke issued a Decision Memorandum dated May 17, 2011, in which he accepted Special Master Swartwood's recommendations and remitted a total of $649,527 to 11 individual complainants.

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[1] 16 U.S.C. § 1858.

[2] *Final Report – Review of NOAA Fisheries Enforcement Programs and Operations, Report No. OIG-19887-2 at p. 4 (Sept. 2010).*

[3] *Secretarial Decision Memorandum at p. 3-4 (Sept. 23, 2010).*

[4] *Id.* at p. 4.

[5] One case was deferred to the second round of Special Master Swartwood's review because the complainant was unavailable during the first round.

Secretary Locke originally limited the review to complaints voiced to the OIG over the course of its 15-month investigation. In March 2011, however, he concluded that it was necessary to allow additional complainants to apply for review. Secretary Locke therefore issued a Decision Memorandum on March 16, 2011, establishing a process and criteria for applications and directing Special Master Swartwood to review such additional applications covering a period back to 1994.

In this second round, Special Master Swartwood received a total of 84 applications. After evaluating these under the eligibility criteria in Secretary Locke's memoranda, Special Master Swartwood and the two lawyers retained to assist him identified 66 complaints for review, a number that was reduced to 63 after two individuals withdrew their three applications. Special Master Swartwood and his staff began by reviewing the material filed by the complainants. They went to lengths to ensure that complaining fishermen had the opportunity to present their claim(s), following up with those whose initial submissions were incomplete or submitted improperly. Next, they reviewed the NOAA files for each case and copied from the file the material relevant to the investigation. Then Special Master Swartwood interviewed each of the complainants[6] and any witnesses identified and available. A total of 80 individuals were interviewed over the course of five months.

Once the interviews were complete, the team prepared a written "Provisional Findings of Fact" for each case. The provisional findings were provided to the NOAA Special Agents and Enforcement Attorneys involved in each case, who submitted their responses in writing. Special Master Swartwood used the responses from NOAA personnel to revise his provisional factual findings into the final "Findings of Fact" for each case. Together with the Discussion and Recommendations sections of each case, these Findings of Fact were woven together to create a 554-page report, with 964 exhibits totaling over 5,000 pages, submitted to Secretary John Bryson on April 6, 2012.[7]

Secretary Bryson's consideration of the report was ongoing at the time of his resignation in mid-June 2012. I began my review of this report soon after becoming Acting Secretary and have read through the report, talked at length with the lawyers here at the Department of Commerce who have been involved with this review, met with Special Master Swartwood about his recommendations before finalizing my decisions, and had my staff review the report to consider whether additional program or policy changes should be implemented by NOAA.

In this report, Special Master Swartwood identifies 18 complaints for which, although he finds an offense was committed, the resolution of the case was affected by conduct that he finds fell outside the standards set forth in Secretary Locke's decision memoranda. With respect to all 18 of these complaints, Special Master Swartwood finds that (1) an excessive

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[6] Of the 58 individual complainants that met with the Special Master, 34 of them were represented by counsel.

[7] *Report and Recommendation of the Special Master Concerning Applications for Review of NOAA Enforcement Action (April, 2012) ("Report & Recommendations").*

penalty assessment was present in a Notice of Violation and Assessment (NOVA) or threatened prior to the issuance of a NOVA; (2) operated to coerce a settlement; and (3) was unfair. He therefore recommends a modification of the penalties assessed. For 16 of these complaints, he recommends the remission of penalties paid for a total of $564,794, of which $373,500 is for a single complaint. For two complaints, he recommends the forgiveness of a total of $151,266.66 currently outstanding.

With respect to the remaining 45 complaints, Special Master Swartwood recommends that I take no action. In some instances, he finds a lack of clear and convincing evidence that there was misconduct because the complainants' version of what happened was not credible given the evidence and other testimony. In others, he finds that the actions of the complainants do not warrant relief from penalties; the report recounts instances in which fishermen did such things as fish deliberately in closed areas, cover up catches above their limits, or hide fish in false-bottomed holds.[8] In other instances, Special Master Swartwood finds that both the assessed penalty and the eventual settlement were fair or that, while the initial penalty assessment was high, the ultimate settlement was fair.

In looking at these recommendations, I have been committed to applying the same standards of fairness as Special Master Swartwood. By this Decision Memorandum, I am directing NOAA to return a total of $543,500 to 14 complainants and to forgive the outstanding debt of two complainants that totals $161,266.66. As detailed more fully below in discussion of individual complaints, I accept Special Master Swartwood's recommendation in the 45 complaints for which no action is recommended. I also accept his recommendation for 11 of the 18 complaints in which he recommends remission or forgiveness of penalties.

For the remaining seven complaints, I am making a decision that differs from the Special Master's recommendation. With respect to two of the seven complaints for which Special Master Swartwood recommends remission, I am rejecting the recommendation because the fisherman involved were either fishing inside a closed area or fishing without a permit and the penalty was assessed against the proceeds from a catch that was seized. Letting these fishermen retain the proceeds of a catch that violates fisheries management regulations, whether intentional or not, would allow them the economic benefit from a catch that was unlawful and would be unfair to fishermen who play by the rules. For the same reason, I am reducing the amount to be remitted for two other complaints. I am also reducing the amount remitted in another complaint because it is essential that NOAA observers be able to depend on cooperation when they go out to sea on fishing vessels.

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[8] One complainant went so far as to falsify the documents submitted with his application in order to bolster his case. The two applications of this complainant were subsequently withdrawn and the individual pleaded guilty to federal charges related to the falsification. See Press Release, U.S. Attorney's Office for the District of Massachusetts, Fisherman Admits to False Filing with NOAA Special Master (May 23, 2012) *(available at* http://www.justice.gov/usao/ma/news/2012/FitzsimmonspleaPR.html (last visited Aug. 24, 2012))

For the remaining two complaints of the seven, I am increasing the amount to be forgiven or remitted because my review of facts and material involved leads me to conclude that Special Master Swartwood's recommendations do not go far enough to remedy unfair enforcement actions.

I am grateful to Special Master Swartwood. He has provided an important service to the Department of Commerce and to the mission of fair and effective enforcement of fisheries, and he has provided aggrieved fisherman an opportunity to be heard. He brought to the task not only the experience and judgment of his career as legal practitioner, Federal Magistrate, and Massachusetts Ethics Commission Chair, but also his nautical experience as a sailor. Over the more than 18 months of work on his two reports, he has come to know many of the fishermen and enforcement personnel involved and developed an understanding of the challenges facing fishing communities and fisheries enforcement. His report reflects this understanding.

As we conclude this exceptional process, it is worth looking back at how it began. Under Secretary Jane Lubchenco received complaints regarding the enforcement program early in her tenure from fishermen and Members of Congress. In response, she asked the OIG to initiate an investigation of the program. The OIG's first report on the fisheries enforcement program in January 2010 identified "systemic" issues that contributed to "a highly-charged regulatory climate and dysfunctional relationship between NOAA and the fishing industry—particularly in the Northeast Region."[9] These issues included a lack of central leadership and management over law enforcement, a need for more transparent and consistent guidance and procedures, and an over-emphasis on criminal investigation, and resulted in NOVAs in the Northeast region that appeared to be much higher than those in other regions. A follow-up OIG report on specific complaints suggested that "a new enforcement orientation within NOAA is needed to reinforce and ensure fairness," but noted that "the critical findings included in this report are driven by the activities and actions of some NOAA General Counsel for Enforcement and Litigation (GCEL) and Office of Law Enforcement (OLE) personnel in the Northeast."[10]

The Special Master's work bears out these findings. As Secretary Locke observed in his decision on the first Special Master report, "[f]or 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."[11] Further, as Special Master Swartwood concludes, "approximately 90% of the complaints of unfair NOAA enforcement action are from the Northeast region."[12] In fact, of the 29

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[9] *Review of NOAA Fisheries Enforcement Programs and Operations*, Final Report No. OIG-19887 at p. 3 (Jan.2010).
[10] *Final Report — Review of NOAA Fisheries Enforcement Programs and Operations*, Report No. OIG-19887-2 at p. (Sept. 2010).
[11] *Secretarial Decision Memorandum, at p 2 (May 17, 2011).*
[12] *Report & Recommendations at p. 18.*

complaints for which Special Master Swartwood recommended that penalties be remitted, all but three came out of the Northeast region. In the report before me, all but one of the complaints for which the Special Master recommended remission came from the Northeast region.

The OIG January 2010 report noted that numerous interviewees "supported enforcement, provided that it is fair, equitable, and not onerous" and "expressed strong support for enforcement against what they believe is a minority of unscrupulous operators who intentionally violate the law and place the industry at risk by compromising the viability of the nation's fisheries." The complaints identified for relief by the Special Master represent a tiny portion (less than 1%) of the enforcement work of NOAA's enforcement agents and attorneys in all regions during the period under review: from March 1994 to February 2010, NOAA issued and resolved over 3,700 NOVAs.

Enforcement officers who fail to exercise their broad powers and latitude with the utmost care do a disservice to the many colleagues who consistently enforce fisheries laws vigorously, professionally, and fairly. Likewise, fishermen who disregard the law do a disservice to their neighbors who comply with the law and operate within catch limits in the current year so that there will be more fish to catch the next year. We have to assure that everyone plays by the same rules put in place to protect and rebuild fish stocks and that enforcement of our fisheries laws is even-handed and respected.

Since the January 2010 OIG Report was issued, NOAA has worked to improve the transparency and consistency of fisheries enforcement as well as its relationship with the fishing community. NOAA has put in place new enforcement leadership, new policies to make enforcement practices consistent nationwide, and better accounting and oversight systems. It has undertaken more than 150 separate actions to address shortcomings and remedy issues in both the enforcement program and administration of the Asset Forfeiture Fund that developed long before current NOAA leadership joined the agency.

At my request, staff within the Office of the Secretary performed a thorough review of the policy changes NOAA implemented to respond to the OIG's January 2010 report and the Special Master's first report. I requested this review to determine whether there were any trends or practices in the second report that were not present in previous investigations and if so, whether those changes necessitated additional policy changes. My staff did not find any such trends or practices and, for the reasons discussed below, I am satisfied based on this review that I do not need to mandate any further changes at this time.

The majority of the issues identified in the second report involve excessive penalty assessments that the Special Master found had the effect of coercing settlement, and penalties assessed inequitably for similar offenses. NOAA has instituted a number of reforms that address such problems. First, on

February 3, 2010, Under Secretary Jane Lubchenco directed that all charging and settlement decisions for enforcement cases be reviewed at NOAA headquarters. This action withdrew a March, 1994 delegation of authority by the then Assistant General Counsel for Enforcement and Litigation of NOAA that allowed individual attorneys to make such decisions without the approval of their supervisors at headquarters. Second, in March, 2011 NOAA put in place a new nationwide policy for assessing civil administrative penalties and permit sanctions. This new policy institutes a more transparent and uniform application of the statutes NOAA enforces and ensures that each penalty or sanction assessment is appropriate given the gravity of the violation. Proposed penalties and sanctions that deviate from this policy must be justified in the review of a charge or settlement. Third, NOAA now requires all enforcement agents and enforcement attorneys to attend professional and ethics training to ensure they are aware of and follow fair, effective, and professional procedures.

Another problem identified in the second report is overzealous or abusive conduct by individual enforcement agents and attorneys due to their discretion to exercise broad and powerful enforcement authority unchecked. The reforms discussed above address this problem by establishing numerous checks on the exercise of this authority. The new penalty policy and the mandatory annual professional and ethics training of enforcement personnel work to change the culture within which the enforcement officials operate. Additionally, NOAA has undergone significant changes in its enforcement leadership, including changes in the Special Agent in Charge of the Northeast Division, Director of NOAA Fisheries Office of Law Enforcement, and Assistant General Counsel for the Enforcement Section. These individuals are highly qualified and dedicated not only to enforcing fisheries laws but also to ensuring that it is done in an environment in which the fishing community can be confident that the laws are being enforced fairly.

The final type of problem identified in the second report was described by the Inspector General as "unduly complicated, unclear, and confusing fishing regulations."[13] To address this problem, in 2011 NOAA launched a multi-year process to review existing regulations and, where possible, revise them to make them clearer and easier to understand. NOAA is working with the regional fishery management councils on this project and is providing instruction on regulatory reform and review as part of its annual New Regional Fishery Management Council Member Training and as part of training modules for agency staff. NOAA is also working with the fishery management councils' enforcement and compliance committees to assess regulatory complexity and burdens. In addition, NOAA is working with the councils and the NOAA Office of the Chief Information Officer on ways to improve web-based delivery of information regarding fishery management regulations. Finally, NOAA is now conducting routine training for the fishing industry and other stakeholders on regulatory compliance in each region at least once each year. This training is being conducted by staff from the Office of Sustainable Fisheries in

[13] *Final Report – Review of NOAA Fisheries Enforcement Programs and Operations, Report No. OIG-19887-2 at p. 4 (Sept. 2010).*

conjunction with the Office of Law Enforcement, the Enforcement Section of the NOAA General Counsel's office, and the fishery management councils.

All of these changes, along with numerous others NOAA has instituted over the past four years, lessen the likelihood that the problems and issues identified in either of the reports will occur again. The actions NOAA has taken represent a commitment to change fundamentally its approach to enforcement, not only by correcting specific deficiencies, but also by implementing new approaches to achieve success by focusing on outreach, engagement, and compliance assistance. Over the past two years as Acting Deputy Secretary, Deputy Secretary, and Acting Secretary, I have had the opportunity to work closely with Under Secretary Lubchenco and her leadership team as they have worked to focus the enforcement program on engaging the fishing community to promote compliance. I have been impressed by the dedication and creativity this group has brought to the process. I am confident that NOAA leadership is paying close attention to the implementation and effectiveness of these reforms and will work vigilantly to ensure the provision of fair and balanced enforcement practices that support the long-term preservation of important fishery resources.

The review that Secretary Locke initiated was extraordinary: it is highly unusual for a law enforcement agency to look back at so many closed cases covering a period of more than 15 years. The Department of Commerce, and NOAA in particular, has gone to these lengths to rebuild trust with communities affected by fisheries regulation and enforcement. As an economist, I recognize that sustainable management of fisheries is vital to these communities, part of their economic lifeblood and their tradition. Effective enforcement is essential to successful fisheries management. This decision concludes the Department's review of past cases, but our commitment to strong, effective, and trusted fisheries law enforcement will continue.

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CASE DETERMINATIONS

Complaint No. 33: Willie R. Etheridge, III

On May 23, 2003, Willie R. Etheridge, III, was issued a NOVA for six counts of landing a shark overage, one count of possessing 22 dusky sharks, two counts of shark finning, and one count of making a false statement. Mr. Etheridge was assessed a civil penalty of $76,500 and a 150-day permit sanction, but on August 4, 2003, settled for a $45,000 civil penalty. Mr. Etheridge alleged that NOAA targeted him in retaliation for his role in challenging NOAA regulations through litigation during in the late 1980's and early 1990's.

Special Master Finding: The penalty assessed was appropriate and reasonable. NOAA did not charge an excessive penalty in order to force a settlement. Mr. Etheridge admitted to the violations. There is no evidence showing that he was targeted, but instead his access to senior NOAA officials regarding the case allowed him to negotiate a favorable settlement.

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: Terry Mulvey

Terry Mulvey was issued NOVAs in two separate cases and one Notice of Permit Sanction (NOPS), which he appeals here. The first was a five-count NOVA issued on June 18, 2004 for fishing for monkfish without a permit, possessing American lobster without a permit, failing to follow orders issued by the Coast Guard, and making a false statement to NOAA. The fifth count was dismissed. He was assessed a civil penalty of $145,000, a 120-day vessel permit sanction, and a 90-day operator permit sanction. The second NOVA was issued on February 24, 2005 for two counts of failing to submit Fishing Vessel Trip Reports (FVTR) and two counts of exceeding the monkfish possession limit. Mr. Mulvey was assessed a $380,000 civil penalty. The NOPS alleged three counts of failing to comply with monkfish possession limits and permanently suspended Mr. Mulvey's vessel and operator permits. These three cases were resolved in June, 2005 in a global settlement in which Mr. Mulvey agreed to a civil penalty of $40,124.74, forfeiture of $4,529.30 worth of seized catch, sale of his vessel, and sale of his vessel and operator permits. Mr. Mulvey complained that NOAA targeted him for failing to timely file FVTRs, which they had not charged other fishermen for in the past.

Special Master Finding: Each of these cases against Mr. Mulvey was supported by evidence. The penalty assessed by NOAA that resulted in a settlement was appropriate and the agreed-upon settlement was realistic and fair in light of other similar cases.

***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. 40: James G. Spalt

On April 1, 1996, James G. Spalt was issued a series of six NOVAs involving several corporations and vessels, alleging over 300 counts of falsifying information on reports, failing to submit required reports, buying from non-permitted vessels, failing to comply with the vessel call-in program, exceeding allocated Days-at-Sea (DAS), and exceeding the allotted crew members allowed to fish. Mr. Spalt was assessed a civil penalty of $4,300,000 and settled on January 30, 1998 for $1,500,000 following a hearing before an Administrative Law Judge (ALJ). Mr. Spalt alleged that since 1995 NOAA enforcement waged a broad and deliberate operation to seize assets from his companies by charging him with arbitrary and exhaustive violations. Mr. Spalt alleged that the fines were broad and excessive given that NOAA suspected Mr. Spalt had frequently violated rules but lacked tangible evidence to prove any specific violation. Mr. Spalt asserted the penalty schedule in effect at that time was excessive and he entered into a settlement agreement without knowing that the agreement would permanently bar him from reentering the fishing industry.

***Special Master Finding*:** The penalty assessed in this case resulted in the seizing of assets and permanent surrender of his dealer permit, all federal vessel permits, and an agreement to cease all commercial fishing in state and federal waters. Mr. Spalt's case was heard by an ALJ whose orders and findings of intentional acts are not contradicted by clear and convincing evidence. The settlement was arrived at after fair negotiations in which Mr. Spalt was represented by able counsel.

***Special Master Recommendation*:** No action with regard to the amount paid in settlement. However, it is also clear that Mr. Spalt would not have agreed to the settlement if he knew that he would never be able to return to the fishing industry. Therefore, a review of Mr. Spalt's request to reenter the fishing industry is suggested.

***Secretarial Decision*:** Based on the Special Master's recommendation, I am not taking action with respect to this complaint, though I am directing NOAA to review Mr. Spalt's request to renew his permit.

Complaint No. 60A: Tom Testaverde

Tom Testaverde complained that the penalty levied against him for a first time offense was excessive. The penalty was issued on December 31, 1996, for installing a net with an improperly repaired fin fish excluder device, which in turn resulted in capture of unauthorized catch. He was assessed a civil penalty of $35,000, a six-month operator permit suspension, and loss of 60 DAS. Mr. Testaverde settled in November 2007 for a civil penalty of $18,912.50, a 60-day operator permit sanction, and loss of 20 DAS.

Special Master Finding: The penalty assessed in this case was excessive. However, the case settled for an amount less than the minimum penalty that could have been charged. As such, the case was fairly 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. 60B: Tom Testaverde

On June 5, 2003, Tom Testaverde was issued a two-count NOVA charging him with exceeding the codfish possession limits and calling out of the system used to record DAS early. He was assessed a $5,000 civil penalty along with forfeiture of $6,443.97 worth of seized catch. He settled the case in September of 2003 for a $4,000 civil penalty to be paid from the proceeds of the seized catch, with the balance returned to him. Mr. Testaverde alleged that the phrasing of regulations requiring calling into the DAS system were ambiguous and led to him landing an overage of cod and calling out of the DAS system early.

Special Master Finding: The settlement in this case took into account Mr. Testaverde's history and attempts at compliance. It reflected the value of codfish counted in excess of Mr. Testaverde's possession limit and was consistent with a case with similar facts that had been decided in NOAA's favor earlier that year.

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. 73: Brian Roche

Brian Roche sought review of three NOVAs issued on March 25, 2005. The first alleged three counts of landing monkfish without a permit, two counts of failing to submit logbooks, two counts of failing to call into the DAS system, and one count of selling shark meat and fins without a permit. The second alleged one count of failing to file timely FVTRs. The third alleged two counts of exceeding the monkfish possession limit and one count of failing to file FVTRs. For all three, Mr. Roche was assessed a civil penalty of $330,000 along with vessel and operator permit sanctions. He settled all three NOVAs on November 18, 2005, for $40,000. Mr. Roche failed to file FVTRs for 39 consecutive months, but complained that NOAA's penalties were excessive and used to coerce him into a settlement agreement for what he believed to be technical violations or honest mistakes.

Special Master Finding: The assessed penalty in this case was excessive, particularly given the nature of the violations that were charged and the lack of willful intent on Mr. Roche's part. However, the final settlement was fair given the number of violations and the length of time covered by the violations.

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. 94: Joshua Wentling

Joshua Wentling was issued four NOVAs in April 2008 for violations that occurred in 2007. The first alleged one count of fishing in a closed area. The second NOVA alleged one count of landing an overage of scallops, one count of fishing in a closed area, and one count of interfering with an investigation. The third NOVA alleged one count of fishing in a closed area. The fourth NOVA alleged one count of fishing in a closed area. Collectively, these NOVAs assessed a $100,000 civil penalty along with forfeiture of $8,318.50 of seized catch. Mr. Wentling settled all four NOVAs on January 19, 2010, for a compromised civil penalty of $20,000 to be paid from the proceeds of the sale of his vessel and an eight-month sanction for his operators permit. Mr. Wentling alleged that the sale of his vessel was coerced as part of the settlement process and that he was forced to accept a personal permit sanction for violations made by his corporations.

Special Master Finding: The penalty in this case was fair and reasonable. Mr. Wentling was already in the process of leaving the fishing business and had listed his vessel for sale for two years prior to signing the settlement agreement. The corporation, not the complainant, paid the civil penalty from the proceeds of the vessel sale. Finally, although Mr. Wentling pointed to firing one vessel captain after a violation, he failed to fire another captain who was responsible for three of the violations.

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. 98: Gary Genthner

Gary Genthner was issued a NOVA on July 14, 2004, alleging one count of deploying lobster traps with blocked escape vents and one count of possession of 20 berried female lobsters. He was assessed a $62,500 civil penalty and vessel and operator permit sanctions of 81 days. He settled the NOVA on December 28, 2004, for a $32,500 civil penalty and 45-day vessel and operator permit sanctions. Mr. Genthner alleged that fines levied against him were unfairly assessed as other fisherman with similar lobster traps were not subject to fines by NOAA. Mr. Genthner expressed concern that appealing to an ALJ would have resulted in him paying the originally assessed amount plus attorney's fees.

Special Master Finding: The assessed penalty was excessive given the nature of the violation. However, the settlement was reasonable and fair given that the violation was intentional and was a second offense.

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. 99: Dennis Sturgell

Dennis Sturgell was issued a NOVA on August 12, 2008, for fishing without properly activating the Vessel Monitoring System (VMS) on board his vessel. Mr. Sturgell received assurances from the company that installed the VMS as well as the company responsible for servicing it that it was properly functioning and that he was in compliance with NOAA requirements. Mr. Sturgell was charged with four counts of fishing without a working VMS, totaling $116,897.95, an amount that was later lowered to $106,897.95 when NOAA dropped one of the four counts. Mr. Sturgell settled the matter on August 25, 2009, for $50,000.

Special Master Finding: The assessed penalty was excessive and resulted in an unfair settlement. The amount did not take into account the role that the manufacturer and servicer of the VMS unit had in its malfunction. Further, the penalties should have been tied to the value of the catch associated with the violations. Mr. Sturgell should have been assessed half of the value of his catch, or $36,448.97, due to the role a third-party played in this violation.

Special Master Recommendation: Remission of $13,550 to Mr. Sturgell.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to return $13,550.00 jointly to Seasick II, Inc. and Dennis L. Sturgell.

Complaint No. 102A: Karen Leigh Jayne Bell

Karen Leigh Jayne Bell received a one-count NOVA on September 10, 2008, for fishing in a closed area, for which she was assessed a $30,000 civil penalty and a 30-day vessel permit sanction. Ms. Bell settled the NOVA on July 7, 2009, for a civil penalty of $8,000. Ms. Bell alleged that the assessed penalty was excessive in order to force a settlement, especially given that the infraction was unintentional.

Special Master Finding: The penalty in this case was fair, even if the infraction was unintentional, as NOAA allowed Ms. Bell to keep her catch to offset the cost of the trip. Furthermore, the penalty was well within the guidelines and the final settlement took into account the problems and financial circumstances of the captain who would bear responsibility for the penalty.

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. 102B: Karen Leigh Jayne Bell

Karen Leigh Jayne Bell received a two-count NOVA in March 2008 alleging one count of failing to maintain a fish intact until offloaded and one count of failing to have turtle conservation measures in place. She was assessed a civil penalty of $30,000 and on June 5, 2008, settled for a $22,500 civil penalty. Ms. Bell made the first seven $1,000 payments of the civil penalty but was unable to continue, thus triggering payment of the original $30,000 penalty with interest under the terms of the settlement installment agreement. Ms. Bell alleged that penalties assessed to her captain should not have been imputed to her and that the assessed penalty was inconsistent with other penalties for similar violations paid by other fishermen.

***Special Master Finding*:** The penalty in this case was not excessive, the settlement was fair, and the corporation is responsible for the actions of its employees in the course of their employment. Although the corporation assumed the captain would pay the penalty, which he failed to do and left the state, the corporation ultimately remains liable for the fines. In addition, because NOAA did not seize the catch, the corporation was able to cover the cost of the trip.

***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. 127: Michael David Hayden, Jr.

On February 8, 2006, Michael Hayden, Jr. was charged with one count of fishing for scallops in a closed area, for which he was assessed a penalty of $5,000. He settled on February 21, 2006, for payment of $2,000. He alleged that he should have been notified that the area was closed and that an enforcement attorney coerced him into settling a case by remarking that "NOAA wins 98% of the time and that if [Mr. Hayden] lost his fine could be as high as $130,000."

***Special Master Finding*:** The settlement was not forced by threat or coercion. The lack of knowledge of the closed area is not a defense. NOAA took into account the inadvertent nature of the violation and Mr. Hayden's lack of violation history. The settlement amount 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.

Complaint No. 132: William Fooks

On July 28, 2008, William Fooks was charged with two counts of failing to transmit a signal from his VMS. He was assessed a penalty of $150,000 and settled on March 10, 2009, for $10,000. Mr. Fooks claimed that in one instance, a wave washed through a window of his boat and disabled his computer. In the second instance, Mr. Fooks claimed that the outage was caused by a loose connection within the machine. This was Mr. Fooks' first and only violation. He alleged that assessed penalty was excessive.

Special Master Finding: The assessed penalty was unreasonable and excessive. Mr. Fooks' claim that a wave disabled the computer is credible and for that count he should only have been issued a written warning. While it was not possible to determine the reason for the malfunction that was the subject of the second count, there was no credible evidence that Mr. Fooks tampered with the system. As a result, the charge should have resulted in only a $5,000 penalty.

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

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to return $5,000 to Bud Lin, Inc.

Complaint No. 201: John I. Keller

John Keller was issued two NOVAs on January 30, 2006, alleging over 34 counts of landing scallop overages and assessing a civil penalty of $460,000 along with a two-year vessel and operator permit sanction. He settled the NOVAs on August 18, 2006, for a $105,000 civil penalty and 30 months of vessel and operator permit sanctions to be served in six month increments. Mr. Keller alleged his settlement was excessive given that it was his first offense.

Special Master Finding: The assessed penalty and settlement in this case were fair because Mr. Keller was shown to be a willing part of a conspiracy that involved numerous illegal fish landings and falsification of records to cover up these offloads. The settlement amount was equivalent to the total value of the illegal trips.

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. 202: Jose "George" Cordeiro

Jose Cordeiro received a NOVA on July 13, 2006, for one count of entering a closed area. His catch was seized and he was assessed a civil penalty of $32,000. He agreed to a settlement payment of $19,000 and forfeiture of an additional $61,000 out of catch proceeds of $113,021 on December 19, 2006. He alleged that the penalty assessed and amount paid were excessive and the regulation outlining the closed areas was unclear. Additionally, Mr. Cordeiro asserted that neither a Coast Guard vessel that passed him when he was in the closed area nor NOAA warned him that he had entered a closed area.

Special Master Finding: The penalty assessed was fair because the regulation deeming the areas closed was clear, and had been in place for two years. The fact that the Coast Guard did not stop the vessel from fishing in the closed area is not a viable defense and NOAA had no duty to warn the vessel that it was entering a closed area. Additionally, the settlement amount was consistent with that reached in similar cases, the amount of time spent fishing in the closed area, and the value of the catch.

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. 203A: Daniel Adrian Bubb

Daniel Bubb received a NOVA in September 2003 that alleged one count of purchasing shark and tuna without a permit, two counts of failing to report fish purchases, and two counts of interfering with an investigation. He was assessed a $270,000 civil penalty and a 16-month dealer permit sanction. Mr. Bubb settled this and another NOVA not included in his complaint on February 4, 2005, for a civil penalty of $60,000 that was later lowered to $43,635.84 due to Mr. Bubb's inability to pay. Mr. Bubb claimed that NOAA put him out of his business as a fish dealer by denying him the opportunity to submit missing reports and instead assessed him with civil penalties. Mr. Bubb argued that the violations of shark and tuna purchases caused no harm to resources and that he lacked the financial means to pay the levied penalty.

Special Master Finding: The assessed penalty was not excessive. Mr. Bubb was given an opportunity to correct his missing reports, failed to do so, and was not forthright with NOAA regarding some sales. Mr. Bubb submitted financial disclosures which were taken into account and the payments were modified to avoid putting him out of business.

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. 203B: Daniel Adrian Bubb

Daniel Bubb was issued a NOVA in December 2008 alleging one count of landing undersized swordfish. He was assessed a $15,000 civil penalty, which he settled one day later for a $10,930.93 civil penalty to be paid from $20,930.93 worth of seized catch. Mr. Bubb disputed that his captain landed the undersized catch that NOAA seized. Rather, he argued, the onboard butcher mistakenly cut the catch too small while at sea. Mr. Bubb also argued that

NOAA improperly sold the seized catch, as they did not obtain bids from three buyers, which was standard procedure, thus resulting in a lower price for the catch.

***Special Master Finding*:** The seizure was appropriate, as the catch was properly measured and found to be undersized. The settlement at 50 percent of the catch value was fair and reasonable to deter fisherman from similar future violations, and took into account Mr. Bubb's financial position.

***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. 205: Joseph J. Gilbert

Joseph Gilbert owned a boat that was detected on the VMS system entering a closed area while it was fishing. Mr. Gilbert ordered the vessel back to port when he learned of the incursion. NOAA issued two Enforcement Action Reports (EAR) on August 5, 2004, after seizing the catch of 7,089 pounds of scallops valued at $35,953.90, alleging that Mr. Gilbert's vessel entered a closed area. NOAA settled with Mr. Gilbert prior to the issuance of a NOVA for $10,000, with the balance of the proceeds from the seized catch returned.

***Special Master Finding*:** The penalty in this case was fair and reasonable. Mr. Gilbert admitted that the vessel entered the closed area and that his captain did not read or understand the regulations establishing the closed area.

***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. 206: James D. Patterson, Jr.

James Patterson, Jr. overfished and was convicted in Rhode Island state court on criminal charges of possessing summer flounder in excess of limits. On April 21, 2003, NOAA assessed a penalty of $18,000 on two counts of falsifying FVTRs to cover up the violations. NOAA settled with Mr. Patterson on September 24, 2004, for $12,000. Mr. Patterson argued that NOAA pressured him into settling as the assessed penalty was excessive, noting that he only made a $500 profit from selling the overages. Mr. Patterson also argued that his penalty should have been reduced further given his cooperation with NOAA.

Special Master Finding: The penalty in this case was appropriate and reasonable as it took into account Mr. Patterson's cooperation. The penalty also took into account the fact that the violations at issue were intentional and the complainant attempted to avoid detection by falsifying several FVTRs.

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. 207: Allen W. Rencurrel

Allen Rencurrel argued that the penalty assessed against his vessel for landing amounts in excess of the limit was excessive relative to similar violations by other vessels. During the offload, the vessel's captain lied to NOAA regarding the existence of 16 hidden bags of scallops. The catch was seized and sold, as it was over the trip limit. On January 16, 2007, Mr. Rencurrel settled with NOAA prior to issuance of a NOVA for a $25,000 civil penalty, forfeiture of the seized catch valued at $111,294, and a nine-day permit sanction.

Special Master Finding: The penalty assessed was not excessive given that the captain of the vessel hid the overage and made several false statements to NOAA officials about the payload. Although the seizure of the catch caused real loss to the owner, the seriousness of the actions justify the resolution here.

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. 208: Stephen S. Celeste, Jr.

In June 2006 Stephen Celeste was stopped by New Jersey Division of Fish & Wildlife Conservation officers while putting out lobster traps. He was charged by NOAA with impeding an investigation by throwing traps overboard, having 21 traps without current NOAA tags, and failing to comply with an officer's instructions and was assessed a penalty of $75,000. After an ALJ hearing, he agreed to a $68,000 payment later modified to $40,000 and a four-week permit sanction. He claimed that the assessed penalty was excessive and he was compelled to settle at the conclusion of the ALJ hearing.

Special Master Finding: The final settlement amount for all of the violations was fair and reasonable. The penalty for untagged lobster traps was excessive by itself given that Mr.

Celeste had sufficient current tags for the traps he was using. Nevertheless, Mr. Celeste willfully evaded law enforcement detection and dropped lobster traps off the side of his boat, warranting significant penalties.

***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. 209: Peter W. Taylor

On August 17, 2007, Peter Taylor was charged with harassing an observer on board his vessel by verbally intimidating him and failing to provide documents and access to materials that were necessary for the observer to do his work. He was charged with two counts, one for refusing to provide information and another for harassing an observer, and assessed a $10,000 penalty on the first count and $15,000 on the second. He settled on May 6, 2008, for $17,500. Mr. Taylor alleged that he was forced to settle because his lawyer told him he would lose before an ALJ.

Special Master Finding: The assessed penalty was unreasonably high in light of comparison with previous cases of harassment of observers. Among the cases reviewed, the penalties for far more egregious conduct were significantly lower than the penalties here. Furthermore, the penalties in this case reflected the practice of charging significant initial assessments and settling for approximately half that amount. A more reasonable assessment would be $5,000 for each count, as they were Mr. Taylor's first, totaling $10,000.

Special Master Recommendation: Remission of $7,500 to Mr. Taylor.

Secretarial Decision: I agree with the Special Master that a portion of the penalty should be remitted. The penalty assessment, especially on the harassment count, was excessive. Mr. Taylor should not be assessed the minimum, however, because the Special Master found that he told his crew not to speak to the observer and refused to answer questions. NOAA observers depend on cooperation to be able to do their job effectively and safely. Mr. Taylor's penalty therefore should be $12,500, and I direct NOAA to return $5,000 to him.

Complaint No. 210: Stephen P. Welch

On August 22, 2008, Stephen Welch and his captain were assessed a penalty of $5,000 and forfeitures of all catch valued at $7,370.85 for fishing in a closed area. As part of a global settlement of this and two other cases, in October 2008 he agreed to a written warning and

forfeiture of the catch, and a payment totaling $21,000 for the other two cases. Mr. Welch alleged that he was forced to settle this case because he wanted to get the matter resolved quickly. He also alleged that he paid an excessive civil penalty for a violation associated with one of his captains fishing in a closed area.

Special Master Finding: Mr. Welsh did not pay a penalty for this matter. Rather, the settlement of this case resulted in a seizure and written warning. The Special Master does not have authority to remit forfeitures.

Special Master Recommendation: No action.

Secretarial Decision: Based on the Special Master's recommendation and because this complaint does not meet the criteria set forth in Secretary Locke's decision memoranda, I am not taking any action with respect to this complaint.

Complaint No. 212: E. Daniel Eilertsen

Daniel Eilertsen crossed into a closed area on four occasions while fishing for scallops in a permitted area. In August, 2007, he was assessed a $25,000 penalty and forfeiture of a catch sold for $21,612.50. He settled the case on January 20, 2009, for a payment of $6,300, forfeiture of the seized catch, and a written warning. Mr. Eilertsen argued that this should have resulted only in a written warning and not a civil penalty.

Special Master Finding: Although Mr. Eilertsen mistakenly drifted into a closed area, he acknowledged fishing productively there. As such, the settlement 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.

Complaint No. 214: Mark Bruce

On boarding Mark Bruce's vessel, a Massachusetts Environmental Police officer found an overage of scallops. The catch was seized and sold for $138,055.20, and a NOVA was issued on March 13, 2008, charging him with exceeding the catch limit, covering up the overage by dumping a bag of scallops, and filing a false FVTR. Mr. Bruce was assessed a $75,000 civil penalty and a four-month permit suspension. On June 26, 2008, he agreed to forfeit the catch proceeds, pay a penalty of $34,500, and take a two-month permit suspension. Mr. Bruce argued that the seizure of his entire catch for overfishing rather than merely the forfeiture of the overage was excessive, and the penalties were excessive for a first violation.

***Special Master Finding*:** The penalty was not excessive and did not force settlement. Mr. Bruce's actions were consistent with attempting to hide an overage. Also, the final settlement was only $2,000 higher than what Mr. Bruce offered, which was a minimal difference.

***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. 215: Paul Lemieux

Paul Lemieux was charged in February 2007 with fishing with an undersized trawl net, possession of lobster claws, a false statement, and operating with an expired permit. The $28,039 catch was seized, and the NOVA assessed a $26,000 penalty and a two-month permit sanction for the vessel and its captain. On August 17, 2007, he and his captain settled for forfeiture, and payment of $11,000 by Mr. Lemieux and $7,000 by his captain, and a 15-day permit sanction. Mr. Lemieux argued that his assessed penalty was excessive given that his entire catch was seized rather than just the catch that was captured with an undersized net.

***Special Master Finding*:** The penalty in this case was fair as it was established that Mr. Lemieux used undersized nets, which was a grossly negligent or an intentional act on the part of the vessel's captain. In addition, Mr. Lemieux's ability to pay was taken into account in assessing the penalty.

***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. 216: Todd Sutton

Todd Sutton fraudulently submitted another fisherman's logbook to acquire a lobster permit. On August 17, 2007, he was assessed a $40,000 civil penalty, revocation of his lobster permit, and a 90-day suspension of his other permits. On January 16, 2008, he settled for a $20,000 payment, revocation of a specified area permit, a 120-day vessel and operator permit sanction, and forfeiture of four DAS for monkfish. He complained that he never used the permit and therefore should not have paid a fine of $20,000.

***Special Master Finding*:** The penalty in this case is consistent with penalty guidance in effect at the time and therefore was fair and reasonable. If Mr. Sutton is unable to pay the balance of his fine he can apply to NOAA for reduction or forgiveness.

***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. 217: John Fernandez III

John Fernandez was the owner of the *Captain Lyman*, which was captained by an employee. On July 14, 2005, the *Captain Lyman* appeared, based on VMS data, to drift into a closed area. According to Mr. Fernandez, when he noticed the infraction he contacted the captain, ordered the vessel back into port, and contacted NOAA to report the violation. When the vessel returned to port, it was determined that a third party vendor had failed to update the Access Area plot lines as had been requested.

On September 22, 2005, Fernandez and the corporation for which he was the sole shareholder were charged with one count of fishing in a closed area and assessed a civil penalty of $20,000. The catch was also seized and sold for $18,525. Two days later, Mr. Fernandez settled the matter for a civil penalty of $18,525, to be paid from the proceeds of the seized catch.

Special Master Finding: The assessed penalty was excessive and designed to force a settlement. This violation was a first offense that Mr. Fernandez reported himself and was caused by the actions of a third party. Therefore, Mr. Fernandez should have been assessed $5,000, the minimum penalty for a first offense.

Special Master Recommendation: Remission of $13,525 to Mr. Fernandez.

Secretarial Decision: I agree with the Special Master that a portion of the paid amount should be remitted. The amount due from him should more closely reflect value of the catch for the amount of time the *Captain Lyman* spent fishing in the closed area. The trip records reflect that Mr. Fernandez' vessel spent 30% of its time at sea fishing in a closed area. His penalty therefore should be 30% of the proceeds of the catch, or $6,525 and he should receive a remission in the amount of 70% of his catch, $12,000. Therefore, I direct NOAA to remit $12,000 to WWJT, Inc. (the corporate entity that paid the penalty).

Complaint No. 218: James P. Freeman

James Paul Freeman was issued a NOVA in June, 2007 for fishing in a closed area and was assessed a $7,500 civil penalty. In August, 2007, Mr. Freeman settled the NOVA for a $4,000 civil penalty. Mr. Freeman complained that he paid an unfair penalty because he was forced to transit the closed area due to inclement weather.

Special Master Finding: The fine was appropriate because it was on the low end of the possible range for a first time offender. Moreover, the evidence is clear that the vessel was preparing to set gear, an activity within the definition of fishing and prohibited in a closed area. The regulation does not provide an exception for a vessel transiting a closed area due to inclement weather and there is doubt as to whether there was inclement weather.

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. 219: Antonette Jones

Antonette Jones is the owner of a vessel that was spotted fishing for scallops in a closed area and made seven passes in this area. On February 3, 2000, she was issued a NOVA and assessed a $35,000 civil penalty, had a catch valued at $21,299.81 seized, and was issued a 30-day vessel permit sanction. Ms. Jones settled the NOVA on April 27, 2001, for a $10,000 civil penalty, forfeiture of the seized catch, and a 20-day vessel permit sanction. She complained that she did not have adequate notice of a closed area and that the penalty she paid was disproportionately large compared to other similarly-situated fishermen.

Special Master Finding: There is a legitimate argument that the notice of the closed area was confusing and potentially misleading. Nevertheless, the captain knew or should have known the vessel was fishing in a closed area. The captain, Ms. Jones' son, turned off the VMS onboard and altered his fishing pattern, lending credence to the argument that the entrance into the closed area was intentional. Given these facts and that this was not a first violation, the settlement was fair and reasonable and 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. 220: Lawrence P. Kavanagh

Lawrence Kavanagh alleged that he was threatened with a NOVA in April of 2007 for possessing nets with undersized mesh. Mr. Kavanagh claimed that the net was represented to be resistant to shrinking due to wax impregnated into the threads and that NOAA threatened to issue a NOVA assessing a $42,500 civil penalty, retaining the sale of seized catch in the amount of $22,921.50, and permit penalties of 45 DAS. Mr. Kavanagh settled the matter for a $28,500 civil penalty.

Special Master Finding: While using a net with undersized mesh is a strict liability violation, the penalty assessments should have accounted for the fact that this was a first violation and occurred in spite of Mr. Kavanagh's good faith effort to ensure he had properly sized nets. The assessed amount was excessive and intended to force a settlement. A more appropriate civil penalty would have been $6,000, the minimum penalty amount allowable for the two infractions under the penalty policy in place at the time.

Special Master Recommendation: Remission of $22,500 to Mr. Kavanagh.

Secretarial Decision: I agree that Mr. Kavanagh is entitled to remission of some amount based on the Special Master's findings. However, the minimum penalty for these infractions is inappropriate in light of the considerable press coverage of the problems with net shrinkage. The shrinkage of these nets was a well known problem in the industry at the time and as such, Mr. Kavanagh was on notice of the problems and had some obligation to check whether his nets suffered a similar fate. Accordingly, I find a penalty of $9,000 more appropriate and direct NOAA to remit $19,500 to K&K Fishing Corp.

Complaint No. 222: William Norton

William Norton was issued several NOVAs between February, 2006 and July, 2007. The first charged his captain with operating without a permit, for which Mr. Norton's company was assessed a $5,000 penalty in addition to seizure of a catch worth $3,868.00. A second NOVA charged him with fishing in a closed area, for which he was assessed a $25,000 civil penalty and a 30-day permit sanction. The third NOVA was settled and is not a subject of Mr. Norton's complaint. In the fourth NOVA, Mr. Norton was charged with having a vessel operating with undersized twine top mesh and with a turtle excluder device, for which he was assessed penalties totaling $22,000. He eventually settled three of these NOVAs for a $28,000 civil penalty and 20-day permit sanction. Mr. Norton complained that at a hearing on this case NOAA withheld an exculpatory document that would have provided a defense to the charged violation. He further complained that he was forced to settle for an excessive amount because he was negotiating a bank refinancing of his fishing operation at the time of settlement and the enforcement attorney used that information as leverage.

Special Master Finding: There is credible evidence that Mr. Norton's vessel was fishing in a closed area, and not for samples as authorized by a NOAA letter of authorization for certain bivalve fishing in the area. The allegedly exculpatory document did not appear to have been in NOAA's possession and would not have provided a defense to the violation. Given the existence of several prior violations settled at the same time, the penalties assessed in the four cases were reasonable and did not unfairly force a settlement.

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. 223: Vito Ciaramitaro II

Vito Ciaramitaro II owned a small fish restaurant and lobster dealer in Gloucester, Massachusetts. From 1982 to 2000 either he or his father, the former owner of the restaurant, possessed a federal dealer permit. Mr. Ciaramitaro alleged that in 2000 a state inspector indicated that he no longer needed the federal permit. Mr. Ciaramitaro did not possess a federal permit until 2004, when NOAA learned that he did not have one. Following negotiations, he entered into a settlement agreement for a civil penalty of $35,000 to be paid within ninety days of the settlement date of August 3, 2006. The business subsequently dissolved.

Special Master Finding: There is no evidence of any intent to avoid a permitting regulation. Further, the violation constituted only a "paper violation," as there were no reporting requirements associated with the permit at issue. The $35,000 settlement was reached following an initial offer of a $50,000 penalty in lieu of the issuance of a NOVA at a higher amount, which forced a settlement. The penalty should be reduced to the minimum penalty for such a violation, $5,000.

Special Master Recommendation: Remission of $30,000 to Mr. Ciaramitaro.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to remit $30,000 to Vito Ciaramitaro II.

Complaint No. 224: Daniel S. Fill

Daniel Fill complained that he was charged excessively for failing to timely submit FVTRs. He alleges that during the 2006 herring season this requirement had been taken care of by a member of the Maine Department of Marine Resources working in Mr. Fill's home port, who would report this data directly to the National Marine Fisheries Service (NMFS) for the

fishermen when they reported it to the state. When this individual left the position in 2007, Mr. Fill failed to file the proper reports with NMFS until he was approached by NOAA personnel who told him that he had been out of compliance for the past three months. On September 7, 2007, he was charged with 51 counts of failing to file reports and assessed a $510,000 penalty. The parties eventually reached a settlement on January 24, 2008, in which Mr. Fill would pay a $51,000 civil penalty and receive an eight-month permit suspension. Mr. Fill has paid $26,000 of this penalty with a remaining balance of $26,666.66.

Special Master Finding: The assessed penalty was inconsistent with fundamental fairness and common sense and calculated to pressure Mr. Fill to settle. A more appropriate penalty for Mr. Fill would have been $30,000, which would have been $5,000 per month during the time he failed to submit each of the two reports. Given his financial situation, Mr. Fill's payment to this point of $26,000 should be sufficient.

Special Master Recommendation: Accept the $26,000 Mr. Fill has already paid as satisfaction of this matter.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to accept the $26,000 Mr. Fill has already paid as full payment for the settlement of this case and to cancel any further payment obligations.

Complaint No. 225: Edward Ahearn, Jr.

Edward Ahearn, Jr. complained that he was assessed excessive penalties of $130,000 with an additional $150,000 for submitting false documents pursuant to a court-ordered subpoena. He was issued a four-count NOVA on September 12, 2002, charging him with two counts of submitting false FVTRs, one count of falsely declaring into the DAS system, and one count of making a false statement. He argued that this large penalty forced him to settle the NOVA on April 22, 2004, for $100,000.

***Special Master Finding*:** Mr. Ahearn admitted falsifying FVTRs and falsely declaring into the DAS system, as well as providing false documents pursuant to a court-ordered subpoena in order to cover up his previous violations, thereby committing serious civil and possibly criminal violations. The settlement was more likely induced by the submission of false documents in response to a court-ordered subpoena than by an excessive penalty assessment.

***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. 226: Walter T. Allyn

On March 13, 2001, a vessel owned by Walter Allyn was entering the harbor when it was boarded by Connecticut Environmental Police. When the officers noted that Mr. Allyn's federal scallop permit was expired, he volunteered that the permit on another boat he owned would be expired as well. His catch was seized and sold for $60,691.85 and on July 31, 2001, he was charged with two counts of fishing without a valid permit, each count including an assessment of $18,000. Mr. Allyn settled on August 1, 2001, for a civil penalty of $20,000, which was paid from the proceeds from the sale of the seized catch, and the balance of the proceeds was returned to him.

Special Master Findings: The penalty assessed was inappropriate given Mr. Allyn's cooperation and self-reporting. In addition, the violation was unintentional. Given the fact that he self-reported along with his lack of intent, Mr. Allyn should have been assessed $5,000 per vessel, the minimum for a first time offender.

Special Master Recommendation: Remission of $10,000 to Mr. Allyn.

Secretarial Decision: I do not accept the Special Master's recommendation for this complaint. Mr. Allyn's entire catch was made without a permit and was therefore properly subject to forfeiture. Instead, he was allowed to keep over $40,000 of the economic benefit from the unlawful catch. Under the circumstances, I find the settlement was amply fair and reasonable and therefore, I am not taking any action with respect to this complaint.

Complaint No. 227: Mark C. Bichrest

Mark Bichrest owned two fishing vessels through his company, Margaret F., Inc. Beginning on June 24, 2007, Mr. Bichrest began fishing for Atlantic herring with one of his vessels. Over the course of the next 16 weeks, Mr. Bichrest failed to make his required reports to NOAA. He was charged on December 12, 2008, with 17 counts of failing to report and assessed a $170,000 civil penalty. He settled with NOAA on April 27, 2009, for $85,000 with $8,000 paid at the time of settlement, an additional $20,000 paid over ten months, and $57,000 suspended.

Special Master Findings: The assessed penalty was overzealous, and unfairly forced Mr. Bichrest to settle his case. This was a first offense. In previous such cases, NOAA has issued written warnings for first offenses. With respect to some of the counts, Mr. Bichrest either knew or should have known of a reporting requirement. Therefore, it is appropriate that he should receive a civil penalty, but at the low end of the scale. Accordingly, he should have been assessed $15,000.

Special Master Recommendation: Remission of $13,000 to Mr. Bichrest.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to remit $13,000 to Margaret F., Inc.

Complaint No. 228: Andrew E. Lang

Andrew Lang complained on December 5, 2007, that he and his captain were assessed excessive penalties of $97,800 for landing overages of scallops. Mr. Lang said he was unaware of his captain's prior history of violations and would not have hired him if he had. Mr. Lang settled the case on June 6, 2008 for $20,000, a two-month vessel permit sanction, and a one-year operator permit sanction. Mr. Lang also failed to file the necessary paper to contest the seizure of his catch, thus forfeiting $6,275.98 worth of seized catch.

Special Master Finding: The penalty assessment of more than $100,000 for 300 pounds of scallop overages worth $6,275 induced settlement. Despite this conclusion, the ultimate settlement of $20,000 was fair and reasonable and thus should be upheld. Mr. Lang was responsible for his captain's violations even though they betrayed his trust.

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. 229: Billie J. Lee

Billie Lee received two EARs on January 21 and 30, 2004, for, collectively, five counts of failing to call into the DAS system, two counts of exceeding the cod landing limit, and one count of not providing accurate information in a FVTR. On May 20, 2004, and prior to the issuance of a NOVA, Mr. Lee negotiated a settlement with NOAA in which he paid a civil penalty of $10,000 and agreed to reduce his DAS allocation by ten days. Mr. Lee complained that fishing regulations are too rigid and that an excessive penalty assessment induced him to settle his case prior to a NOVA being issued for his failure to properly use the DAS notification system.

Special Master Finding: Mr. Lee admitted to understanding the regulation and willfully violating it. Mr. Lee's assertion that he was compelled to settle because of an excessive penalty assessment was not credible because he had not been assessed a fine when he settled. Consequently, the settlement 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.

Complaint No. 230: William R. Reed

William Reed complained that he was assessed an excessive penalty on June 8, 2000, of $15,000 for four instances of filing FVTRs to under-report landings. His landings exceeded state landing limits by 240 percent, 40 percent, 34 percent, and 150 percent. Mr. Reed argued that he was issued an excessive penalty, which induced him to settle for the assessed amount.

Special Master Finding: Credible evidence demonstrated that Mr. Reed filed four false FVTRs and supported a finding that the charged offenses were intentional. The penalty was reasonable because for a first-time offense $15,000 - $20,000 could have been levied for filing four false FVTRs.

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. 231: J. Patrick Reese, Jr.

In July of 2004, J. Patrick Reese was investigated for allegedly purchasing illegally caught overages from trucks at an inland location in Maryland. Mr. Reese eventually cooperated with NOAA investigators, who discovered that he had made 68 purchases that he failed to report. On January 30, 2006, he was assessed a $445,000 civil penalty, which he eventually settled on December 8, 2006. Under the terms of the settlement, Mr. Reese was to pay a $35,000 cash penalty and, contingent on the pending sale of his waterfront commercial property for $7,000,000, a $150,000 balloon payment that he personally guaranteed. The sale of the property did not occur but NOAA did not waive the balloon payment, despite Mr. Reese's offer to settle it for $25,000.

Special Master Findings: Mr. Reese's violations were unintentional, as he did not know that the fish he was receiving were illegally caught overages directly from boats, not trucks reselling from dealers. Furthermore, his records were accurate (though not reported to NOAA as required for boat purchases) and, upon learning of these violations, he cooperated with NOAA. The balloon payment was clearly contingent on the sale of the property, which did not occur. The penalty assessment was excessive and inconsistent with the nature and circumstances of the violation.

Special Master Recommendation: The balloon payment should be waived upon Mr. Reese submitting the $25,000 payment he offered to NOAA.

Secretarial Decision: I agree with the Special Master's recommendation that the balloon payment (and any associated interest) in this case should be waived, particularly given that the condition on which it was expressly based did not occur. While the Special Master recommended that Mr. Reese's obligations be forgiven upon a payment of $25,000, I find a $15,000 payment more appropriate given the circumstances of this case. I therefore direct NOAA to accept a $15,000 payment from Mr. Reese in satisfaction of the $150,000 balloon payment that was part of the original settlement in this case.

Complaint No. 232: Ronald T. Ringen

On June 24, 2003, and February 26, 2004, Ronald Ringen was issued two NOVAs charging him with two counts of submitting false FVTRs, three counts of possessing improperly tagged or untagged lobster traps, one count of disposing of fish upon the appearance of an officer, two counts of failure to keep a logbook, one count of submitting a false report of fishing for scup with improperly identified pots, and one count of selling lobsters without a permit. He was assessed a penalty of $129,250 and a 120-day operator permit suspension. He settled the NOVAs on February 12, 2005, for a $32,000 penalty, later modified to $27,600 and a 60-day operator and vessel permit sanction. Mr. Ringen complained that he was assessed excessive penalties for multiple highly technical and complicated rules violations.

Special Master Finding: The penalty assessment was excessive. A credible defense could have been made for two of the counts with which Mr. Ringen was charged. However, Mr. Ringen was represented by capable counsel throughout, and thus made informed decisions as to the settlement at the hearing. The ultimate settlement 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.

Complaint No. 233: Richard R. Walz, III

Richard Walz complained that he was assessed excessive penalties, which induced him to settle. In February, 2005, he was assessed a penalty of $60,000 and forfeiture of $4,762.45 in seized catch for a monkfish overage, failure to call into the DAS system on a timely basis, failure to maintain logs, and false statements. He settled after three days of a hearing before an ALJ and paid a penalty of $22,500 with a 60-day permit sanctions.

***Special Master Finding*:** There was no evidence of an excessive penalty that induced settlement. Mr. Walz was aware of the regulations, consciously chose to circumvent them, and then subsequently provided false oral and written statements to law enforcement officials. Mr. Walz was ably represented by counsel and received a reduced settlement. Therefore, the settlement 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.

Complaint No. 234: Dennis Saluti and Thomas Reilly

Dennis Saluti and Thomas Reilly were both employees of, and the primary shareholders for, Sea Rich Seafoods. On June 12, 1995, they were visited by a NMFS investigator, who was seeking records to determine whether Sea Rich had been purchasing illegally caught fish from vessels. Initially, Sea Rich did not turn over records, largely because Mr. Saluti did not have the technical expertise to retrieve them. Sea Rich later complied with document demands from NOAA. On April 21, 1997, Sea Rich was charged with a 113-count NOVA alleging that it accepted illegally caught fish, failed to report its purchases, and interfered with a NOAA investigation. The NOVA assessed a civil penalty of $4.7 million. At this time, Messrs. Saluti and Reilly were attempting to sell Sea Rich for an anticipated sale price of $8.5 million. The NOVA was settled on June 6, 1997, for a cash payment of $1,000,000 and the permanent revocation of Sea Rich's dealer license. Mr. Reilly also forfeited his personal tuna license for five years. Sea Rich was eventually sold for $1.15 million.

Special Master Findings: NOAA personnel knew that Messrs. Saluti and Reilly were in the process of attempting to sell their business and used this information to unfairly force a settlement. This exercise of authority was arbitrary and capricious. The penalties levied here were excessive given the actions alleged. Furthermore, 17 counts of the NOVA allege interference with an investigation. However, the 17 counts consist of one incident in which the alleged interference is questionable at best. Based on the appropriate penalty schedules, Messrs. Saluti and Reilly should only have been assessed a civil penalty of $626,500.

Special Master Recommendation: Remission of $373,500 to Messrs. Saluti and Reilly.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to remit $373,500 to Messrs. Dennis Saluti and Thomas Reilly.

Complaint No. 235A: Charles S. Dodge

Charles Dodge sold an overage of monkfish to a dealer in 2008. Upon learning of the overage, NOAA charged Mr. Dodge on July 10, 2007, with landing an overage and assessed him a $25,000 civil penalty for the vessel and the captain and a 30-day permit sanction and two DAS sanction. NOAA counsel allowed Mr. Dodge 30 days to respond to the NOVA before it was entered as a final order. Mr. Dodge agreed to a settlement of $12,500 along with several reduced sanctions on April 13, 2008.

Special Master Findings: Mr. Dodge's violation was his first and, in contrast to some other cases, was unintentional. Given this lack of intent, the amount was high in relation to other cases and NOAA did not take this lack of intent into account when assessing Mr. Dodge's penalty. Therefore, Mr. Dodge's penalty should be reduced.

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

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to remit $5,000 to Harmony Fisheries, Inc., Mr. Dodge's company.

Complaint No. 235B: Charles S. Dodge

Charles Dodge was issued an EAR on April 29, 2008, alleging a landing of monkfish overage. He settled on August 20, 2008, prior to the issuance of a NOVA for a $17,000 civil penalty, a one-year probationary period, and forfeiture of $4,236.20 of seized catch. He complained that he was coerced into settlement after allegedly being threatened with a $75,000 NOVA for landing the monkfish overage.

***Special Master Finding*:** There was no evidence that the settlement was coerced. Mr. Dodge knew the monkfish conversion factor and still landed a 19% overage. Given this was Mr. Dodge's second violation in a year and that he settled for $17,500 when he could have been assessed a $60,000 penalty, the penalty was not excessive, and the settlement was not coerced.

***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. 235C: Charles S. Dodge

Charles Dodge was issued an EAR on December 4, 2008, for landing Atlantic bluefin tuna without a valid permit. He settled the case on April 7, 2009 prior to the issuance of a NOVA for

a forfeiture of the seized catch, valued at $14,515.23, and a written warning. Mr. Dodge complained that he tried, but was unable, to renew his tuna permit online prior to going fishing. He alleged that after the EAR was issued for fishing without a valid permit, NOAA forced him to forfeit his catch proceeds worth $14,515.23 under threat of a NOVA.

Special Master Finding: There was no evidence that the settlement was coerced. There was no dispute that Mr. Dodge caught tuna without a valid tuna permit. Although Mr. Dodge's issue with his permit was caused in part by the website, there was no evidence that the settlement was excessive or unfair.

Special Master Recommendation: No action.

Secretarial Decision: Based on the Special Master's recommendation and in light of the fact that no penalty was assessed against or paid by Mr. Dodge, I am not taking any action with respect to this complaint.

Complaint No. 236: L. Paul Barbera, Jr. and Peter Barbera

In May 1998, NOAA and the Rhode Island Department of Environmental Management (DEM) opened a joint investigation of South Pier Fish Company, Inc., a fish dealer owned by L. Paul Barbera, Jr. and Peter Barbera. The focus of the investigation was false reporting of summer flounder overages. During the course of the investigation, the officers obtained an administrative investigation warrant and interviewed fisherman who indicated that they had sold overages to South Pier. Additionally, the office manager at South Pier indicated in an interview that she had been instructed by Paul Barbera on how to launder overages.

The Barberas, on behalf of South Pier Fish Company, were issued a 19-count NOVA on May 22, 2002, assessing a $270,000 civil penalty and a 630-day dealer permit sanction. South Pier was charged with falsely reporting information on its dealer reports by attributing various catches to different vessels, reporting incorrect species, splitting and altering landing dates, and altering catch amounts in order to appear to comply with lawful day and species catch limits. South Pier settled the NOVA on February 12, 2003, for a $225,000 civil penalty and a 630-day dealer sanction, which was held in abeyance pursuant to continued lawful conduct during the abeyance period.

The Barberas complained that their officers/stockholders were coerced into paying an excessive penalty by threat of criminal prosecution.

Special Master Finding: There was substantial evidence of an intentional scheme, in concert with others, to hide numerous fishing violations. There was no evidence of overzealous

or abusive conduct, no threat of criminal prosecution, and the Barberas were represented by counsel. Therefore, the penalty assessment and settlement 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. 237: Carlos Rafael

Carlos Rafael was fishing for scallops when the Coast Guard boarded his vessel for a routine inspection. The boarding party discovered that twine tops, portions of net designed to allow fish to swim away rather than be caught as bycatch, were smaller than permitted. On December 21, 2006, Mr. Rafael's catch of $158,692.50 was seized by NOAA and sold. Mr. Rafael settled with NOAA before the issuance of a NOVA for a $25,000 civil penalty to be paid out of the proceeds of the seized catch. The balance of the proceeds from the sale of the seized catch were returned to him.

Special Master Findings: The evidence indicates that the trip at issue was Mr. Rafael's first using these particular twine tops and his violation was unintentional. Furthermore, he did not benefit from the smaller than permitted twine top, since he only caught $29.50 worth of bycatch. The entire catch was seized in order to force him to settle for a higher amount, since he had to use the catch to pay expenses associated with the trip. Given the lack of intent and benefit on Mr. Rafael's part, he should only have received a civil penalty of $7,500, an amount he offered during settlement negotiations.

Special Master Recommendation: Remission of $17,500 to Mr. Rafael.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to remit $17,500 to Vila Nova Do Corvo II, Inc.

Complaint No. 238: Malvin Kvilhaug and Sharon Thuestad

The *F/V Perseverance*, a vessel owned and operated by Malvin Kvilhaug and Kenneth Thuestad (now deceased), was observed by a U.S. Coast Guard cutter fishing inside a closed area in March, 1997. The Coast Guard subsequently boarded the vessel, determined it was in violation, and escorted it back to New Bedford. There, it was met by NOAA officers, who seized over 9,000 pounds of scallops and 170 pounds of mixed fish including 19 bags of sea scallops in a light green vat hidden underneath some floorboards. The entire catch was sold for $71,933.97.

The *Perseverance* was observed by the U.S. Coast Guard fishing again in a closed area on May 3, 1997. When they boarded the vessel they found 2,105 pounds of scallops, 900 pounds of unshucked scallops and 50 pounds of monkfish. When the vessel returned to New Bedford the scallops were seized and sold for $14,360.07. On June 17, 1997, the *Perseverance* was in the midst of a scallop trip when it was seized in the open ocean by a U.S. Coast Guard vessel. The catch from this trip was not seized.

NOAA issued two NOVAs on March 28, 1997 and June 19, 1997, alleging two counts of unlawfully entering and fishing in a closed area, unlawfully refusing to allow a Coast Guard officer to inspect the vessel, and interfering with an investigation by operating without lights and taking evasive action to avoid a Coast Guard vessel. Messrs. Kvilhaug and Thuestad were assessed a $410,000 civil penalty, a three-year operator and vessel permit sanction, and forfeiture of $86,353.97 worth of seized catch. The *F/V Perseverance* was also seized pending resolution of the NOVA. The parties settled on August 6, 1997, for a $39,000 civil penalty with $19,000 suspended pending VMS unit installation on three vessels owned by Mr. Kvilhaug, sale of the *Perseverance,* an agreement by Mr. Kvilhaug not to purchase additional vessels for four years, and a five-year operator permit sanction for Mr. Thuestad.

Malvin Kvilhaug and Sharon Thuestad (Mr. Thuestad's widow) complained that their vessel was improperly seized, that they were personally held liable for violations committed by a corporate entity, and that excessive penalties unfairly forced settlement.

Special Master Finding: The seizure of *F/V Perseverance* was justified given that it was discovered inside a closed area on two occasions within 1.5 months of one another. While the imposition of individual liability for corporate violations absent evidence of control would ordinarily constitute overbroad and overzealous enforcement authority, in this case there was adequate consideration for Mr. Kvilhaug's personal contribution to the settlement. Finally, while the penalties assessed were excessive, the settlement and resulting sale of the vessel were not coerced or unfair.

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. 239: Paul Weckesser

On April 9, 2009, the caption of the *Miss Shauna*, a vessel owned by Paul Weckesser, sent an email to NOAA indicating that he was terminating his fishing trip early due to mechanical problems. When the vessel returned to shore nearly eight hours before the time estimated in the termination notice, the vessel was boarded by U.S. Coast Guard and NOAA officials. During the offload it was determined that the vessel had approximately 5,000 pounds

more scallops than reported in the termination notice. The entire catch was seized and sold for $126,885.60.

NOAA issued Mr. Weckesser a NOVA on July 24, 2008, for one count of submitting a false statement into the VMS systems, one count of submitting false daily scallop catch reports, and one count of making a false statement to an officer. He was assessed a $105,000 civil penalty, 270-day vessel and operator permit sanctions, and one access area trip forfeiture. Mr. Weckesser settled the NOVA on March 13, 2009, for a $55,000 civil penalty, forfeiture of $126,885.60 of scallop proceeds, and a 150-day operator permit sanction, and a four-month vessel permit sanction.

Paul Weckesser complained that excessive assessed civil penalties unfairly forced his settlement of a NOVA for submitting false daily scallop reports and making false statements regarding when the vessel was engaged in fishing.

Special Master Finding: The settlement was not excessive given the many inconsistencies between Mr. Weckesser's account of events and corroborated facts presented in NOAA's report and the VMS data. The VMS data conclusively showed that the vessel was not fishing subsequent to the trip termination notification, despite Mr. Weckesser's representations to the contrary, corroborating the charges and making the settlement 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. 240A: Edison Love and Michael Love

In September 1995, U.S. Coast Guard officers boarded the *Catlin*, a vessel owned by Edison and Michael Love, on a routine compliance and safety inspection. During the inspection, the officers discovered an undersized cod end mesh net on the deck. The net was not in use but was wet and had a dead fish and crab inside. Captain Hopkins informed the officers that they had retrieved the net during a trawl and that he planned to discard it upon returning to port. The officers told him that regardless of what he did with it, it would result in a violation. On June 19, 1996, the Loves were issued a NOVA for one count of possessing an undersized mesh net. They were assessed $2,500 civil penalty and settled the NOVA on November 12, 1996, for a $1,700 penalty.

Edison and Michael Love challenged the rigidity of the regulation that resulted in an assessment penalty for possessing an accidently picked up undersized cod mesh net.

Special Master Finding: The Loves negotiated a settlement through competent counsel and the assessed penalty was not excessive and the eventual settlement was not coerced.

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. 240B: Edison Love and Michael Love

The Loves owned several vessels including the *Caitlin*, which was sailing out of port to perform repairs prior to beginning fishing. Its captain did not call into the DAS system during the 13 hours over which repairs took place. The *Caitlin* then fished and returned to port, when it appears that her captain called out of the DAS system five hours early. Following an investigation and the seizing of the catch, which was sold for $52,642.66, NOAA issued a two-count NOVA on October 18, 1996, charging in the first count that the *Caitlin* failed to call into the system when it began to fish and the second appeared, though it was defectively drafted, to allege that the *Caitlin* called out of the system early. The parties settled on April 30, 1997, for a $30,000 payment, a ten-day multispecies permit sanction, a relinquishment of the remaining DAS for the fishing year, a ten-day operator permit sanction for the captain of the vessel, and a forfeiture of the proceeds of the catch.

Special Master Findings: The applicable regulations require a vessel to call into the system when it leaves the port, regardless of when it begins fishing. Nonetheless, the Loves had sufficient DAS available that they would not have to report improperly in order to have enough DAS left to last them for the year. Therefore the penalty was excessive and unfairly forced a settlement. Additionally, they were cooperative with NOAA and there is no evidence of intent or the landing of an overage. Therefore, they should have been assessed at the lower end of the penalty range, which would be one-half of the settlement amount, $15,000.

Special Master Recommendation: Remission of $15,000 to the Loves.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to remit $20,000 to Terry L. Hopkins, Inc. I increased the remitted amount based on the disproportionate severity of the penalty the Loves were assessed compared to the nature of the violation.

Complaint No. 241: Gaetano G. Brancaleone

Gaetano Brancaleone's vessel, the *Paul & Domenic*, was originally given 165 DAS through a Fleet Permit in 1994. Mr. Brancaleone appealed this allotment, and his DAS for the

1995/1996 fishing year were later increased to 188, less the regulatory reduction of 10% or 169 DAS. At the time of the notification, he was asked whether he would like to continue with a Fleet Permit or to renew his permit with individual DAS. These permits carried with them different "layover" requirements, which mandate the amount of time a vessel must spend in port between trips. In February, 1995, Mr. Brancaleone renewed his permit for Fleet DAS, which was issued in May, 1995. The issue of which permit he was operating under remained unclear and his case continued to be shown in the NOAA system as under appeal.

In October, 1995, NOAA became aware that Mr. Brancaleone was not following the layover requirement for his Fleet Permit. When questioned about the discrepancy, Mr. Brancaleone said that he must have made an honest mistake and offered to make up the time for the trips in question. In December, 1996, NOAA issued a one-count NOVA, assessing a civil penalty of $20,000 with a nine-day vessel permit penalty. Mr. Brancaleone settled with NOAA for $8,500 in February, 1997.

Special Master Findings: The regulations associated with the Fleet and Individual DAS distinction were confusing to someone in Mr. Brancaleone's position. Despite the fact that NOAA communicated with Mr. Brancaleone extensively on this matter, the communications did not clarify the distinction between these two regulatory regimes and their attendant requirements. Given that this was Mr. Brancaleone's first violation and that he made every effort to comply with what he thought were his duties under the DAS regulations, the assessed penalty of $20,000 was excessive. He should have only received a written warning and therefore the $8,500 he paid as a settlement should be remitted.

Special Master Recommendation: Remission of $8,500 to Mr. Brancaleone.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to remit $8,500 to GGB, Inc., Mr. Brancaleone's company.

Complaint No. 244: Donald Braddick

In April 2003, the *Sea Nymph III*, owned by Donald Braddick, was boarded off the coast of North Carolina by U.S. Coast Guard officials and officers from the Dare County, NC Sherriff's office. The Coast Guard officials contacted NOAA and enforcement officials also boarded the vessel. During the course of the inspection, the officer discovered a hidden compartment next to the main fish hold and in it they found a basket of shark fins, some gag grouper, and a cobia. Prior to the discovery, Mr. Braddick told officers that there were no other holds on board but he later indicated that the compartment was actually part of the hull.

When the vessel was unloaded, it was determined that it had 44 unaccounted-for shark carcasses based on 88 pectoral fins found on board. Officials also found seven dusky sharks, which is a prohibited species. Further, the NOAA officials subsequently learned that what they

had been told was one trip was actually four trips and that no FVTRs had been completed onboard.

Officers ultimately seized the entire catch, which included 317 pounds of shark fins, 4,345 pounds of shark carcasses, and the prohibited dusky sharks. The catch was sold for a total of $6,946.30. On June 13, 2003, NOAA issued a four-count NOVA alleging that Mr. Braddick unlawfully landed shark fins without corresponding carcasses, unlawfully possessed seven dusky sharks and fins, made false statements to authorized officers, and obstructed an authorized officer's taking of fish through the vessel's hidden compartment. Mr. Braddick was assessed a $27,000 civil penalty and a 60-day vessel permit sanction. He settled the NOVA on July 18, 2003, for a $16,000 civil penalty and forfeiture of $6,946.20 worth of seized catch.

Donald Braddick complained that a penalty assessment was excessive given the relative value of the unlawful fish and that the excessiveness of the penalty forced him to settle.

Special Master Finding: The discrepancy between the shark fins and carcasses is too significant for Mr. Braddick to overcome. The scientific tests and expert analysis definitively show that Mr. Braddick had too many fins for the number of carcasses onboard. There is also persuasive testimony showing that Mr. Braddick had a hidden compartment, that he knew that the compartment was being used for hiding shark fins, and that he tried to mislead officers about these facts. Finally, it is undisputed that he had prohibited dusky sharks and, given his 30 years of fishing experience, he should have been able to readily identify them. Under the circumstances, the settlement was justified.

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. 245: David Aripotch

During an investigation of the Fulton Fish Market in 1997, NOAA officials determined that the *Corey & Leah*, owned and operated by David Aripotch, had sold overages of summer flounder to various dealers within the market and submitted false and inaccurate landing reports. NOAA enforcement officials allegedly contacted Mr. Aripotch on several occasions to ask him if knew anything about illegal activity at the fish market but he declined to cooperate on the advice of counsel. Eventually, NOAA determined that Mr. Aripotch had landed 17,000 pounds over his limit of summer flounder, which had netted him approximately $33,300.

On January 12, 1999, an EAR was issued charging Mr. Aripotch with 18 counts of submitting inaccurate reports and two counts of submitting inaccurate and false reports. A four-count NOVA was issued on June 30, 2000, charging Mr. Aripotch with submitting 26 false FVTRs and assessing an $85,000 civil penalty along with a 240-day permit sanction. On December 14, 2000, he settled the matter for a $61,000 penalty and a 120-day vessel and operator permit sanction. In January, 2001, the agreement was modified to reduce the permit sanction to 93 days, in exchange for Mr. Aripotch making the vessel available for nine days for research.

Mr. Aripotch complained that he should not have been held responsible for the overages landed by his captains, that the penalty assessed was excessive, and that the settlement resulted from his inability to provide information about the alleged activities at the Fulton Fish Market.

Special Master Findings: As the owner of the vessel, Mr. Aripotch is liable for his captains' actions. As to his claim regarding an excessive penalty, upon reviewing the Offense Investigation Report (OIR) in this case, NOAA appears to have charged Mr. Aripotch with an improper dollar value for his overage. As a result, he was charged an excessive penalty that unfairly forced settlement. Instead of $60,000, he should have been charged with $33,313.92 worth of overages. Taking into account the necessity to deter future violations, the final assessed penalty should have been one and a half times the value of the overage, or in this case, $50,000.

Special Master Recommendation: Remission of $11,000 to Mr. Aripotch.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to remit $11,000 to David Aripotch.

Complaint No. 246: Yvonne Peabody

During an April, 2004 inspection of the *Miss Vertie Mae*, a vessel owned by a corporation of which Yvonne Peabody is the President, the Virginia Marine Police determined that the permit of the operator had expired nine months prior. The operator indicated that he had filed an application to renew the permit but had not yet received a response. The Marine Police Officer determined that the operator had operated the vessel five times since his permit had lapsed. The operator indicated that the U.S. Coast Guard had boarded the vessel twice during the period, determined that his permit had lapsed and told him to renew it as soon as possible.

A NOAA enforcement officer authorized the Virginia Marine Police Officer to seize the catch (18,000 pounds of scallops) and to inform the operator that he could not take any trips

until the permit was renewed. The matter was settled during the months of August and September, 2004 before a NOVA was issued. The parties admitted the violation of the EAR and agreed to forfeit the proceeds from the sale of the catch ($79,443.60) without penalty or permit sanction.

Ms. Peabody complained that the seizure was excessive penalty because it was a simple mistake that did not harm the resource.

***Special Master Finding*:** Ms. Peabody's captain was warned twice to renew his permit, but made six trips without a valid permit. Given that a vessel's owners are ultimately responsible for the actions of their captains, the forfeiture of the catch proceeds was reasonable.

***Special Master Recommendation*:** No action.

***Secretarial Decision*:** Based on the Special Master's recommendation and because no penalty was paid by Ms. Peabody, I am not taking any action with respect to this complaint.

Complaint No. 247: Leonardo Vitale

In May, 1994, U.S. Coast Guard officers and Massachusetts Environmental Police boarded the *Stella*, a vessel owned and operated by Leonardo Vitale, as it returned to Gloucester Harbor because they suspected that it was landing female lobsters scrubbed of their eggs. Reportedly, a total of 24 officers boarded the vessel, which had six to eight crewmen on board, to search for illegal lobsters. The U.S. Coast Guard report indicates that they observed crew members throwing lobsters over board (despite being told not to), a brush embedded with clumps of lobster eggs in the bristles, five berried (egg-bearing) lobsters and a significant amount of lobster eggs in various locations on the deck. It was later determined that 7,000 pounds of groundfish and 1,968 lobsters were offloaded.

The Massachusetts State Lobster Hatchery and Research Station positively determined that the five lobsters removed from the vessel had been scrubbed and that of the 182 female lobsters examined, 31 had their eggs illegally removed either by hosing or brushing. In May, 1995, the Commonwealth filed an application for a criminal complaint charging Captain Vitale with possession of 31 female egg-bearing lobsters. He was subsequently found guilty of the charges. On appeal, the decision was reversed because the case was not brought within the period proscribed by the statute of limitations.

On June 10, 1996, NOAA issued a NOVA for one count of possessing berried female lobsters and one count of unlawfully throwing lobsters overboard. Mr. Vitale was assessed a $25,000 civil penalty and settled the NOVA on July 28, 1997, for a $9,100 civil penalty.

Leonardo Vitale complained that an excessive penalty assessed for landing illegal lobsters resulted in a coerced settlement.

***Special Master Finding*:** The *Stella* possessed 31 berried lobsters. This fact was confirmed by the Massachusetts State Lobster Hatchery and Research Station and by the finding of a judge in the Massachusetts criminal trial. The fact that this case was later reversed is not relevant on the subject because the dismissal is based on the applicable statute of limitation. Thus, the penalty was not excessive and the settlement was not coerced.

***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. 248: William Grimm

During the course of an investigation of the possible use of a fictitious vessel to hide overages and unauthorized landings at the Fulton Fish Market in New York, NOAA enforcement officers determined that the *Perception*, a vessel owned by William Grimm, had sold fish to an unpermitted dealer and that it had landed multispecies on several occasions without calling into the DAS program.

In a subsequent interview, Mr. Grimm admitted that he had instructed his captain to falsify FVTRs on two instances when he landed summer flounder after the season had closed in 1996. With respect to another six occasions, Mr. Grimm admitted that he landed his summer flounder catch under the name of a fictitious vessel, the *Magpie*. He also admitted that he intentionally did not provide NOAA officers with the paperwork for these landings, that he subsequently destroyed the records, and that he previously lied to the officers when asked if he knew anything about the *Magpie*.

NOAA issued a five-count NOVA on November 23, 1998, alleging that Mr. Grimm sold summer flounder to an unpermitted dealer, landed summer flounder for commercial purposes under a fictitious vessel name, submitted an FVTR under a fictitious vessel name, failed to call into the DAS system, and made a false statement to an officer. He was assessed a $95,000 civil penalty and a two-year vessel and operator permit sanction. Mr. Grimm settled the NOVA on August 27, 1999, for a $54,500 civil penalty and a 120-day vessel and operator permit sanction.

William Grimm complained that the permit sanction he agreed to in his settlement of the charges against him was excessive because NOAA picked the best four fishing months for his vessel to be tied up.

Special Master Finding: Mr. Grimm acknowledged the civil penalty was fair under the circumstances and review of the permit sanction was beyond the Special Master's authority.

Special Master Recommendation: No action.

Secretarial Decision: Based on the Special Master's recommendation and because this complaint does not meet the criteria set forth in Secretary Locke's decision memoranda, I am not taking any action with respect to this complaint.

Complaint No. 249: Alan Curtis

Alan Curtis was the captain of the *Potpourri* in November, 2004, when a Maryland Department of Natural Resources (DNR) police officer observed Captain Curtis and a member of his crew engaging in what he considered suspicious activity following the offloading of scallops at a dealer. The officer reported his suspicions to NOAA and notified NOAA when the vessel was returning from its next fishing trip. NOAA enforcement officers positioned themselves at the dock and videotaped the *Potpourri* offloading seven bags of scallops at a dealer and then changed locations to moor in front of a restaurant. The officers then observed Captain Curtis pass two packages that appeared to contain scallop bags to a couple at the dock and leave the scene. He reappeared about 15 minutes later with the one of the packages, which was full of scallops.

When questioned about his actions that night, Captain Curtis at first told NOAA and Maryland DNR officers during a videotaped interview that the scallops were from a terminated trip and that his girlfriend had brought them to the landing site that morning. When he was told that he had been videotaped at the landing, he admitted that the scallops had been on board from an earlier broken trip and that he had forgotten they were on board when he went on the most recent trip. He said he sold the scallops he landed on the recent trip to the dealer and gave the overage of approximately 100 pounds to a friend to sell. He also admitted that he had sold another overage recently to a restaurant, the proceeds of which he split with his crew.

NOAA issued a NOVA to Captain Curtis on February 16, 2006, alleging that he possessed and landed a scallop overage, submitted a false FVTR, and made a false statement to an officer. He was assessed a civil penalty of $30,000 and a 90-day vessel and operator permit sanction. Captain Curtis settled the matter on July 23, 2007, for a $15,250 civil penalty with his operator permit suspension held in abeyance pending payment of the civil penalty.

Captain Curtis complained that he did not intentionally break the law and that the penalty and loss of the trip proceeds were excessive.

Special Master Finding: Substantial evidence, including a videotaped confession, demonstrates an intentional violation. The settlement was thus 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. 250A: Clarke A. Reposa, Sr.

During early July, 1999, two vessels owned by Clarke A. Reposa Sr. went out on separate fishing trips. Mr. Reposa took the *Dona Maria* out from July 3-6, 1999, on a trip for which he did not call into the NMFS DAS program. As a result, he was not authorized to land multispecies. Nonetheless, he landed over 1000 pounds of multispecies during the trip and failed to report the landing on the FVTR he submitted for the trip. On July 5-6, 1999, Mr. Reposa's other vessel, the *Sister Alice*, was properly fishing multispecies during two separate trips with Todd Chappell, its captain, at the helm. Mr. Chappell submitted two FVTRs for those trips which indicated that he landed smaller amounts of multispecies than the reports of the dealer to whom he sold the fish, Seair Seafood.

Pursuant to an anonymous tip, the Rhode Island Department of Environmental Management (DEM) opened an investigation in July, 1999 into allegedly unauthorized multispecies landings by the *Dona Maria*. During the course of the investigation, Mr. Chappell provided DEM with FVTRs from trips aboard the *Sister Alice*, which was authorized to land multispecies. Mr. Chappell later confirmed to NOAA enforcement agents that the reports he provided to the DEM were accurate reports for July trips aboard the *Dona Maria*. During the course of its investigation, NOAA was able to determine that the reports that Mr. Chappell provided DEM were not for the *Dona Maria* and also that *Dona Maria* had landed multispecies on July 6, 1999, without calling into the DAS program.

As a result of the investigation, NOAA issued two NOVAs. The first, issued on October 25, 2000, alleged one count of making a false statement to a NMFS officer, and one count of filing a false FVTR, and one count of providing an officer with false FVTR information. Mr. Reposa was assessed with a $45,000 civil penalty and a 75-day vessel permit sanction. The second, issued on November 7, 2001, alleged one count of failing to call into the DAS system and one count of filing inaccurate FVTRs. Mr. Reposa was assessed a $40,000 civil penalty.

The matter was tried by an ALJ over a four-day period, during which NOAA provided testimony from five witnesses and 49 exhibits and Mr. Reposa provided nine witnesses and 20 exhibits. At the end of the hearing, the ALJ found the respondents liable for the charges against them and upheld the penalty. A U.S. Magistrate recommended that the ALJ's decision be

upheld but the parties settled before that recommendation could be reviewed by the U.S. District Court Judge assigned to the case.

Mr. Chappell complained that the penalties assessed for improperly attributing landings from one of his vessels to another were excessive, that the charges were unfairly and untimely brought, and that the ALJ proceeding was flawed.

***Special Master Finding*:** An ALJ and a U.S. Magistrate Judge upheld the findings and penalty assessment. They both had access to all the evidence, witness testimony, and transcripts. As such, their findings and decisions should be given deference. Consequently, the penalties and findings were not excessive and were fairly brought.

***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. 250B: David F. Barbera

While investigating another entity for alleged fisheries violations (*see* Case 250A), Rhode Island state enforcement officials interviewed David Barbera regarding a shipment he offloaded from one of the entities. Mr. Barbera produced an invoice as well as an index card he used to record information during the course of the day that he would later use to create an invoice. He turned the invoice over to the state officer and disposed of the card, as evidently was his standard practice. After refusing to cooperate with NOAA in its investigation into the other case, on February 2, 2001, Mr. Barbera was charged with two counts of interfering with an investigation and destroying records, namely the index card. He was assessed a $30,000 civil penalty in total for the two counts. Mr. Barbera appealed the case to an ALJ, who found that the interference count was not supported by the evidence, but that the destruction of documents count was. Mr. Barbera paid the $15,000 penalty associated with the records destruction count.

Special Master Findings: NOAA's actions in this case constituted an abuse of its prosecutorial authority. The classification of Mr. Barbera's index card as a document that had to be maintained is not consistent with the facts or the language of the relevant statutes and regulations. Further, NOAA enforcement officials aggressively tried to get Mr. Barbera to testify against the other entity and only when he refused did they charge him with the violations at issue. Ultimately, the penalty assessed in this case was inappropriate for the actions charged and Mr. Barbera should have been assessed $5,000 for these violations.

Special Master Recommendation: Remission of $10,000 to Mr. Barbera.

Secretarial Decision: Based on the Special Master's recommendation, I direct NOAA to remit $10,000 to David F. Barbera.

Complaint No. 251: Stephen P. Jordan

After arriving into port, Stephen Jordan learned that he had exceeded his allotted DAS by a significant margin, a fact that he was unaware of when he left port. He unloaded his catch, which NOAA seized and sold for $20,439.39. He was issued a NOVA on August 13, 2004, and assessed a civil penalty of $12,000 and forfeiture of the proceeds from the sale of the catch. Mr. Jordan negotiated with NOAA and the parties settled on the same day for a $10,219 civil penalty, to be paid from the proceeds of the seized catch with the balance, $10,220.49, returned to Mr. Jordan.

Special Master Findings: The assessed total penalty of $32,439.39 was excessive and unfairly forced a settlement because Mr. Jordan needed the proceeds of the catch to pay his crew. Because this was an inadvertent first offense, a more appropriate penalty would have been at the low end of the penalty scale, $5,000.

Special Master Recommendation: Remission of $5,219 to Mr. Jordan.

Secretarial Decision: There is no question that Mr. Jordan exceeded his days-at-sea allocation and that the corresponding catch was landed. Additionally, I am not persuaded that the need to pay one's crew – a cost of doing business every fisherman assumes along with the obligation to comply with catch limits whenever going out to sea – is a sufficient basis by itself to find coercion. Given the importance of the DAS system and the need to prevent economic benefit from noncompliance, I am not accepting the Special Master's recommendation and am taking no action in this case.

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

Rebecca M Blank

Acting Secretary Rebecca M. Blank