

Written Testimony
Of
Sebastian O’Kelly, former Ombudsman, Department of Commerce
On H.R. 5180, The National Marine Fisheries Service Ombudsman Act of 2010
Before
The House Subcommittee on Insular Affairs, Oceans and Wildlife

July 27, 2010

Thank you for inviting me to testify on H.R. 5180, The National Marine Fisheries Service Ombudsman Act of 2010. I am currently a consultant to the law firm of Hoffman, Silver, Gilman and Blasco, but I am here today to present my individual perspective as the former Ombudsman for the Department of Commerce and not that of the firm or its clients.

My understanding is that this bill was born of controversy over the National Marine Fisheries Service’s (NMFS) enforcement practices in New England. The creation of my position was also born of controversy, also in New England, twelve years ago but the situation was a little different. The controversy was over whether NMFS would open parts of Georges Bank to scalloping. These areas had been closed to fishing to restore groundfish stocks and had the added benefit of boosting scallop populations. Then-Secretary William Daley had been dissatisfied with the reluctance of NMFS to open those grounds despite scientific evidence over the plentiful abundance of scallops. Ultimately, the area was opened to scalloping on a limited basis with appropriate groundfish bycatch restrictions. In the process, the Secretary decided to create the Ombudsman position to provide an independent viewpoint and arbiter on major marine fisheries, marine mammal and endangered species decisions that fall under the purview of NMFS. I served as the Ombudsman from 1998 to 2001 as a Schedule C political appointment. I was the only one to serve in the position and it was not continued into the next administration.

Based on my experience there are two concepts critical to the bill to maximize the effectiveness of the Fisheries Ombudsman. They are independence and integration into the fisheries decision-making process. My comments are aimed at the fisheries management and regulatory process and are less relevant to enforcement as I had minimal involvement in that area.

The legislation takes several steps toward ensuring independence. They include giving the position a statutory mandate along with a separate reporting requirement to Congress. There is a tendency in all bureaucracies to resist or control independent viewpoints. This was the case when the first Inspector Generals were established and a primary reason why Congress ensured that the IGs reported both to the agency and Congress. It looks like you are emulating that model in this bill. The personnel protections in Section 2(a)(6) are also positive steps towards protecting the office’s independence.

Integration into the decision-making process is a more difficult goal to achieve. The legislation notes that the Ombudsman’s functions include mitigating points of conflict and resolving complaints from the regulated community. That raises a few of questions. Is the Ombudsman role primarily to examine how NMFS implements and enforces its regulations and respond to complaints over unfair enforcement? Or should the Ombudsman have the ability to review and have an impact on the actual substance of the regulation itself as it is being developed? What powers should the Ombudsman have to mediate a dispute or resolve points of conflict after a rule has been approved by the Regional Fishery Management Council? After its final approval by the Department?

During my tenure, the overwhelming majority of complaints I received were over the allocation and conservation requirements in fishery management rules. I also received complaints over some marine mammal and endangered species protections. Enforcement was an issue that I did not receive many complaints. If the sponsors of the legislation are intending for the Ombudsman to be able to have input into the substance of fishery management rules and decisions aside from just their enforcement then it needs to be spelled out more clearly. Clarification of how the office might fit within the formal process of fishery management decision-making governing the Magnuson-Stevens Act would also be helpful. Also, the bill should indicate that the Ombudsman have access to all records maintained by NMFS as well as ensure it is included as at least a "cc" in the paperwork trail that goes to the Administrator and ultimately the Secretary. Otherwise, the office will likely not be in the loop on many of the issues it will inevitably receive complaints about.

The Ombudsman in the bill reports directly to the NOAA Administrator. During my tenure, I reported to the NOAA leadership, with a dotted line relationship to the Secretary. While there were some advantages to this reporting relationship, it did not have all the advantages that one might think. The Magnuson Stevens Act (MSA) defers significant powers to the Regional Fishery Management Councils. Departmental orders implementing the Act also delegate review and initial approval of Council recommendations to NMFS. By the time a fishery management rule reached NOAA and Departmental review, agency and departmental leadership had very little flexibility to make or suggest any changes. Two barriers stood in their way – many times rules arrive at the Department with the fishing season about ready to start, in some cases as little as 24 hours. Any delay brought howls of protesting from the fishing community, even if there was strong disagreement over the restrictions in the rule. Second, the MSA has timelines and specific criteria for review, approval, or rejection of Council actions. Any attempt by the Secretary or NOAA Administrator to substitute his judgment for NMFS and the Councils after they have already acted would face strict legal scrutiny and possible court action.

Lastly, the Congressional report requirement in the bill provides some transparency and accountability for the Ombudsman. It would be worth considering extending that transparency, particularly if the office's role is to provide meaningful input in the development of fishery management regulations, to make the Ombudsman's comments and views on such regulations a part of the public rulemaking record. That would allow the public, the fishing community and others to ascertain the Ombudsman's involvement, thoughts and position, if any, on a fishery management rule. Also, it would put NMFS in the position of having to publicly address the Ombudsman's concerns in the rule-making record, though in the end the Ombudsman's comments would only be advisory. This approach would be a little unusual, but there is a precedent. SBA's Office of Advocacy frequently publicly comments on the small business impacts of rules being developed by Federal agencies.

Thank you again for inviting me to testify and I look forward to your questions.