

TESTIMONY OF  
STEPHEN M. OUELLETTE  
BEFORE THE  
**Domestic Policy Subcommittee**  
**Oversight and Government Reform Committee**  
**U.S. House of Representatives**  
GLOUCESTER, MASSACHUSETTS  
MARCH 2, 2020

Chairman Kucinich, Congressman Frank and Congressman Tierney:

I would like to thank each of you for your service to our nation at a time when government is under unusual pressure to move forward on a broad range of issues from our economy, war, healthcare and beyond. Nonetheless, we would not be here looking for your help if serious issues did not exist in the fishing industry that need your immediate attention, and I, and all of those for whom I work in the fishing community thank you for taking the time to come to Gloucester and see for yourselves the difficulties we are having with the National Oceanographic and Atmospheric Administration's (NOAA) law enforcement branch. Sadly, despite years of rebuilding and the failure of the Agency to restore to the industry what it promised, we face growing difficulties from abuse of the enforcement powers you entrusted to them. We appreciate your response to the request of the fishing industry for a review of the issues raised by the Department of Commerce Office of the Inspector General (OIG) on the issues of NOAA Office of Law Enforcement (OLE) and the Office of the General Counsel for Law Enforcement (GCLE).

I have reviewed the Inspector General's Report and can attest that their findings correspond to my observations over the past fifteen years. I found little in Dr. Lubchenco's response that persuades me that the cited abuses will stop, or that sufficient, timely corrective action will be taken to correct serious flaws in management giving rise to violations or the agency's approach to dealing with its constituents. Most importantly, the response does nothing to correct serious abuses of the past that have cost fishermen their homes, businesses, livelihoods and dignity. I recognize that Dr. Lubchenco is new in the position, and has engaged some very competent people, and I hope they will hear our message and yours. The feedback we get from NOAA personnel is that many within the NOAA law enforcement community believe that they have nothing to fear and this will all blow over.

As some of you are aware, I am a maritime attorney, and for over fifteen years have represented commercial fishing interests along the eastern seaboard, from the Carolinas to Maine, primarily on regulatory matters. My concentration in this area began in 1994, just as Amendment 5 to the Northeast Multispecies plan was being implemented. I have remained involved with the Council process since then and have worked with fishing interests, the councils, state agencies and NOAA/NMFS in trying to set a regulatory course that provides for sustainable fisheries while seeking to preserve fishing communities, including the one in which my family and I live and work. I am a strong believer in seeing the intent of lawmakers carried forth utilizing sound science and basic common sense to achieve a reasoned result that achieves sustainable fisheries, while preserving fishermen. Beginning in the late 1990s I began to detect a shift in focus from NMFS and NOAA, as regulations increased-with many higher level managers becoming

at best indifferent, and at worst highly antagonistic to the fishing industry. Beginning ten years ago, as the number and nature of enforcement cases increased and fines skyrocketed, I openly questioned what I consider to be inappropriate enforcement by the NOAA OLE and the OGC. I have raised these issues in meetings with NOAA personnel and attorneys and in correspondence with my congressional delegation and at fishery council meetings. I appreciate the efforts of the Massachusetts legislature and the Massachusetts Attorney General in helping bring these issues to the attention of members of Congress which has ultimately led us the IG's investigation and now, here. Hopefully we can now get Congress to address the abusive practices of NOAA and in the larger picture, restore the service aspects of the National Marine Fisheries Service.

Unfortunately, many have already fallen victim to this system, and many are still paying the bill, and consideration should be given to reopening cases and correcting unjust results.

I want to make it clear that industry values the commitment of many at NOAA and NMFS to ensuring the continued sustainability of our fisheries, and to fishermen and fishing communities. There remain many within these agencies who continue to work hard to assist fishermen, many of whom have expressed their frustration with the issues we raise, including some from the law enforcement community itself. Unfortunately, over the past fifteen years I have come to recognize that much of the management at NOAA and NMFS has become disconnected from those they regulate to the point that they are indifferent to the avoidable human tragedy they create. Unfortunately, this attitude has, in my estimation, spread into the law enforcement community to the extent that many in OLE and GCLE are completely disconnected from the fishery, having little

TESTIMONY OF STEPHEN M. OUELLETTE

3/2/2010

Page 3

understanding of the purpose of regulations, the nature of the industry they are regulating, the difficulty in compliance, financial strains, economic hardship of running a small business, economic condition of the fishery and the overall impact of regulations on fishermen. As a result, enforcement becomes unusually harsh and fines become unrealistically high for minor violations, and are multiplied where innocuous violations are repeated due to ignorance, misunderstanding or inadvertence. In some cases, it is almost as if enforcers are making sport of how large a fine they can impose or how complicated they can make a simple case appear-and one anonymous email, attached hereto as Exhibit 5, suggests there is financial incentive to do so.

There is little doubt that the fishery regulations in the Northeast are the most complex ever imposed on so many small businesses. The industry understands the need for regulations to keep fisheries sustainable, but overzealous enforcement of complex rules threatens the viability of small businesses. The rules are horribly complicated and fill volumes. Reportedly the only agency producing more regulation is the Internal Revenue Service. Rules change frequently and dramatically, with fishermen and boat owners in the Northeast receiving on average 500 pages of permit holder letters each year from the Northeast Region of NOAA alone. Many receive duplicates and multiple vessel or permit holders receive sets for each vessel they own, often in multiples. An owner, such as Mr. Burgess, who will also testify today, and owns 11 permits, receives as many as twenty sets of each letter, which must be reviewed to make sure they are actually duplicates of the same item and not new or corrected letters.

Many regulations also tend to make little sense to fishermen, as they are counterintuitive or just plain wasteful of a valuable resource. When groundfish trip daily

limits were imposed in the late 1990s, some provisions were included to allow overages to be landed by sacrificing days at sea. Although this often required a disproportionate loss of time, during which other species could be caught, fishermen availed themselves of this provision to avoid discards. Fishermen seeking to use the provision were required to call and advise NOAA Law Enforcement of the overage and have the appropriate time deducted from the vessel's days at sea. NOAA law enforcement effectively lobbied to remove this, placing fishermen in the undesirable position of having to choose between discarding valuable fish, or compromising safety and remaining at sea to allow time to accrue on their clock. Under current provisions, fishermen are now required to either remain at sea, or discard catches down to match the time they have been at sea. It is a terribly wasteful system-in 1998; "conservation" measures reduced landings from 6M lbs of codfish to 2M lbs. Discards increased by 5M lbs. Fishermen are always seeking ways to avoid wasteful discards, too often finding that their common sense solution places them in technical violation-at considerable cost. We too often receive calls from fishermen who, due to weather or mechanical issues, need to return to port, but have too much fish for their time at sea. We advise them to discard, as NOAA makes NO allowances for even life threatening emergencies. In one case, NOAA Office of the General Counsel did, too late, allow one of my client's vessels to bring in a bluefin tuna that belonged to a vessel that had foundered (whose crew was rescued by the Coast Guard). After waiting an hour for a response, with conditions deteriorating, I instructed the crew, by phone, to cut the fish loose and return to port. When the NOAA attorney finally called me, I advised him that safety considerations forced us to make a decision.

He seemed incensed and the crew was met by NOAA agents who reportedly questioned them for over three hours.

In part, the problem stems from the regulatory complexity resulting from strict rebuilding requirements imposed on a wide range of fisheries with regional variations and multiple gear and vessel types, seasonal differences, etc... Vessels are limited as to when, where and how long they can fish. Their gear is strictly regulated and their catch limited, often on a daily basis. Most vessels must notify NOAA before they leave the dock, wait for a sailing confirmation number and report again when they land. Vessels' positions are electronically monitored. Catches are reported to NMFS on vessel trip reports submitted monthly, in some cases electronically on a daily basis, and receiving dealers submit electronic reporting on a weekly basis. There is actually little opportunity to cheat, but great opportunity to make an honest mistake.

Vessels and dealers are subject to frequent, unannounced inspection, by armed Coast Guard, NOAA law enforcement agents and state environmental officers. Generally, fishermen attempt to comply with regulations but because of regulatory complexity, and rules that often force captains to compromise safety to avoid having to discard their catches, violations occur. The regulatory burden is excessive, and my review of NMFS's OMB filings under Paperwork Reduction Act Requirements shows that it dramatically understates the regulatory burden currently placed on fishermen by its regulations. Despite the increased regulatory burden, with decreased landings, overall earnings are decreasing, driving the cost of compliance up proportionately.

While regulatory complexity has increased, the number of fisherman and the time available for fishing has decreased. NMFS continues to restrict access to fisheries,

despite huge leaps in rebuilding, so cost of compliance rises in the face of declining profits, with little hope fishermen will ever be able to harvest the fruits of their sacrifices. Yet NOAA continues to escalate fines and penalties for innocent violations, to the point that most fishermen are terrified that they, or their crew, will make a mistake that costs them tens of thousand of dollars and result in loss of their business and their home.

While, in my experience, NOAA agents have generally been cordial to me, with a few exceptions who have since left or been forced out, the fishermen's complaints that they are treated like criminals is consistent with the agents' demeanor and positions as criminal investigators. I was surprised to see this designation appearing on the agents' business cards a number of years ago, and the IG's report reveals why. Fishermen are approached in the same fashion as criminal suspects, and in a few cases, agents have tried to use criminal laws to enforce Magnuson provisions, improperly, see my letter to Senator Kennedy detailing specific cases, Exhibit 1. Guns are often displayed and I have had frequent complaints from fishermen that agents deride them for not showing agents enough respect. There is a general adversarial nature that seems to occur when criminal investigators get involved, and not surprisingly, fishermen find it disconcerting. Unlike most agencies, NOAA does not have civil compliance officers to whom fishermen can turn to ask questions and avoid costly mistakes. While NOAA agents will respond to questions, they are not always correct-in one case I was involved in 20 years ago, fishermen landed an extra bluefin tuna after they were told by OLE they could take it off their following year's quota, only to have it seized when they landed-although the agent was reportedly polite and apologetic.. In other cases, fishermen have arrived at dock and found their estimate of catch exceeds their allowed limits. Action to bring an

TESTIMONY OF STEPHEN M. OUELLETTE

3/2/2010

Page 7

unintentional overage to the attention of enforcement through self reporting often results in seizure of catch and hefty fines.

NOAA GCLE takes the position that Congress, in delegating unfettered authority, has stated no violation, however small, should go unpunished, and that even innocent or negligent violations should be punished significantly more than “the cost of doing business,” even when no profit is alleged to have resulted from the “violation.” NOAA has been given authority to fine up to \$140,000 per violation, with each day being a separate violation. We frequently see fines of \$50,000-250,000 for reporting violations, minor overages, common misunderstandings of rules, etc that have occurred over time, even though there is no profit to the boat, ill intent or negative conservation impact. NOAA attorneys frequently cite to statutory language that allows NOAA to assess fines even if it requires a respondent to reorganize their business (more commonly referred to as bankrupt). NOAA has a penalty schedule that allows first time violations to be assessed at \$5,000-80,000 with up to 90 days of permit sanction, Exhibit 4. With most fishermen in this region making \$50-60,000 per year, and vessels limited to as few as 27 days per year, even a first time violation is significant. Fines regularly start at \$30-100,000 and paperwork violations can result in million dollar fines, as noted below.

Often, fishermen end up in violation because NMFS issues confusing or obscure regulations, some of which I will detail below. A number of violations occur because NOAA is unable to timely do such tasks as calculate a vessel’s available days at sea. Fishermen can no longer do this with new rules on differential counting and the fact that their annual allocation can be determined until NOAA figures “carry-over” DAS, which may not be done until  $\frac{3}{4}$  of the way through a fishing year.



We often seek guidance from NOAA attorneys as to regulatory compliance, but their opinions often seem out of touch with the intent of regulations, generally expanding the definition of a violation. For example, consider the responsibility of a dealer to detect violations by vessel from which it acquires fish. NOAA takes the position that a dealer is not required to investigate whether vessels are in compliance, just not to assist in a violation, or ignore an obvious one. At least one dealer is being charged for conduct a NOAA Special Agent in Charge specifically told them they would not be responsible for. GCLE attorneys actually have stated to that when faced with an overage, the dealer should accept the legal limit and turn the balance back to the boat, rather than accept it and accurately report it-in effect encouraging dealers to hide overages, where such an absurd argument supports its position. In one typical episode, one NOAA attorney was citing fishermen for estimating his catch and not waiting for dealer weights before filling in his logbook, and another was citing fishermen for not estimating and waiting for his dealer's weights-these two attorneys worked out of the same building.

Fishermen feel victimized by the process, with fines for innocent violations routinely exceeding a fisherman's year's pay, leading to a climate of distrust by fishermen in their government, understandably so. In most cases, fishermen enter my office completely bewildered as to why they are being charged. Sadly, experience has shown me that few, if any, fishermen are ever in compliance with all of the regulations. Nor does the adjudicatory process instill confidence. To fully understand how the process works, let me take you through it.

A fisherman may be boarded at sea or at dockside, or be subject to an audit that reveals a potential violation. A case is opened and the fishermen and crew may be

questioned by NOAA. Boardings are conducted by Coast Guard personnel armed with automatic weapons, often accompanied by agents from other agencies, dogs, etc... at all hours of the day or night. NOAA agents routinely carry and display firearms, and announce themselves as criminal investigators. Boardings routinely extend over a period of 2 to 3 hours (but have gone as long as 8 hours), and may result in vessels being ordered to return to port for seizure of catches, including a few occasions where the vessel was later exonerated, see my letter to Senator Kennedy, attachment, detailing specific incidents. Most vessels are boarded three to five times per year-some vessels have been boarded as frequently as 30-50 times in one year. Because NOAA law enforcement is civil, fishermen are not advised of rights and are generally intimidated by the process. If any fish is believed to have been harvested illegally, e.g. from a closed area or in excess of limits, the catch is seized. Until the investigation is completed a vessel may be prevented from leasing days at sea or other rights, which can result in the vessel being prevented from fishing. In the case of audit of a vessel's landings report, etc, the fishermen is generally not advised that an investigation is underway but may be called into an interview.

Once the investigation is completed, the fisherman is an issued ticket, called an Enforcement Action Report (EAR) and the file is forwarded to the NOAA GCLE where it is assigned to an enforcement attorney. If no further investigation is required, the attorney will issue a Notice of Violation and Assessment (NOVA) and/or a Notice of Permit Sanction (NOPS). These documents state that the attorney has found a violation occurred and assesses the penalty and/or sanction. The respondent is advised of a right to hearing before an Administrative Law Judge (ALJ) but cautioned that the ALJ has the

authority to raise any fines to the statutory maximum of \$140,000. Generally a proposed offer of compromise-at 80-90% of the assessed fine, along with a copy of the regulation alleged to have been violated and a financial disclosure form, if the respondent claims inability to pay. Financial disclosure forms, annexed hereto, Exhibit 3, require extensive financial information from both a fisherman and his spouse.

The administrative process allows a hearing on the merits of the case, but NOAA regulations limit review of penalties, unless the judge finds good cause to vary from NOAA's counsel's findings, 15 CFR 904.204(m). Many cases involve few significant factual issues, other than ability to pay, and often focus is on the issue of the penalty. Agency counsel routinely take the position that since they set the penalties, as attorney they can not be forced to disclose the basis for any specific penalty as it would affect their ability to represent their client, a position upheld by ALJs, putting Respondents in a difficult position to challenge the appropriateness of a fine, not knowing what factors were taken into account. As an aside, although penalties appear to be set in a highly subjective fashion, GCLE attorneys claim inability to compromise penalties to less than 50% without supervisor approval, which usually requires proof of inability to pay.

Hearing before an ALJ offers limited opportunities for discovery. NOAA attorneys frequently fail to disclose documents they believe are "not relevant," despite a broader definition that allows discovery of discoverable documents 15CFR904.240(e)(1). The hearing process takes months, and provides no ability for interim rulings on individual counts, absent consent from the Agency. With costs for briefs, etc, the process may cost \$5-10,000 for a small case, and significantly more in complex cases. Either side may take an appeal of an ALJs decision to the NOAA Administrator. Although

termed discretionary review, the discretionary review is required to exhaust administrative remedies before seeking review by a United States District Court, where review is conducted under the Administrative Procedures Act standard of substantial evidence. In short, it is an expensive, time consuming process, with little opportunity for a fisherman to succeed. One case, described below, has now extended over the course of 13 years, and has just reached the US District Court for the second time, (Frontier Fishing Corp).

Although defending an enforcement action is costly, most fishermen, having little faith in the administrative process and judges paid by NOAA, decide to seek a settlement because of the threat in the NOVA that by challenging it the fine can rise to \$140,000, and the mental stress from having to deal with the concept of heavy fines hanging over them for months to years. Once a fisherman has had a violation, it then serves as the basis for enhanced penalties in the future, and in order to reach compromise, NOAA attorneys often require future lump sum payments or leave penalties suspended for a year or more, which can cause a later, minor issue to have disastrous consequences. In a case that recently came to my attention, NMFS is warning boats not to hire a fisherman who is unable to pay a ten year old fine, under threat of sanction to the owner-in effect NOAA has imposed a lifetime ban on fishing from which there is no appeal, because this man can not pay an old fine.

**Capt. Billie Lee**

Capt. Lee was a lifelong fisherman until recently, when he ran afoul of NOAA law enforcement, due to his failure to possess the notorious yellowtail letter of authorization. Vilified by Andrew Winer of NOAA who called him a “repeat offender”-

implying criminal culpability, Capt Lee tried his best to follow the rules, but violated a rule when he entered port too early with 200 pounds of excess fish. Legally caught, he simply had to discard this dead fish at sea, or stay at sea for an additional sixteen hours-not advisable as he fished alone-to fully comply. Relying on a common sense principal formerly embodied in a rule, Capt. Lee left his vessel called into the days at sea system to account for this fish, and dutifully reported it to NOAA. In doing so, he gave up 2 of his limited fishing days, in which he could have legally landed 4,000 more pounds of fish. Sadly, the common sense rule was rescinded by NOAA and he needed to discard 200 pounds of fish to be legal, and go back and catch it-and possibly another 3,800 pounds. To NOAA, compliance is more important than conservation.

Capt. Lee also lacked the so-called yellowtail letter (LOA), intended to assist enforcement of differential yellowtail trip limits North and South of Cape Cod. At least 25 other boats landing at the Gloucester Seafood Display Auction similarly lacked the LOA. This fact came to light years after the LOA was eliminated. NOAA won't tell how many of the 500 or so active groundfish vessels lacked them-two other vessels were given warnings, not fines, for LOAs violations. The difference between them and Capt. Lee-they didn't land at the Gloucester Auction. Why 25 vessels' failed to possess an LOA which cost nothing and didn't affect their fishing remains obscure-some had them in most years- some were issued three for one year and none in the next. NOAA had no written application and has no documents recording requests, so we'll never know. NOAA says it makes no difference-simply put, produce a letter from 2002-2006 or pay the fine. Mr. Lee's case is simpler; he stopped getting the letter after a rule change in 2003 implemented a yellowtail trip limit in the Gulf of Maine, making it seem

unnecessary-he always landed under the minimum for any area. In the four years he lacked the LOA, Capt. Lee was never asked to display it when he was boarded, he complied with yellowtail trip limits, and he reported **all** of his fish to NOAA (as did the Gloucester Auction).

Capt. Lee hardly went rogue as Mr. Winer implies. Capt. Lee is a good American: a veteran and lifelong fisherman who struggled in the face of reduced catch limits under an ever increasing regulatory burden- rules that force fishermen to make choices between what is moral and makes common sense and what the agency demands. Too often, I have advised fishermen to discard their catch enter port early for safety reasons, or risk Capt. Lee's situation. This ethical dilemma stems from NOAA's elimination of the "running clock" and refusal to implement safe harbor provisions. The agency's position on the LOA, which served no conservation purpose and confused many honest fishermen (and NOAA personnel themselves), is yet another-"gotcha" for NOAA to further vilify fishermen.

Faced with these issues, at the age of 62, it made more sense for Capt. Lee to abandon his way of life and seek a new occupation.

### **Richard Burgess**

Capt. Richard Burgess is one of the most conscientious vessel owners I have had the pleasure of working with. (His case is also detailed in my letter to Representative Tierney, annexed hereto, Exhibit 2) He apparently misjudged his available Days at Sea ("DAS")<sup>1</sup> on his vessel, a 42 foot gillnetter fishing from the port of Gloucester, but not without NOAA's help. This occurred, in part, because at various times NMFS has been

unable to timely provide him with DAS usage calculations for months at a time,<sup>2</sup> due to computer issues and problems calculating DAS usage based on differential counting.<sup>3</sup> NMFS also continued to issue sailing numbers to the vessel, despite the apparent overage. Mr. Burgess had literally hundreds of available DAS that he could transfer from permits on skiffs he holds for that purpose. The NOAA attorney advised that if the Capt. Burgess agreed to forfeit \$25,000 of the total of approximately \$27,000 in catch, in addition to the DAS that would have been used, NOAA would seek no further penalty. In the interim, the boat would not be permitted to lease days to the boat and fish until he agreed to settle the case, or until the vessel received its next year's allocation in May. As a lawyer for the fishing industry, the complete lack of judicial remedy placed me in an impossible position, other than to advise him to accept what NOAA so "generously" offered.

All too often, NOAA issues vessels sailing authorization, and then sends enforcement agents to seize catches for minor DAS issues, errors in permit renewals or minor overages. Twelve years ago, honest mistakes like these required an adjustment to a vessel's DAS, or bringing ones self back into compliance. Now they result in hefty fines.

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<sup>1</sup> As you already may know, a vessel's allotted Days at Sea are the amount of days a fishing vessel may fish in a given fishing year.

<sup>2</sup> A Montauk fishermen made a similar complaint to me. NMFS has informed him that they can not tell him how many DAS he has remaining, indicated he might be over, and apparently has held up his DAS lease application. If he can not lease his DAS before Thursday, he will lose 30 DAS, worth \$24,000 on the open market-and not be able to fish his vessel until next year.

<sup>3</sup> As a prime example of how convoluted the system is, in November of 2007, NMFS had charged this fisherman for 35.96 monkfish DAS, in some cases TRIPLING his actual time, when they now finally advise him he has actually used only 17.98 DAS. It should not go unnoticed that NMFS made a 17 DAS error, causing this fisherman to adjust his fishing based on NMFS's false statements as to the effect of differential counting on his monkfish DAS. OF course, whether This fisherman or NMFS makes the error, the only loss is borne by This fisherman.

Mr. Burgess also lacked a yellowtail LOA for one of his boats in one year. Although NMFS says they didn't issue him one for the 2005 fishing year, we located a duplicate they issued, inexplicably from the 2004 year, indicating that because he renewed his permit early, NMFS may have been unable to issue a new letter for the 2005 year, and just issued him a duplicate for the 2004 year. In any event, all of his fish was reported, by his boat and by the GSDA. The violation was de minimis and a common mistake, made by as many as 50% of the active vessels in the Northeast Region. The tenor of his interview by agents and offer of leniency in exchange for getting him to get him to make statement against the Gloucester Seafood Display Auction made it clear that the charges against him were only a pretext to seek information on the Auction.

#### **HERRING REPORTING CASES**

In a number of cases, in which six figure fines were handed out, and then settled for 20% of the assessed fines, a number of vessels fell out of compliance with NMFS Interactive Voice reporting systems. In most cases the vessels were reporting their catches monthly through Vessel Trip Reports and dealers were reporting purchases and attributing them to vessels weekly. IVRs had been completed by personnel at the Maine State Division of Marine Resources. When the individual gave notice she would stop doing it, some fishermen believed, incorrectly, they would be contacted by someone at NMFS. A number of vessels fell out compliance. Although NMFS claims they need the vessels' IVRs on a weekly basis to avoid precipitous shutdowns of the fishery due to quota concerns, NMFS personnel were fully aware that these vessels were landing herring-and of the quantities through dealers-but did nothing for months and then notified NOAA law enforcement. When notified, vessels came into compliance. NOAA then



issued fines of up to \$520,000, \$10,000 per violation, despite the fact NMFS personnel allowed the violations to occur. One has to ask whether the data was crucial enough to justify the fines, if NMFS personnel could be bothered to make a few phone calls to the vessels they knew had become non-compliant. While compliance is the vessel's responsibility, NOAA should not be permitted to impose repetitive fines where it is aware that fishermen are unwittingly out of compliance, but they do, and they do it frequently, at great cost to the industry.

It is quite common for fishermen to begin to fish, adjacent to a closed area, alongside a Coast Guard cutter, only to have the cutter's crew wait and watch until an offense has been unwittingly committed, and then stop the vessel-law enforcement never seems interested in stopping a fisherman from making a mistake that turns into a violation, where it can seize a catch or assess a fine.

### **Common Mistakes Become Big Fines**

NOAA has also made sport of seizing trips where vessels make errors in renewals. In one case, a scallop vessel received new permits 30 days before its permits expired. The vessel continued to sail under NOAA sailing authorizations, but during a routine boarding, it was discovered that the "new" permit actually expired the same day as the old permit as NOAA reissued permits with a different class of herring permit. The catch, valued at \$140,000 was seized, as was the trip of the owner's other vessel for the same reason. Eventually, all but \$60,000 was returned.

In other cases, scallop vessels landing under 18,000 pound trip limits have had trips seized for variances as small as 2.5%, despite the impossibility of accurate weights on board and scientific evidence showing how scallop weights change based on water

absorption in the vessel's hold. (To the credit of GCLS, these policies have been modified based on one of our cases).

Traditionally, late logbooks resulted in refusal to renew permits. In the past few years, GCLE, in some cases, has started to review date stamps on logbooks, and charged fishermen for tardy reporting, at up to \$10,000 per page, without any notice of this change. NMFS reports that less than 25% of vessels are fully compliant!

One dealer, during a change in NMFS permit structure where he was told that his permits would all be issued by the Northeast Region, failed to note that his shark permit issued from the Southeast Region. When the permit was not renewed the first time, he fell off the notification list. Eventually, as reporting requirements changed, he was not notified and fell out of compliance on reporting. A single misunderstanding of a statement by NMFS that all of his permit were to be issued together meant all of his permits would be issued together results in 600 violations. When the issue came to light, he produced his records and showed what he had purchased and from whom. GCLE indicated an intent to fine him \$6,000,000, and suspend his permits for 2 ½ years, but eventually settled the case for \$750,000-which he has been paying for years. No ill intent, illegal profits-record keeping violations, multiplied out over years become a profit center for government.

### **Systematic Problems**

The real issue here is NOAA's unfettered ability to issue fines, the basis of which is non-discoverable, and under the administrative law system, place the burden of proof on the Respondent to prove the penalty is inappropriate. Penalty schedules should be set with public input, and reviewed in open by fact finders limited to assessments for each

type of violation, with transparency in aggravating or mitigating factors. The Agency should not be able to disingenuously hide its decision making in assessing fines behind the attorney work product privilege, which has heretofore been the Agency's practice in these cases. Because of the gravity of these penalties, fact finding should be given to US District Court Judges, or magistrates, instead of Administrative Law Judges, if the assessments are to continue to be able to take a man's livelihood, business or home. Fact finders should be limited in the amount they can assess for any type of violation, and should have the ability to reduce or eliminate fines altogether for a violation, and not be bound at all by GCLE determination. Most importantly, fines should have some relationship to the status of the fishery, and the Agency should not be able to extort monies from fishermen by seizing trips or tying up boats without a hearing or by holding a potential \$140,000 fine over their heads for any violation. I note that fishermen have **no** confidence in the system.

Somewhat uncharacteristic of the American judicial system with its supposed due process protections; there is less judicial involvement, or common sense, required in NOAA's taking of a man's business assets, home and ability to earn a living, than in a challenge to a parking ticket issued on federal land.

#### Factors which Must Be Addressed

1. Initially, NOAA has become an agency where fishermen find few friends or supporters, or at least very few who can afford to voice their support for fear or retaliation. Even within the NOAA enforcement community, agents are upset with NOAA's approach to fishermen, but fear for their jobs if they voice their opinions.

Unless and until NOAA management takes a new approach to the fishing industry, there will never be positive change.

2. Enforcement must be used as a positive tool to educate fishermen and help them avoid violations of complex rules. Compliance, not fines should be the goal. Port agents used to fill this role for fish dealers, and sadly, with their elimination, dealers have a harder time staying compliant and the quality of data has deteriorated. Similarly, NOAA agents seldom do friendly checks of vessels and have lost the discretion to allow a vessel to get back into compliance without issuing a violation. Use of criminal investigators creates a hostile atmosphere, and should be limited to cases where criminal action is suspected-notably most Magnuson violations can not be pursued criminally and are expressly excluded from the criminal provisions of the Lacey Act.

3. NOAA must implement a regulatory review process to ensure that rules make sense, and ensure that unintentional violations of complex rules are not punished too harshly, if they need to be punished at all.

4. Penalty schedules should make calculations of penalties more proportionate to the violation, and not contain ranges, such as \$5-80,000 for a first time violation. Fines should reflect all issues facing fishermen, especially those created by the Agency. Agencies are granted deference because of their specialized knowledge, yet they claim ignorance of these very issues in enforcement proceedings. AIJs should be free to refine penalties and sanctions, and no burden should fall on the Respondent to overcome a penalty, but not have unfettered ability to raise them to statutory maximums.

5. Penalties need to be reviewed by managers responsible for implementation of regulations, to ensure that enforcement does not misconstrue the need for and effect of

regulations. The Agency should be required to utilize its knowledge as to the effect on businesses of fines and sanctions it imposes, something they claim they do not do at this time.

6. Respondents should be permitted complete discovery into the basis for fines and sanctions, and the Agency should be prohibited from claiming any privilege merely because it elects to have the same person who assess the fine represent it at hearing.

7. The Agency should be prohibited from seizing the catches of domestic, permitted vessels, or placing restrictions on a vessel's permits, without hearing before an ALJ or US District Judge.

8. Congress should place a 12 month statute of limitations on violations, to prevent NOAA from data-mining scientific data collections to conjure up prosecutions.

9. The Agency should be required to limit fines so that NOVAs do not improperly threaten respondents into settling based on fears of unwarranted increases in fines.

10. The IG should review past cases to determine whether improperly treated fishermen should have fines remitted or other corrective action taken.

11. Congress needs to reduce the scope of NOAA's fining and sanction authority, and limit fines for repetitive, technical non-compliance, as does OSHA. Large fines for technical violations should not be imposed unless the permit holder has refused to bring himself into compliance-Although NOAA claims a Fix It Ticket process exists, it is used sparingly in the Northeast.

12. Procedural regulations should provide for partial judgments to eliminate unsupported claims prior to hearing.

Conclusion

NOAA's system of law enforcement is horribly broken and has caused, and continues to cause, unjust and unwarranted impacts on hard working members of our fishing industry. Where these men once faced the perils of the sea, their own government has become an even greater threat. I urge you to force this Agency to reform and make it work to benefit the American people, including those in the fishing industry, as the Magnuson Act requires. Absent strong, positive action, not only will a way of life be lost and fishing communities further devastated, but confidence in the very fabric of our government will be undermined in an irreparable manner.

I thank you again for looking in the issue on behalf of fishermen, their communities and the consumers who rely upon the fishing industry for wholesome seafood.

Respectfully submitted,

/s/ Stephen M. Ouellette  
Stephen M. Ouellette, Esquire