



March 16, 2011

## SECRETARIAL DECISION MEMORANDUM

In my January 25, 2011 Decision Memorandum, I outlined the categories of cases that are eligible for review by the Special Master I appointed to review certain fisheries enforcement cases. Since the issuance of that Memorandum, I have continued to receive requests to expand the pool to include complainants who did not submit complaints to the Department of Commerce Inspector General (OIG). To inform my consideration of these requests, I contacted Special Master Charles B. Swartwood to discuss whether the process should be opened to a wider group based on the progress of his investigation to date. Without discussing any particular cases, Judge Swartwood informed me that he is approaching the end of his fact-gathering for the cases referred to him for review so far, and that he has observed issues that suggest that review of a wider pool of cases may be merited.

Accordingly, I have decided to allow certain individuals and companies that did not submit complaints to the OIG to apply for Special Master review, using the same standards of review as those I announced in my September, 2010 Decision Memorandum. Under Secretary Lubchenco and I have concluded that it will be impossible for the agency to move forward until questions concerning past enforcement practices are addressed more comprehensively.

### *Universe of Cases Eligible for Review*

I authorize the Special Master to review applications from respondents who were issued a Notice of Violation and Assessment (NOVA) on account of a violation of the Magnuson-Stevens Act on or after March 17, 1994 that was settled or otherwise resolved before February 3, 2010, provided that:

1. The NOVA imposed a civil penalty that was paid as part of the disposition of the case;
2. The disposition of the NOVA did not include the issuance of a ruling or opinion by a federal district judge; and
3. The appeal of the NOVA is not currently pending before an Administrative Law Judge or the NOAA Administrator.<sup>1</sup>

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<sup>1</sup> My rationale for these limitations is set forth in my January 25, 2011 Decisional Memorandum.

The dates I selected to define the eligibility period are based on the OIG's conclusion in its January 2010 Report that "GCEL's process for determining civil penalty assessments is characterized by significant discretion on the part of individual enforcement attorneys, with minimum guidance on how to exercise that discretion." Specifically, the dates correspond to the period during which it was NOAA practice to allow individual attorneys to make charging and settlement decisions without the prior approval of their supervisors at headquarters. Thus, I selected March 17, 1994, the date on which the Assistant General Counsel for Enforcement and Litigation delegated the authority to individual attorneys in the regions, as the beginning date for the eligibility period. The ending date for the period is February 3, 2010, the date on which Under Secretary Lubchenco directed that all charging and settlement decisions for enforcement cases be reviewed at headquarters. Any lines that I draw will result in some respondents being left out of the process, but these dates reasonably capture the period during which the enforcement practices of concern occurred.

#### *Application Process and Contents*

In order to be considered, applications must be postmarked no later than Friday, May 6, 2011 and sent to the following address:

**Special Master for NOAA Enforcement Cases  
c/o JAMS  
One Beacon Street, Suite 2300  
Boston, Massachusetts 02108**

Applications for review must set forth facts sufficient to establish from the face of the application that the case falls into one of the following categories, both of which were set forth in my September 23, 2010 Decisional Memorandum:

1. Cases in which GCEL attorneys charged excessive penalties in a manner that unfairly forced settlement; or
2. Cases in which conduct of the kind specifically enumerated in the IG's September 2010 Report prejudiced the outcome of the case.

The facts alleged in the application should include (but not be limited to) the date of the incident and the circumstances that gave rise to the NOVA and the procedural steps taken after the issuance of the NOVA and the results of those steps. Any available documentation regarding NOVA should be appended to the application as an exhibit. All factual allegations set forth in the application must be verified by a sworn affidavit or declaration from the applicant.

Any applicant who is currently under an obligation to pay a civil penalty may include in the application a request for a stay of the payment obligations pending the completion of the review. The request should be supported by facts that establish that a stay is appropriate given

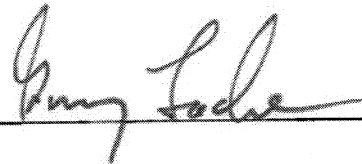
the circumstances of the case. Unless an applicant receives correspondence from the Special Master indicating that a stay has been granted, they should continue to adhere to all payment plans and schedules.

Some of the complainants whose cases are currently being reviewed by the Special Master have requested a stay of their current payment obligations. Effectively immediately, I am staying the obligations of those complainants until I have received and acted upon the Special Master's recommendations regarding those complaints.

***Review Process***

I direct the Special Master to review the applications received to determine whether, on their face, they meet the criteria set forth above. For applications that he determines meet the criteria, the Special Master will conduct such investigation appropriate to apply the same standard of review set forth in my September 23, 2010 Decision Memorandum. At the conclusion of his investigation, he will make recommendations to me regarding whether the civil penalties associated with those cases should be remitted or modified.

I hereby direct staff at DOC and NOAA to take all steps necessary to facilitate the implementation of this directive, including but not limiting to negotiating an extension of the current Special Master contract to include (1) the additional work outlined above and (2) any additional resources necessary to carry out this directive.



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Secretary Gary Locke