

TESTIMONY OF  
STEPHEN M. OUELLETTE, ESQUIRE  
BEFORE THE  
**UNITED STATES SENATE**  
**Committee on Homeland Security and**  
**Governmental Affairs**  
**Subcommittee on Federal Financial Management,**  
**Government Information, Federal Services and**  
**International Security**  
BOSTON, MASSACHUSETTS  
June 20, 2011

Chairman Carper, Senator Brown and members of the Committee:

I would like to thank each of you for your service to our nation and your particular attention to issues of concern facing our nation's fishing industry 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. The issues facing our Nation's fisheries are of considerable concern to our region due to their economic, cultural and social impact.

Natural fish products remain one of the last natural protein source which can be harvested with use of minimal fossil fuels and require the introduction of no chemicals or fertilizers into the environment. 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 Boston and continue the inquiry into the difficult relationship between National Oceanographic and Atmospheric Administration (NOAA) and the commercial fishing industry, and in particular NOAA's law enforcement and management branches.

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As I will explain, I am not confident that NOAA and its sub-agency NMFS have the ability to properly manage our Nation's fisheries, or the associated commercial industry without significant oversight, by Congress and possibly a National Committee selected by major stakeholders to ensure that the best interests of the Nation are fulfilled, as required by the Magnuson Act. I, for one, do not believe NOAA is spending money properly if the intent is to protect the domestic fishing industry. In the Northeast, the fishing industry appears to decline in inverse proportion to increases in NOAA's budget and we seem to be facing a chronic under-fishing crisis. At the same time as the fleet has declined, and in turn serious fisheries violations have all but disappeared, fines and penalties have increased on remaining fishermen, creating an over-enforcement problem—too many enforcers chasing too few fishermen.

As some of you are aware, I am a maritime attorney in practice for over 25 years, and for over fifteen years have represented commercial fishing interests along the eastern seaboard, from the Carolinas to Maine, primarily on regulatory matters. I am a member of the Maritime Law Association of the United States Fisheries Committee. 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

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1990's 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. Over the course of many years I have raised these issues in meetings with NOAA personnel and attorneys and in correspondence with my congressional delegation and at fishery council meetings, copies of some of these are attached. 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 finish the process of correcting issues with NOAA law enforcement and get focus back to the business of restoring our Nation's commercial fishing industry.

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

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.

The industry was dismayed, but not surprised, when its allegations of abuse by NOAA Office of Law Enforcement (OLE) and the Office of the General Counsel for Law Enforcement (GCLE) were substantiated by the Department of Commerce Office of the Inspector General (OIG) in his report, and by Secretary Locke's Special Master, Judge Swartwood. Even I was not prepared for the apparent abuse by the Office of Law Enforcement of the Asset Forfeiture Fund, and it is difficult for industry to have respect for an agency that has done so little to reveal the scope of this abuse of public funds, particularly given the unjust fashion in which these monies were extracted from the fishing industry.

I have reviewed the Inspector General's Report and can attest that their findings correspond to my observations over the past fifteen years, see my letters to Senator Kennedy and Representative Tierney annexed hereto, Attachments 1&2. While NOAA has implemented some positive changes, such as a revision in its regulations that placed on respondents, usually fishermen, the burden of rebutting the appropriateness of penalties, while denying them the opportunity to discover the basis for the penalty, there has been little other positive progress. NOAA's new penalty policy, issued in March of this year, will create more predictability in assessing fines, but still sets fines at

unrealistically high levels, such that one error in judgment, such as retaining excess bycatch, can cost a fisherman his business and life savings.

There is no question that adequate enforcement is crucial to the success of fishery management plans, however, as the number of participants in the fishery declines, and as opportunities for “cheating” have been eliminated through such means as mandatory vessel tracking, onboard observers, daily reporting, and regulations are adopted which avoid discard issues, one would expect enforcement to be similarly reduced. Part of the problem in the Northeast has been that as serious violations, like closed area incursions and illegal landings schemes of the 1980’s have all but disappeared, law enforcement had elevated simple misunderstandings of complicated regulations into cases with hundreds of thousands of dollars in fines. Symptomatic were the fines levied on a number of herring vessels in 1998. These vessels were required to report their landings weekly through a call-in system, in addition to their monthly vessel trip reports and weekly landings reports by dealers. Many had made their weekly reports through the State of Maine. When Maine ceased handling the reporting, a number of vessels fell out of compliance with weekly reports, but continued to file monthly reports and the dealers, weekly. Fully aware of which vessels were out of compliance, NMFS managers, who claimed the weekly information was crucial to avoid over-harvest, did nothing for six months, and then notified NOAA OLE, not the vessels. Upon notification, all vessels immediately brought themselves into compliance, but each received fines, up to \$520,000. NOAA spends little -or no money- assisting the industry in dealing with compliance, and more on meting out penalties to its constituents.

Nor have the number of enforcers been reduced as the number of industry participants declined. One of my clients reported over thirty dockside boardings in a 45 day period by Massachusetts Environmental Police. Shortly thereafter, I met with one of the Environmental Police Officers (EPO) and inquired as to the frequent boardings. The answer was that under the Joint Enforcement Agreement between the EPOs and NOAA, funded with monies from the Asset Forfeiture Fund, the Massachusetts EPOs were required to board federal boats every day. The EPO was very polite and very forthright, apologizing for the frequency of the boardings, but stating my client's boat was the only federal vessel fishing in his region, and the daily requirement could only be met by frequent boardings. Notably, the fisherman was always found in compliance, and was gratified that he was not being singled out. Nonetheless, one has to question whether the need for enforcement should be reduced as the fleet diminishes and electronic monitoring and government observers have become so pervasive. In effect, just as fishermen over-harvested fish, enforcers have over-harvested the assets of the fishing industry -simply put, there **too many enforcers chasing too few fishermen.**

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

NOAA's recent response has been to elevate a number of cases to criminal violations. While the Magnuson Act intentionally provides for few criminal penalties, and even the Lacey Act prohibits prohibitions based on underlying Magnuson Act violations, NOAA agents have started to threaten criminal conspiracy charges for violations of Magnuson regulations. We have recently seen criminal charges issue for observer issues and marine mammal violations involving commercial fisherman. In one instance, a fisherman appears to have been charged for trying to release an entangled whale from his gear. One of my clients' businesses was recently served with subpoenas indicating NOAA has elevated a civil charge of exceeding landings limits into a criminal investigation. This action is consistent with comments NOAA General Counsel Lois Schiffer made last year at a symposium held at the Roger Williams School of Law to review the history of the Magnuson Act. At the meeting Atty. Schiffer indicated her desire to see amendment to expand penalties under Magnuson, including criminal prosecutions, private causes of actions, etc... NOAA appears to be finding inventive ways to pursue criminal actions, contrary to the intent of Magnuson's drafters.

Sadly, despite years of successful rebuilding the Agency's promises of restoring the commercial fishing industry to its former strength has gone unrealized. Predictions

by the Agency of future gains for ongoing conservation measures are never realized. For example, in 2004, NOAA justified a significant reduction in the landings, and paring of the groundfish fleet, by predicting future increases in harvest. I have provided a chart from the Amendment 13 document showing the predicted harvests for no action and for the significant reductions required to accelerate rebuilding. This showed landings, already increasing due to stock rebuilding; increasing to over 200,000,000 pounds of groundfish by 2010, optimistically theorizing that the break even point for these measures would be attained in 2036. The groundfish fleet is landing around 60-70,000,000 pounds, and the break even point will likely not be attained by 3036, See Attachment 3. That the Northeast Multispecies Fishery has undergone significant rebuilding is unquestionable, but at the current landings of approximately 60-70 million pounds of groundfish, it is landing less than 40% of its Annual Catch Limits (ACL). Those ACLs are conservatively set at only 75% of NOAA's scientifically calculated Total Allowable Catch. Recent reports by the Commonwealth of Massachusetts Department of Marine Fisheries, in conjunction with University of Massachusetts School of Marine Sciences and Technology indicate that NOAA's TAC themselves are set arbitrarily low, indicating that landings could be as much as 60% more than currently permitted. NOAA's policies have resulted in an extended period of chronic under-fishing. I recently calculated losses in the Northeast Multispecies fishery to be as much as \$200,000,000 per year. Similar under-fishing has been occurring on other species such as monkfish and swordfish, with between \$300,000,000 and \$500,000,000 in direct landings being lost every year in the New England region, see underfishing memorandum and attachments, Attachment 4. (Although this memorandum is a year old, the figures remain largely unchanged.). Since

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some of these fish are harvested under international treaties, in swordfish, in particular, uncaught quota may result in permanent transfer of our quota to foreign nations.

Economists apply a four to one multiplier to landed value as an indicator of overall economic activity and the this region alone is losing as much as \$2,000,000,000 in economic activity each year, representing tens of thousands of jobs and hundreds of millions of dollars in lost tax revenues for both the federal and state governments.

In 2004, the groundfish fleet numbered 1,200 vessels; it now numbers less than 500, and predictions are that it will further consolidate to as few as 250. At the same time, the budget of the Northeast Regional Office has climbed from approximately \$20M in 1998 to as much as \$80M, with the number of full time employees increasing from around 100 to 170, in inverse proportion to the number of active fishing vessels. When the fishery became limited access in 1994, the New England Fishery management Council took pains to protect the nature of the fishery as a small business model. Vessels were constrained by their size and horsepower, and permits could not consolidated. Under Amendment 7, approved in 2007, limits were placed on landings from inshore areas to protect the inshore fleets. Eventually, as scientific mandates required significant reductions in the fishing activity allowed each vessel, under Amendment 13, only after extensive, often contentious debate was limited consolidation allowed through days at sea leasing. Vessels were allowed to transfer their available fishing days. The latest iteration of management has been the “catch share” program. As the March 8, 2011 testimony of Mr. Vito Giacalone, Policy Director of the Northeast Seafood Coalition before the Senate Subcommittee on Oceans, Atmosphere, Fisheries and Coast Guard indicated, the so-called sector system was forced on the industry as the only option NOAA would accept

for dealing with the Agency's interpretation of statutorily mandated Annual Catch Limits and Accountability Measures. This system casts off all of the protections the NEFMC had implemented from 1994 through 2004 and allows virtually uncontrolled consolidation of the New England groundfish fishery. As this process was unfolding, one NOAA social scientist, reviewing similar consolidation plans from around the world concluded:

“The primary social impacts that have been documented in empirical cases involving consolidation (explained in greater detail below) range from employment loss, decreased income, decreased quality of life, changing relations of production, structural disadvantages to smaller vessels and firms, dependency and debt patronage, concentration of capital and market power, inequitable gains, regulatory stickiness, reduced stewardship, decreased community stability, loss of cultural values and so on.”

Social Assessment Literature Review: Leasing and Permit Stacking, Olsen, J. Northeast Fishery Science Center, August 9, 2009, Attachment 5.

As consolidation is increasing in the Northeast Multispecies fishery, attempts are being made to set up “permit banks” using state and federal funding to protect and preserve “small boat” fleets, in effect expending public monies to avoid the predictable problem of allowing consolidation.

As noted in the recent Preston Pate report, NOAA is doing a poor job managing the fishery, with an inefficient bureaucracy, largely untrusted by its constituency. Clearly not good governance, nor a reasonable expenditure of federal funds.

The upshot of all of this is that landings are not increasing, and more and more available fish is left in the ocean each year, where unlike money in the bank, it eventually dies of natural mortality and is wasted, contrary to Magnuson's stated purpose. Jobs are lost, coastal communities decline, traditional ways of life and culture are undermined and the consuming public loses a healthy source of protein-never has NOAA even considered

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the impact on public health. As government expenditures on fishery management in the Northeast rise each year, the industry decreases in almost inverse proportion. If Congress intends for NOAA

to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery  
16 USC Sec. 1801 (B)(5)

as stated in Magnuson, it is falling abysmally short, while hundreds of millions of pounds of fish go unharvested from our oceans.

In short, NOAA is doing a very good job of expending government monies if the intent of Congress is to create the world's largest aquarium off of New England, but a very poor job if the intent is to protect our domestic fishing industry. In the Northeast, the Agency continues to encourage costly "catch share" schemes which force excessive consolidation, driving many out of the industry, in the face of chronic under-fishing.

### **Systematic Problems**

The real issue here is NOAA's apparent disconnect and lack of concern over the future of the commercial fishing industry, fishing communities and the fish consuming public. As such, NOAA and NMFS need a complete overhaul, the agency's need to be instilled with the concept that Magnuson is not just about conservation. It is also about feeding a Nation, fueling an economy, supporting communities and preserving our heritage. Sadly, these values are seldom carried out in NOAA's policies.

#### 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. Council membership seems to be awarded by NOAA based on political

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support, not on the needs of the fisheries. Unless and until NOAA management takes a new approach to the fishing industry, there will never be positive change. Establishment of a National oversight committee comprised of stakeholders, chosen by stakeholders, could address this problem.

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. The Asset Forfeiture Fund must be separated from NOAA OLE and OGC. These funds should be used to meet compliance needs of the industry-observer coverage, outreach programs, cooperative research and industry-funded science.

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. NOAA performance needs to be tied to achieving Optimum Yield, as specified by Magnuson. Where, as in the Northeast, chronic under-fishing occurs, NOAA should be tasked with closing the gap between allowable and actual catches to achieve Optimum Yield, including assessing its interpretation of the Magnuson Act, and

recommending changes to correct the Act where it is seen as preventing achievement of Optimum Yield.

5. Congress needs to address the conflict between needs for ten year rebuilding programs and the cost benefit of such short rebuilding periods.

6. Congress needs to investigate whether NOAA is improperly elevating Magnuson violations to criminal cases.

7. Congress should amend the Magnuson Act to allow de novo review of penalties in excess of \$10,000 or sanction in excess of 90 days by Article Three judges.

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.

10. 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 use of federal funds, including the Asset Forfeiture Fund is doing little to protect the domestic fishing industry in the Northeast, and is actually working to undermine our traditional values. The 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. Some positive progress has been made, but clearly

excessive funds are currently being expended that could be put to better use in science and streamlining the management process. Where fishermen once feared most 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 into 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