



January 25, 2011

SECRETARIAL DECISION MEMORANDUM

Subject: Scope of Special Master Review of NOAA Fisheries Enforcement Cases

By Secretarial Decision Memorandum dated September 23, 2010, I put in place a process that would allow me to consider exercising my authority under the Magnuson-Stevens Act (MSA) to modify or remit civil penalties assessed in certain enforcement cases handled by NOAA's Office of Law Enforcement (OLE) and Office of General Counsel for Enforcement and Litigation (GCEL). Specifically, I appointed former Federal Magistrate Charles B. Swartwood as Special Master to review complaints regarding enforcement cases that were submitted to the Office of the Inspector General (OIG) during its investigation (collectively "Complaints") and to make recommendations to me whether I should remit or modify the civil penalties associated with the Complaints. This memorandum addresses questions that have arisen about the scope of cases that Judge Swartwood is to review.

The Complaints fall into two groups: the 27 that were specifically addressed in the OIG's September 23, 2010 Report (Report) and another 104 that the OIG determined for various reasons not to address in the Report. The OIG investigated and evaluated the merits of the group of 27 Complaints and presented its conclusions in the Report. The OIG concluded that 19 of the 27 Complaints merited further review of some kind. To enable Special Master review, the OIG provided the identities of individuals associated with these 19 Complaints and, with the exception of the one complainant who declined to have his case heard by the Special Master, the OIG files associated with these Complaints have been forwarded to Judge Swartwood. His review and evaluation of these Complaints is underway.

With respect to the 104 Complaints not discussed in the Report, the OIG has provided identities for 26 complainants; the remaining 78 Complaints are associated with persons who have not yet agreed to waive confidentiality provided by OIG to encourage people to come forward, and thus the OIG has not disclosed their identities. Of the 26 additional Complaints, files associated with 13 have been forwarded to Judge Swartwood and his review has begun.

In the course of reviewing the information provided by the OIG regarding the 26 Complaints recently identified as well as the information contained in NOAA's databases, it appears there are certain categories of Complaints that may not be appropriate for review by the Special Master. In addition, I have received a number of requests from complainants, members of Congress, and others requesting that I expand the universe of complaints available for review, and that I stay current obligations to pay civil penalties pending the completion of the review. This memorandum memorializes my decision regarding all these requests.

A. Universe of Cases to Be Reviewed.

1. ***Complaints for which no civil penalty was imposed.*** At least five of the 26 Complaints recently identified by the OIG do not relate to circumstances for which any penalty was imposed; another relates to a criminal case. The purpose of review by the Special Master is to consider the exercise of authority to "comprise, modify, or remit, with or without conditions, any civil penalty" under section 308(e) of the MSA.
2. As there is no such action to take with respect to the Complaints for which no penalty was imposed, such Complaints will not be referred to the Special Master for review. Likewise, I will not refer any Complaints associated with criminal charges to the Special Master as my MSA authority does not extend to criminal sanctions. Instead, I am directing that materials associated with these six Complaints be provided to NOAA for evaluation of lessons learned in conjunction with ongoing improvements in enforcement practices and procedures.
3. ***Complaints that have been the subject of a decision by a federal district court judge.*** Several of the 26 Complaints relate to cases that have been considered by at least one federal district court judge. In my September 2010 Memorandum, I noted that "finality is an essential tenet of the US legal process" and that the opportunity to "re-open cases is rarely available." This is especially the case where the litigant has had the opportunity to air grievances before an independent judiciary.

My aim in establishing the review process was to provide an avenue of review of agency action to individuals for whom agency action was the final stage that occurred. Those individuals who have presented their complaints to a federal district court judge have availed themselves of the full due process of the federal judicial system, and in most cases did so with the assistance of legal counsel of their choosing. Thus, the cases associated with these complaints were already heard by an independent reviewer. In addition, it would be inappropriate for me to set aside the decision of a federal court.

Accordingly, I will not refer to the Special Master any Complaints associated with cases that have been heard and decided by a federal district court.

4. ***Complaints that are currently pending before an Administrative Law Judge or the NOAA Administrator.*** At least one of the Complaints relates to a case that is currently pending before an Administrative Law Judge; I understand that there may be others that are pending before the NOAA Administrator. As discussed below, I will not refer to the Special Master any such complaints.

Pending cases are being handled under new leadership within GCEL with full awareness by both parties of the matters raised by the OIG's report and with new policies and procedures in place. Furthermore, to the extent individuals are dissatisfied with any decision of an ALJ, they have the opportunity and the right to seek review by the NOAA Administrator, who is also in a position to review the outcome in light of the OIG report and subsequent changes in policies and practices. Finally, it would be a waste of resources to conduct concurrent reviews of these complaints.

5. ***Complaints not submitted to the OIG.*** Some members of Congress and Massachusetts Governor Deval Patrick have asked me to expand the universe of complaints to be reviewed by the Special Master beyond those submitted to the OIG. Specifically, they have requested that I establish a window of time to give additional individuals an opportunity to apply for review or have suggested specific cases they believe should be reviewed.

The OIG conducted a thorough process for identifying complaints concerning NOAA's law enforcement. In addition to posting notice of the investigation on the OIG website with a link to an email address that could be used to file a complaint, OIG investigators reached out to identify complainants by traveling to the regions and meeting with people who had contacted them and pursuing leads to others with complaints. In addition, the investigation was covered by local press, and the articles provided information regarding how to file a complaint. As a result of these extensive outreach efforts, the OIG spoke with over 225 individuals during the course of its investigation. This work represents a diligent effort to identify the universe of individuals who believe that enforcement cases were affected by conduct outside the bounds of propriety and fairness.

I recognize that the opportunity for relief from penalty assessments that was unavailable during the OIG's investigation might encourage some people to come forward who were reluctant to do so before. However, the response to the initiation of Special Master review suggests that this is not the case: I understand that the great majority of the complainants for the 104 complaints not discussed in the September Report have not yet responded to the OIG request that they waive confidentiality so that their complaints can be forwarded to Judge Swartwood for review. The OIG will contact individuals with complaints associated with penalty assessments one more time.

In establishing this review process, I have tried to balance the need to address government conduct that may have overstepped the bounds of propriety and fairness with the important role that finality plays in our legal system. The importance of finality warrants placing reasonable bounds on the cases that are eligible for review by the Special Master. Given both the OIG's thorough efforts to cast a wide net during its investigation and my aim to have the Special Master address issues raised by the OIG, I find that the universe of cases identified by the OIG is a reasonable boundary. Accordingly, I have decided I will not expand the scope of the complaints to be reviewed beyond those previously submitted to the OIG.

B. Stay of Obligations Pending Review

Several complainants have requested that their obligation to pay civil penalties or comply with sanctions be stayed pending the review of their cases by the Special Master. To date, all such requests have been denied. On December 16, 2010, members of the Massachusetts congressional delegation requested that I reverse this decision and stay payment obligations during the pendency of the review. For the following reasons, I decline to do so.

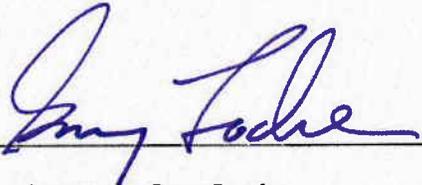
First, I have instructed the Special Master to identify cases where there is clear and convincing evidence that specific kinds of conduct had a material impact on the amount of the penalty. Unless and until the Special Master does so, I have no basis to alter any civil penalty.

Second, to institute a stay would presume the outcome of the Special Master's evaluation of individual cases. In conducting his review, Judge Swartwood is acting in a quasi-judicial capacity; I am counting on him as a respected jurist to make an independent evaluation of each case he reviews on its merits. It is important for the integrity of this process and the recommendations he will make that there be no political or other undue influence on his independence. Thus, I do not consider it appropriate for the Department of Commerce to take any action that may appear to presume an outcome or that could influence his recommendations. I decline to do so now by staying any of the pending obligations.

Finally, with limited exceptions, the complainants who have current obligations to pay penalties are doing so pursuant to a settlement agreement that they or their attorney negotiated. I must presume that they agreed to financial arrangements they considered manageable. To the extent any of their financial circumstances have changed since executing their settlement agreement, NOAA will consider modifications to the agreement to address those concerns, as it would do for any settling party.

Accordingly, those complainants whose complaints are being reviewed by the Special Master and who have a continuing obligation to pay any penalties or comply with other sanctions will remain under such obligation until such time as I act upon any recommendation by the Special Master to modify or remit any such penalties.

I hereby instruct the Department's Office of General Counsel, NOAA, and the Special Master to take all steps necessary to implement these decisions.



Secretary Gary Locke