TESTIMONY

OF

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BEFORE THE

SUBCOMMITTEE ON INSULAR AFFAIRS, OCEANS AND WILDLIFE
U.S HOUSE OF REPRESENTATIVE COMMITTEE ON NATURAL RESOURCES

ENFORCEMENT OF FISHERY MANAGEMENT LAWS AND REGULATIONS

MARCH 3, 2010

Chairwoman Madeleine Bordallo and Members of the Subcommittee:

Thank you for the opportunity to testify this afternoon on the important questions surrounding enforcement of our nation's marine resource laws and regulations by the National Oceanic and Atmospheric Administration (NOAA). My name is James P. Walsh and I am a partner in the law firm of Davis Wright Tremaine LLP, based in its San Francisco, California office. I am essentially a litigator, mostly in federal courts, but I also act as defense counsel in civil penalty proceedings and in an occasional criminal case. My litigation practice has been split roughly fifty-fifty between oil spill cases, where our firm represents those injured by oil contamination, and natural resources and business matters where we represent, among other clients, many in the fishing industry, primarily on the West Coast and in the Pacific. Recently, I defended the Marshall Islands Fishing Company, owned in part by the Government of the Marshall Islands, in a fishing vessel civil forfeiture case in Federal District Court in Guam, a case that was settled just before trial last May. I am also a member of the firm's Quality Assurance Committee and regularly provide advice to my colleagues on ethics and competence issues. I am not speaking on behalf of any client at this hearing today and the views I offer are purely my own.

Framing the Issues

I believe this is a very opportune moment for Congress to closely examine federal fishery enforcement practices. Today, I would like to address three issues with the Subcommittee: (1) the need for reform in the way NOAA internally manages its fishery enforcement cases; (2) the need to change in several important respects the manner in which administrative penalty cases are handled, in particular under the civil procedure regulations found at 15 C.F.R. Part 904; and (3) possible amendments to the enforcement provisions of the Magnuson-Stevens Act. I believe reforms at all three levels are needed to bring about a greater perception of fairness and balance to the NOAA enforcement process and to more strongly inculcate due process principles in the enforcement program at NOAA. Overall, my sense is that the lawyers and investigators at the

agency are dedicated and well-meaning but, because of lack of management oversight and accountability and an absence of the strong advocacy that brings balance in our judicial system, the NOAA enforcement program has developed a kind of "tunnel-vision" about what is important and what is fair.

The bottom line is that fishery enforcement will always be primarily reliant on self-regulation and compliance. Punishing transgressions will definitely, in the right circumstances, be needed, and will often be welcomed by others in the same fishery. But heavy-handedness by enforcement officials can backfire, particularly in many of our fisheries where the regulations have become so incredibly complex and economic circumstances so stressful. I strongly believe that the basic fairness and due process principles I speak about today are not the domain of any political party or any public or private interest group, but are recognized and shared by all of us. Moreover, the enforcement problems at the agency cannot simply be approached as an academic or ideological issue. Practical solutions can and should be found.

Concerns about the NOAA enforcement have been brewing for some time. Many in the fishing industry have long grumbled about fishery enforcement practices, but most have remained silent and paid their fines. But, ironically, it was the U.S. Department of Commerce's Office of Inspector General (OIG) that in September 1998 first identified serious management problems in the law enforcement program (Audit Report No. STL-9835-8-0001). The OIG found that leadership from the National Marine Fisheries Service (NMFS) was urgently needed to provide the Office of Law Enforcement with more specific policy guidance to assist it in addressing its goals and objectives and allocating its resources. NOAA management at the time apparently agreed with this and other recommendations. As the more recent OIG Report (Review of NOAA Fisheries Enforcement Programs and Operations; No. OIG-19887; January 2010) indicates, the problems have only gotten worse.

My Background and Experience

Let me provide some further background so that the Subcommittee can understand my perspective. In 1972, I was hired by Senator Warren G. Magnuson as staff counsel to Subcommittee on Oceanography of the U.S. Senate Committee on Commerce, Science and Transportation and later served as the Committee's General Counsel. I was also one of the initial staff members of the Senate's National Ocean Policy Study. Senator Magnuson tasked the staff of the Committee to implement ocean program recommendations by the 1969 Stratton Commission on Marine Science, Engineering and Resources. From 1972 until 1977, I was responsible for staffing the enactment each year of between 10-15 new laws, or major amendments to existing laws, which, among others, included the Marine Mammal Protection Act, the Endangered Species Act, the Coastal Zone Management Act, various fishery laws, vessel and tanker safety statutes, oil spill liability provisions, U.S. Coast Guard laws, and other maritime and ocean statutes.

One of those laws I helped draft was the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the first comprehensive federal fishery management program which applied out to the newly expanded coastal jurisdiction of 200 nautical miles. Three points are important to recall about enactment of that 1976 legislation. First, the federal

government at the time had no nation-wide comprehensive fishery management and conservation program. Domestic fisheries were almost entirely regulated by individual coastal states to the three-mile coastal boundary at sea; federal management was limited to international treaty implementation and enforcement of the Lacey Act and some other specific but narrow laws. Second, enactment of the Magnuson-Stevens Act was viewed as a unilateral act under international law given that the U.N. Law of the Sea Treaty was still under development. The sponsors of the legislation, however, grew impatient with the international process and were concerned that any treaty would come too late to prevent serious overfishing by foreign fleets operating close off U.S. shores, particularly in New England. The Magnuson-Stevens Act is basically a conservation measure, but Congress has always also been concerned about management impacts on coastal fishing communities. Finally, enactment of the Magnuson-Stevens Act was the result of cooperative bi-partisan efforts between the House and the Senate and representatives of both parties. For the most part, the content of the Magnuson-Stevens Act was sui generis, something quite different than what had gone before, except perhaps for the enforcement provisions which were largely borrowed from other statutes.

In 1977, President Jimmy Carter appointed me to be the Deputy Administrator of NOAA, a position that then required Senate confirmation. Beginning in 1978, I became responsible for management of the agency's ocean programs, including early implementation of the Magnuson-Stevens Act. I also was responsible for agency testimony before Congress, assisting with the agency's budgets, and hiring and supervising agency leadership. I served in that position until August 1981. From January to August 1981, I also served as Acting Administrator of NOAA until Dr. John Byrne, President Reagan's selection for NOAA Administrator, was confirmed.

Therefore, my perspective on fishery enforcement derives from experience in each of the federal government's branches: legislative, executive and, most recently, the judicial.

Back to Basics: Ensuring that the rule of law controls and that prosecutorial discretion is reasonably exercised

The fishery management enforcement system managed by NOAA sits within the larger context of relevant constitutional limits on government and Congressional guidance on how enforcement is to be conducted. Several first principles must always be kept in mind:

First, the Fifth Amendment to the U.S. Constitution mandates that federal agencies may not deprive individuals of "liberty" or "property" interests without providing the charged individual with procedural due process. Under the Magnuson-Stevens Act, civil penalties may not be imposed without providing notice and an opportunity for a fair hearing before a neutral decision-maker. The hearing process must be structured with due regard for the risk of an erroneous depravation of such interests.

Second, pursuant to the Administrative Procedure Act's (APA) formal hearing procedures, which are incorporated into the Magnuson-Stevens Act, the agency must bear the burden of proof on all matters, including the penalty to be assessed. The APA also provides the charged party with the ability to rebut the allegations of the agency, including by cross-

examination of witnesses, which many consider to be the most important defense right for a charged individual or company.

Third, the due process clause requires that agencies must provide "fair notice of what conduct is prohibited before a sanction can be imposed." *U.S. v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 980 (9th Cir.). To meet this notice standard, a statute or regulation must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so he or she can act accordingly. Courts have also said that vagueness in a statute or regulation can encourage arbitrary and discriminatory enforcement by failing to provide explicit standards for enforcement officials. This due process requirement is particularly important with respect to violations of the Magnuson-Stevens Act, which generally are considered strict liability offenses where liability attaches without regard to intent or negligent behavior. And we are all presumed to know the law.

Fourth, the penalty assessed for a particular violation must, under the Excessive Fines Clause of the Eighth Amendment, bear some relationship to the gravity of the offense. In 2003, a Federal District Court in Massachusetts confirmed that this principle applied to forfeiture under the Magnuson-Stevens Act. *Roche v. Evans*, 249 F.Supp.2d 47, 59 (D.Mass.2003).

As you can see, these concepts are quite general in nature and require close attention to ensure compliance in actual application. While some of the controversy in New England emanates from the dislike of the entire fishery management system by some fishermen, there is a legitimate debate, I believe, about whether NOAA's fishery enforcement program is true to these basic principles.

One of the most important powers in any law enforcement program is the power of prosecutorial discretion: i.e., the decision to bring, or not bring, a particular case. This agency power is also implicated in the OIG's 2010 Report. A good way to highlight the issues associated with the exercise of prosecutorial discretion is to recount a fishery enforcement action that found it way to the Ninth Circuit Court of Appeals from Hawaii, a true horror-story for the fisherman involved. Mr. Hayashi and his son were fishing from a boat off Hawaii and porpoises were attempting to seize the fish they caught. To scare them off, Mr. Hayashi fired two rifle shots behind, but away from, the porpoises. This conduct was reported to NMFS enforcement agents and Mr. Hayashi was then charged with a criminal violation of the Marine Mammal Protection Act (MMPA). The main evidence appears to be statements cooperatively given by Mr. Hayashi and his son to the NMFS investigators. Mr. Hayashi was then convicted.

On appeal, the conviction was reversed. In its opinion, the Appeals Court made the following rather remarkable statements:

> "Initially, we note that two substantial errors infected the proceedings before the magistrate judge and the district court. First, both parties, the magistrate judge, and the district court all employed the incorrect regulatory definition of the charged crime. Second, the district court's affirmance rested, in part, upon the erroneous belief that negligent acts are criminally punishable under the MMPA.

> These errors affected the two most basic elements of every criminal proscription—the actus reus, or act itself, and the mens rea, or mental element required for criminal liability. The errors resulted not from a misunderstanding of obscure interpretive gloss, but from a basic misreading of clear statutory and regulatory commands. Although every lawyer involved was complicit in these errors, the responsibility for prosecuting the correct crime lies ultimately with the government.
>
> We hold that reasonable actions—those not resulting in severe, sustained disruption of the mammal's normal routine—to deter porpoises from eating fish or bait off a fishing line are not rendered criminal by the MMPA or its regulations."

The case took nearly four years to resolve, left Mr. Hayashi with a criminal charge hanging over his head for all that time, and required him to invest his financial resources and his time into fighting a case that should never have been brought. NOAA should manage its fishery enforcement to avoid ever imposing this kind of horrible experience on those who are subject to its regulations.

Possible Reforms

A. NOAA/NMFS Management: Be informed and involved clients

Based on my own experience at NOAA, one of the agency's great strengths is the cadre of superb scientists who are at the helm managing its many important public tasks. I have great respect for NOAA and NMFS managers, both at the top and at the mid-level where much of the work gets done, and I admire their scientific experience and capabilities. However, that same strength is a weakness when it comes to law enforcement. Very few NOAA managers I worked with wanted to be involved, at all, in enforcement matters, because it was not their interest and requires a set of skills one does not develop as a scientist or as a tenured faculty member at a university. Consequently, top management at NOAA and NMFS do not regularly pay much attention to the fishery enforcement process, nor is it likely they fully understand how it should function best. After all, NOAA is not the Department of Justice.

During the time I was at NOAA, we debated how to deal with the agency's enforcement responsibilities in the context of formal delegations of authority. Delegations of authority are important in a federal agency and documents govern who is authorized to do what. Currently, nearly all management decisions under fishery management plans, including those that might be implicated in an enforcement action (i.e., was the quota actually reached?) are delegated to NMFS regional administrators. However, the NMFS Office of Law Enforcement, in the agency organization chart, reports to the NMFS Deputy Assistant Administrator of Operations, not the regional administrators. Finally, according to another formal delegation, the powers and authorities of the Secretary of Commerce to assess penalties is given exclusively to the Office of General Counsel, which reports directly to the NOAA Administrator. It is not clear how, if at all, these divergent delegations allow the proper level of management authority to come together to make decisions where the authority of each (NMFS regional administrator, NMFS

administrator, NOAA attorneys, and NOAA administrator) must be brought to bear, which should be at the outset of the case.

The sum total of these management attitudes and delegations, over the years, has been to allow those in fishery enforcement, in the General Counsel's Office and NMFS Office of Law Enforcement, to do their own thing. In fact, individual lawyers within the Office of General Counsel appear to be in charge, admittedly with supervision by an Assistant General Counsel for Enforcement and Litigation, but not by top NOAA and NMFS management officials who are supposed to be managing the fisheries. Moreover, lawyers are the sole determinant of the penalty to be assessed. The discretion given the Secretary of Commerce in determining a penalty under the Magnuson-Stevens Act is quite broad. Although enforcement attorneys refer to a published penalty schedule, the assessed penalty can deviate from those suggested on the schedule and often do. The penalty schedule has never been subjected to public notice and comment that I can remember. It has been my experience that neither senior NOAA nor NMFS management is consulted in a penalty determination by NOAA enforcement attorneys. The recent OIG Report confirmed that this is, in fact, the practice and labeled it "arbitrary."

A basic legal/ethical issue is created by these enforcement arrangements: who is the client and are NOAA enforcement lawyers acting as both lawyer and client? Under all bar association rules, an attorney has ethical duties to his/her client, for example not to act without a client's approval, to keep the client fully informed, and to gain approval of the client for settlement purposes, among other decisions. There is also a very practical aspect to these duties: the client serves as a "check-and-balance" on the lawyer, and vice versa. Both have duties and responsibilities to fulfill in our system of justice. The suggestions of the 1998 OIG Report, in my mind, can be summarized as follows: NOAA and NMFS management--please act like an involved and informed client and guide the enforcement activities of the agency and do not simply leave all major decisions to the lawyers and the investigators. It has been my experience that, when it comes to litigation over fishery management plans in federal district court, the agency and its lawyers function together as attorneys and clients, but not necessarily in the enforcement realm. I believe that both the lawyers and agency management will be better off if the enforcement program operates consistent with the proper attorney-client relationship.

It may be useful to create an agency Enforcement Committee including NOAA/NMFS management and its lawyers, either centrally or regionally, to vet cases before they are filed and to follow them at key points through the process, either when going to Federal Court or when starting a proceeding before an Administrative Law Judge. Requiring the lawyers to explain their cases, and the basis for the requested penalty, to NOAA/NMFS management and then get client approval could well generate the kind of "down-to-earth" case assessments that would prevent the problems noted in the OIG's 2010 Report. It might even prevent cases such as Mr. Hayashi's from ever going to court.

B. <u>Make the Civil Penalty Process More Balanced and Fair</u>

It is a general impression by most that go through the agency's civil penalty process, as set forth in 50 C.F.R. Part 904, that it is not fair and is heavily balanced in favor of the agency. Rightly or wrongly, that is the perception. One reason for this perception may be the fact that the

agency writes the rules, brings the case, hires the administrative law judges, appeals the decisions to itself, and prevails more often than not. Most lawyers who practice in this area generally advise their clients to settle, at the outset of the agency demanded penalty amount, given the cost of going through the process and the likelihood of winning. In making this observation, I do not in any way wish to cast aspersions on those who function under the established guidelines and regulations. I have settled cases on fair terms for all parties. But the difficulties in the program are systemic and require broader attention.

Unlike the rules in federal district court, the agency's procedural rules were not hammered out through the involvement of those likely to be affected by its outcome. In my experience, those in the fishing industry do not plan to violate fishery management laws and regulations, but allegations of violations do occur, even to the most conscientious. NOAA's civil penalty rules were not subjected to the rigorous analysis of seasoned federal court litigators or experienced judges before they were enacted. Agency lawyers largely wrote them. For example, in the current civil penalty process, a charged individual is given a simple choice: pay the penalty assessed by the agency or request (and suffer the cost of) a formal hearing. In federal court, the agency allegations could be challenged in a number of ways prior to trial and there is constant pressure to settle cases without the need for trial. Independent judges and mediators are available to give the parties a third-party assessment of each side's case and to urge settlement. I have never tried a case in federal court without there being at least one serious settlement session. NOAA lawyers follow the agency rules and, thereby, get an advantage procedurally, at least in my opinion, over a charged party, given that settlement is purely at the discretion of NOAA attorneys and they set the penalties.

The assessment of the penalty under NOAA rules is the most seriously deficient aspect of the entire procedure. First, the NOAA lawyer assesses the penalty, more or less on his/her own. That lawyer-determined penalty amount is then presumed, based on past precedent, to be properly determined by agency in the proceeding and the charged party must then rebut the basis for the assessment. But because the lawyer determined the penalty, he or she cannot also be a witness in the same case and could refuse to allow any discovery of that assessment based on the attorney-client privilege. When this conundrum came on appeal to the NOAA Administrator in 2001, the agency ruled that the charged party could not depose or seek answers to written questions from the attorney based on the attorney-client privilege and the convenience of the agency. *In the Matter of AG Fishing Corp*., 2001 WL 34683652 (March 17, 2001).

In my view, the presumption that a penalty which has been assessed is correct under the facts and the law does not comport with statutory and constitutional due process, and is not authorized by the Magnuson-Stevens Act and is contrary to the APA (5 U.S.C. §§ 554 and 556). Moreover, the ability of a charged party to undertake discovery of the reasons for the assessed penalty, and to cross examine an agency witness at a hearing, is uncertain and, therefore, also violates fundamental principles of due process if not allowed. How else can one challenge the factual and discretionary bases for the assessment?

These and other problems are endemic to the practices and procedures under the agency civil penalty regulations. It is time for the agency to reconsider its rules of procedure in civil penalty cases, perhaps by appointing a task force to review the regulations that would include

seasoned legal practitioners, agency lawyers, sitting administrative law judges, and perhaps even retired federal judges. Unfortunately, I did not see this task on the NOAA Administrator's February 3, 2010 list of actions to be taken in response to the recent OIG Report. I do not believe that the actions she has identified in that Memorandum will solve all the core problems identified in the OIG's 1998 and 2010 Reports.

C. Amend the Enforcement Provisions of the Magnuson-Stevens Act

Finally, it is time to consider amendments to the enforcement provisions of the Magnuson-Stevens Act, based on more than the views of NOAA's enforcement attorneys. One such possible amendment would be make much more specific the factors to be considered by the Secretary of Commerce in setting the penalty (16 U.S.C. § 1858(c)). The basis for a penalty amount must be more transparent and understandable.

Another issue that merits examination is the issue of forfeiture of vessels. It has been the position of the agency that any vessel is subject to forfeiture for a violation, at the discretion of the agency. In my case in Guam, we never resolved the issue of whether the Civil Asset Forfeiture Reform Act of 2000 (18 U.S.C. § 983) applies to fishery enforcement actions. That law sought to rein in runaway agency forfeiture actions that appeared to be based on the need for income rather than the dispensation of justice. For example, why should a fishing vessel be forfeited for a single violation which would only be subject to a $140,000 civil penalty.

Another possible amendment would be to create a new category for judicial civil penalties, similar to the remedy found in the Clean Water Act (33 U.S.C. § 1319), for large civil penalty cases, such as for cases with over $250,000 in assessed penalties. I would also favor a jury trial in such cases as well. I do not believe that the NOAA civil penalty rules were ever fashioned for large cases.

Finally, the Committee could consider making the Equal Access to Justice Act now in the Federal Rules of Civil Procedure available in civil penalty administrative proceedings.

I am sure others will have ideas for new legislation as well.

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Again, thank you for the opportunity to present this testimony today. I would be happy to try to answer any of the Subcommittee's questions.