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## Lawyer cites ethics issues with NOAA counsel funds

By Richard Gaines  
Staff Writer

Fishing industry attorney Stephen Ouellette is seeking bar association and congressional inquiries into the ethics of enforcement and litigation lawyers who, according to a U.S. Inspector General's report, have covered virtually their entire operating expenses — almost \$1 million a year — on inflated fines they levy against fishing boats and shoreside businesses.

Those who set the level of penalties should not benefit from those penalties, Ouellette has asserted in a lengthy letter to Lois Schiffer, chief counsel for the National Oceanic and Atmospheric Administration.

Citing the ongoing, 13-month investigation into NOAA law enforcement practices by the Commerce Department Inspector General's office, Ouellette said the probe "now reveals for the first time that the NOAA Office of General Counsel for Enforcement and Litigation not only sets the fines, but budgets for them as revenue, apparently drawing 99 percent of its non-salary operating expense from the Asset Forfeiture Fund."

He wrote to Schiffer on Sunday, informing her that he was "requesting an ethical opinion from our (Massachusetts) Board of Bar Overseers as to the propriety of agency counsel acting in the dual role of prosecutor and initial agency fact finder, including the setting of fines, while deriving economic benefit from the fines they assess and collect, as well as the practice of resisting disclosure of the basis for setting those fines."

Also on Sunday, Ouellette summarized his lengthy letter to four congressional offices at the forefront of the policy and ethics' battles with NOAA — Sen. John Kerry and Reps. Barney Frank and John Tierney, all Massachusetts Democrats, and Rep. Walter Jones, a North Carolina Republican.

The letter also openly challenges Schiffer's written plan not to look back at any miscarriages of justice by NOAA lawyers and agents. Due to Internet transmission problems, Schiffer's office could not be presented with questions about today's story until nearly deadline, so no responses were available.

Ouellette was the first lawyer to begin documenting the same catalogue of violations that Inspector General Todd Zinser has been bringing forward since March.

A 2001 Ouellette letter to the late Sen. Edward M. Kennedy complained of "adoption of penalty schedules without public input and prevention of inquiry into the basis of levies for fines ... in apparent violation of the due process clause of the U.S. Constitution," and creating "an air of distrust in the industry to further its enforcement actions, which threatens to undermine the industry...."

"I think the Congress needs to demand an ethics inquiry into (enforcement and litigation office) and its use of fines it assesses," wrote Ouellette. He also alleged in both letters that government lawyers have repeatedly promised that they derived "no benefit from the Asset Forfeiture Fund."

The findings that sparked Ouellette's fury were present in the July 1 report to Jane Lubchenco, the NOAA administrator, but were overwashed by furor caused by revelations in the report from IG Todd Zinser.

Zinser wrote that the federal ocean police force led by former chief Dale J. Jones Jr., and the enforcement and litigating lawyers had uncontrolled access to the Asset Forfeiture Fund and, over the course of more than four years, had spent as much as \$49 million in more than 82,000 transactions. That gave the \$5 billion agency with a widely traveled law enforcement staff and far fewer agents — 172 — than vehicles — 202. And that didn't include a "luxurious" undercover vessel costing \$300,000.

So free from controls was the fund that the auditing firm KPMG, retained by the IG, concluded the fund "was more of an abstract concept than a tangible entity within NOAA."

Congressional reaction to the IG's report has been angry and varied.

Sen. Chuck Schumer, D-N.Y., said the evidence points to the existence of a multi-million dollar "slush fund" that helped dispossess fishermen struggling with excessive regulations. Schumer called on NOAA to "hold people responsible, sell off the cars and boats and other unauthorized

purchases and fund fishermen who were unjustly or excessively fined and whose fishing seasons have been shortened."

"The IG's report discredits the whole rotten operation," Congressman Frank said in a telephone interview Tuesday.

Frank and Tierney, who represents Gloucester and much of the North Shore, last week sought the firing or resignation of Lubchenco, who was appointed to head NOAA by President Obama and who, in turn, named Schiffer to be chief counsel.

Lubchenco did not ask the IG to step in until after a congressional letter arrived last June together with pressure from up and down the coast by both Republicans and Democrats — and from state houses from Boston to Raleigh, N.C.

Frank late last week said the White House had promised him the changes he sought could be achieved without costing Lubchenco her job.

But North Carolina's Jones raised further questions Tuesday.

"If (Lubchenco's) not going to step down, the administration needs to explain why, and somebody needs to answer not only to fishermen but to the taxpayers," said Jones, who represents the fleet along the Outer Banks. "There is something amiss here and it needs to be thoroughly vetted."

Jones and most East Coast federal lawmakers of both parties have announced agreement with Ouellette's position that past miscarriages of justice must be rectified.

"Past judgments must be reviewed," Jones told the Times in a phone interview Tuesday.

Ouellette wrote to Schiffer his "complete disagreement with your position that the abusive NOAA enforcement cases of the past should remain intact ... If (the enforcement and litigation office) always relied on a policy of only looking forward, they could never prosecute any cases since time is a one-way arrow. This tortured logic leads us into Alice's Wonderland."

Tierney's office Tuesday also issued a statement to the Times, saying, "The congressman is already working on draft legislation to ensure proper management of the Asset Forfeiture Fund and will work with his colleagues on other efforts to hold NOAA accountable for its actions. He

also continues to demand an investigation into specific enforcement cases and to urge NOAA to take critical look at unfair catch share regulation."

Sen. Olympia Snowe, a Maine Republican, has urged that NOAA freeze additional use of the Asset Forfeiture Fund "until we can get to the bottom of it and what's happened."

Kerry also indicated he is "currently working with my colleagues in the Massachusetts congressional delegation to determine the appropriate response to the Inspector General report."

"But it's clear further action is needed," Kerry said.

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