

**WILL NOAA'S NEW LEADERSHIP ADDRESS
SERIOUS PROBLEMS IN FISHERY LAW ENFORCE-
MENT?**

HEARING

BEFORE THE
SUBCOMMITTEE ON DOMESTIC POLICY
OF THE
COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES
ONE HUNDRED ELEVENTH CONGRESS

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CONTENTS

	Page
Hearing held on March 2, 2010	1
Statement of:	
Ouellette, Stephen, attorney; Richard Burgess, Gloucester-based fisherman; and Jim Kendall, New Bedford Seafood Consulting, former scallop fisherman, former New England Fishery Council member	50
Burgess, Richard	75
Kendall, Jim	83
Ouellette, Stephen	50
Zinser, Todd, Inspector General, Department of Commerce, Office of Inspector General; Jane Lubchenco, Ph.D., Under Secretary of Commerce for Oceans and Atmosphere, Administrator, National Oceanic and Atmospheric Administration; and Dale Jones, Director, Office for Law Enforcement, National Oceanic and Atmospheric Administration Fisheries Service	13
Jones, Dale	32
Lubchenco, Jane	25
Zinser, Todd	13
Letters, statements, etc., submitted for the record by:	
Burgess, Richard, Gloucester-based fisherman, prepared statement of	77
Kendall, Jim, New Bedford Seafood Consulting, former scallop fisherman, former New England Fishery Council member, prepared statement of ...	85
Kucinich, Hon. Dennis J., a Representative in Congress from the State of Ohio, prepared statement of	4
Lubchenco, Jane, Ph.D., Under Secretary of Commerce for Oceans and Atmosphere, Administrator, National Oceanic and Atmospheric Administration, prepared statement of	27
Ouellette, Stephen, attorney, prepared statement of	53
Zinser, Todd, Inspector General, Department of Commerce, Office of Inspector General, prepared statement of	16

WILL NOAA'S NEW LEADERSHIP ADDRESS SERIOUS PROBLEMS IN FISHERY LAW ENFORCEMENT?

TUESDAY, MARCH 2, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON DOMESTIC POLICY,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Gloucester, MA.

The subcommittee met, pursuant to notice, at 11:20 a.m., at the Kyrouz Auditorium, Gloucester City Hall, 9 Dale Avenue, Gloucester, MA, Hon. Dennis J. Kucinich (chairman of the subcommittee) presiding.

Present: Representatives Kucinich and Tierney.

Also present: Representative Frank.

Staff present: Jaron R. Bourke, staff director.

Ms. KIRK. Good morning. I would like to ask everyone to take their seats, please. Thank you.

Mr. Chairman, Congressman Tierney, Congressman Frank, all of our guests here from Washington, I want to thank you and welcome you to the city of Gloucester.

Thank you for convening and participating in this important hearing. I also want to recognize our state senator who is here, Bruce Tarr, and our state representative, Ann-Margaret Ferrante. We also have representatives here from Senator Kerry's office and Senator Scott Brown's office, as well. And a special thank you and welcome to former Mayor John Bell, who is with us, as well.

I wanted to sort of give you a sense of where you are, and you are in Gloucester, which is America's oldest fishing port in the Nation. For 400 years, we have supplied a hungry nation with fresh, wholesome fish. Gloucester is the No. 1 ground fish port in New England, and we are 10th in the Nation in fish landings. In addition, we are the port infrastructure for the vast majority for the Gulf of Maine.

Before you leave here today, I would ask you to just venture up to our third floor to observe and remember the 5,000 names of Gloucester fisherman who have gone down to the sea in ships. Their names are listed on the walls of our city hall and are in our memory.

I especially want to thank Congressman Tierney. Gloucester is resilient and it is through your efforts and the efforts of so many others that Gloucester will continue to fish for another 400 years.

Thank you.

[Applause.]

Mr. TIERNEY. Thank you.

Mr. KUCINICH. Domestic Policy Subcommittee of the House Oversight and Government Reform Committee will now come to order.

I'm Congressman Dennis Kucinich, chairman of the subcommittee, and I'm here with Congressman Tierney and Congressman Frank.

Congressman Tierney asked me a few weeks ago if I would come to Gloucester and I'm happy to be here. I have had a deep and abiding interest in New England and, of course, coming from Cleveland, where we have an active fishing industry in Lake Erie, I understand the importance of this industry to your state and to the Nation.

The purpose of this field hearing is to examine problems in the National Oceanic and Atmospheric Administration's Office for Law Enforcement identified by the Department of Commerce Office of the Inspector General and to hear NOAA's agency response to those findings.

Now, without objection, the Chair and other Members will have 2 minutes to make opening statements followed by opening statements not to exceed 2 minutes by any other Member that may join us, and without objection Members and witnesses will have 5 legislative days to submit a written statement or extraneous materials for the record.

Today's field hearing of the Domestic Policy Subcommittee of the House Oversight and Government Reform Committee concerns serious and persistent problems in fishery law enforcement in the Northeast Region.

Gloucester fishermen have for years felt that they were being treated as criminals by the Office for Law Enforcement of the National Marine Fisheries Service. They felt that the fines they paid were unfairly harsh. And they felt a deep mistrust of Federal law enforcement officers.

They were right. This January, at the request of the NOAA's Administrator, Dr. Jane Lubchenco, responding to the request of my colleague, Congressman Tierney and others, the Inspector General for the Department of Commerce issued a scathing report which found, among other things, NOAA management, concerned primarily with managing a science-based agency, does not exercise adequate leadership or oversight over the fishery law enforcement elements of its mission.

By virtue of staffing and practices, Office of Law Enforcement, that's the OLE, conducts itself as a criminal investigation unit, which is at variance with the primary statute it enforces and blurs the distinction between regulatory enforcement matters and criminal investigations.

Compared to other Federal national resource law enforcement agencies, OLE's emphasis on employing criminal investigative techniques and personnel to regulatory law enforcement matters is aberrant.

The Inspector General found that penalties assessed in the Northeast region are comparatively harsh. The Inspector General also discovered that NOAA management does not apply customary internal controls and auditing practices to the Civil Asset Forfeiture Fund. As a result, the Office of the Inspector General could not

draw any conclusions about how those funds were managed, and it commissioned a forensic audit of the fund, which will be published later in March.

Last, the Inspector General is continuing its investigation with respect to allegations of abuses or arbitrary enforcement practices in certain individual cases.

Dr. Lubchenco responded to the IG's findings with an extensive list of immediate and longer term actions. Later this month the recently appointed general counsel for NOAA will issue her plan for comprehensive reform at the troubled agency.

Clearly, profound changes will have to be made to correct the problems identified by the Inspector General. Those problems originated with OLE and NOAA top management. They have been festering a long time. New top management at NOAA offers a chance at reform, and we felt we had to hear from Dr. Lubchenco herself about the direction she's charting.

We also felt it was important that the chief of the Office of Law Enforcement testify and answer questions about his leadership. Judging by the comments that we have seen from fishermen and OLE employees alike, Mr. Jones has much explaining to do and bears much of the responsibility for the problems at OLE identified by the Inspector General.

I also want to note that today's hearing and this subcommittee's engagement in this issue is due to the advocacy of Congressman Tierney, and I thank him for his advocacy and also for the urgency that he expressed in bringing this matter forward.

At this time, the Chair will recognize Mr. Tierney for his opening statement.

[The prepared statement of Hon. Dennis J. Kucinich follows:]

Opening statement

Dennis J. Kucinich, Chairman
Domestic Policy Subcommittee
Oversight and Government Reform Committee

Field Hearing entitled:

“Will NOAA’s New Leadership Address Serious Problems in Fishery Law Enforcement?”

Gloucester, MA

March 2, 2010

Good morning. Today’s field hearing of the Domestic Policy Subcommittee of the House Oversight and Government Reform Committee concerns serious and persistent problems in fishery law enforcement in the Northeast Region.

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General for the Department of Commerce issued a scathing report which found, among other things:

- NOAA management, concerned primarily with managing a science-based agency, does not exercise adequate leadership or oversight over the fishery law enforcement elements of its mission.
- By virtue of staffing and practices, Office for Law Enforcement conducts itself as a criminal investigation unit, which is at variance with the primary statute it enforces and blurs the distinction between regulatory enforcement matters and criminal investigations.
- Compared to other federal natural resource law enforcement agencies, OLE's emphasis on employing criminal investigative techniques and personnel to regulatory law enforcement matters is aberrant.
- The IG found that penalties assessed in the Northeast Region are comparatively harsh.

- The IG also discovered that NOAA management does not apply customary internal controls and auditing practices to the Civil Asset Forfeiture Fund. As a result, OIG could not draw any conclusions about how those funds were managed, and it commissioned a forensic audit of the Fund, to be published later in March.
- Lastly, the IG is continuing its investigation with respect to allegations of abusive or arbitrary enforcement practices in certain individual cases.

Dr. Lubchenco responded to the IG's findings with an extensive list of immediate and longer term actions. Later this month, the recently appointed General Counsel for NOAA will issue her plan for comprehensive reform at the troubled agency.

Clearly, profound changes will have to be made to correct the problems identified by the IG. Those problems originated with OLE and NOAA top management. They have been festering a long time. New top management at NOAA offers a chance at reform, and we felt we had to hear from Dr. Lubchenco herself about the direction she is charting. We also felt it was important that the Chief of the Office for Law Enforcement testify and

answer questions about his leadership. Judging by the comments we have seen from fishermen and OLE employees alike, Mr. Jones has much explaining to do and bears much of the responsibility for the problems at OLE identified by the Inspector General.

Mr. TIERNEY. Thank you very much, Mr. Chairman, and I want to thank the mayor particularly for her opening remarks in welcoming us here, as well as the other elected leadership that are here, Senator Tarr, Representative Ferrante, former Mayor John Bell, and so much of the leadership of the fishing community and the business and citizenry of this area, this community, who thinks this is a very serious matter.

I'm particularly pleased to be joined by my colleague, Barney Frank, who has been a leader on this issue for many, many years, and I want to thank the chairman for holding the hearing and holding what I believe is the first congressional hearing on the issues raised in the Inspector General's report, which is entitled Review of NOAA Fisheries Enforcement Programs and Operations. And I want to thank you for convening it in Gloucester. I know it was at some inconvenience to you and others; but as Mayor Kirk indicated in her opening remarks, and as those in the audience know well, it's only appropriate that the hearing take place right here in Gloucester which has been renowned for the fishing community since its founding in 1623. We are very proud of that.

Generations of local residents have earned a living and provided for their families through their catches from the sea, and last week we had the opportunity in Washington to meet with a number of fishermen and their families who visited as part of the United Fish Rally. I think that was an excellent gathering of people that really focused on this issue.

During that meeting I had occasion to talk with a young teenager who was accompanying his mother and he told me about the kinds of fish his mom and dad were catching, the challenges they were facing, and how he sometimes went out to sea with them. He knew what he was talking about. He was knowledgeable and he spoke with pride. But the little anecdote evidences what's true in so many cases, that fishing is a family business in this city and in the Northeast.

One of the reasons we advocated for this hearing to occur here in Gloucester, Mr. Chairman, was so that you and the other Washington-based agency officials could come to the city and see and listen to what the fishing industry means to its residents.

I'm happy that Administrator Lubchenco finally made the opportunity this morning to meet with representative groups from the Gloucester fishing community. I know it was an inconvenience for her and I know it took some pressing to get you to come here, Doctor, and the same with Mr. Jones, but we think it's valuable that you be here and we are glad that you showed up and took advantage of getting here a little early this morning to speak directly to some of the folks.

Let me also say that this family business is a very big deal. Of all the New England states, the commercial fishing industry had one of the highest sales, income, and employment impacts in Massachusetts according to data published by NOAA. But the fishing community in Gloucester and elsewhere in Massachusetts continues to confront frequent hurdles and significant hardships. They have been increasingly burdened with complex and seemingly unrealistic regulations limiting their access and restricting their days at sea.

The Magnuson-Stevens Act should be amended to provide more flexibility. We acknowledge Representative Frank Pallone's legislation and many of us co-sponsored that. We acknowledge his leadership, as well.

On top of this, my colleagues and I have been hearing now from local fisherman about how they have been subjected to unfair treatment, cited for seemingly arbitrary violations and charged exorbitant fines. That's why we asked the Administrator to investigate and that's why she asked the Inspector General for a report.

The stories have been told from many years past and were told in Washington at the rally and they were told this morning, I'm sure, to the Administrator. The Inspector General's report just confirms. It notes that there are systemic nationwide issues with NOAA's law enforcement programs, practices, and personnel.

Among other things, this report cited NOAA's Office of General Counsel for Enforcement and Litigation. The data for the dates between July 2004 and June 2009 showed that in the Northeast region the initial fine assessments totaled nearly \$5.5 million. That's two and a half times greater than the second highest region and five times or more than the other four regions.

Additionally, the data shows that Northeast is the region with the greatest percentage reduction from assessed-to-settled fine amounts, approximately 5.35 million assessed to approximately 1.6 million settled, which is about a 70 percent reduction.

There is a lack of oversight and enforcement by NOAA. The questions of fairness and consistency abound. The program integrity and accountability are in question, and at the very least an appearance of abuse of authority exists.

A further concern is that NOAA currently retains proceeds from these excessive penalties. It is very troublesome that there is inadequate auditing of this money, which is deposited into the Asset Forfeiture Fund. By the Inspector General's count, there was \$8.4 million in this fund at the end of 2009.

We should question whether allowing the agency to keep those collected penalties provides some sort of perverse incentive for officials to levy excessive fines.

Today's hearing offers us the opportunity to hear from three key senior officials: Dr. Lubchenco, the Administrator of NOAA; Mr. Zinser, the Department of Commerce's Inspector General; and Mr. Jones, the Director of NOAA's Office of Law Enforcement.

Mr. Jones has been aware of these issues for some time. Many of us can recall visiting with Mr. Hogarth and with him in Washington, DC, in 2006. I remember his promise to visit and consult with local fishermen, and I remember that he didn't do so, and that the next thing we heard the auction was raided. The hearing is also an opportunity to carefully scrutinize what has been happening and to get a better understanding of the conduct of certain NOAA personnel.

But this hearing is not solely intended to be a retrospective or to exercise blame. It's not what the committee is about. It's not what this fishing community is about at all. The fishing community here wants to end any and all abuse of authority and mistreatment. They want meaningful action and real change with NOAA's

enforcement and legal operations. They want more reasonable, flexible, and transparent regulations and rules.

The Inspector General noted clearly that this is not a situation where fishermen reject all regulation. More than anyone, they understand the need to preserve and conserve. So as the Inspector General said, the numerous individuals with whom they spoke supported regulation and enforcement provided it is fair, equitable, and not onerous.

That's why this hearing is an opportunity to learn about the immediate and long-term actions that Dr. Lubchenco proposed in response to the report. It's also an opportunity to hear from Mr. Zinser on whether such actions sufficiently address the problems identified in his report. And if not, what other reforms are necessary as well as the Inspector General's report on what he will do with continuing the scrutiny of past specific conduct and enforcement and reports of those particulars.

From this hearing my colleagues and I hope to learn what, if any, further congressional action is warranted to ensure that our fishing community is treated fairly and with the respect it deserves. I'm looking toward to the testimony of the witnesses.

And again, Mr. Chairman, I thank you very much for joining us in Gloucester and having this hearing. I yield back my time.

Mr. KUCINICH. Thank you, Mr. Tierney.

The Chair recognizes Congressman Frank.

Mr. FRANK. Mr. Chairman, I appreciate your letting me sit as a member of this panel since I'm not a member of this committee, although I used to be. But I used to be a lot of things.

I wanted to say that the work of my colleague, Mr. Tierney, in this particular action and in general has been congressional representation at its best. And I'm also pleased that we are here with state, local, and Federal cooperation of all elected officials. Too often you get finger-pointing. And having the mayor and having the state legislators and having the Congressmen here is an example of a community coming together.

There is a fundamental problem here. It is not just the specifics. It is an attitude that looks at fishing violations as if they were crimes. Yes, there are occasional crimes. There are a very, very small number of people who set out deliberately to violate the law. The great majority of people who are caught up in this net of enforcement are among the hardest working people in this country. They are doing a very important job for the economy. They are doing it in very difficult circumstances with a great deal of complexity.

People who drive know that there are lines painted on the road. They are not painted in the ocean. People who haven't fished don't have a sense of the inherent uncertainty that is out there. And for people who have been treated as punitively as the fishermen have been treated is simply wrong.

Now, one of the problems, we are told, is that there is an overload of criminal enforcement agents in the area and not enough elsewhere. Now, I don't want to put anybody out of work, so I have a solution here, take some of these people who have been doing this tough law enforcement and send them to the Securities and Ex-

change Commission. We have underenforced in one area and over-enforced in another.

[Applause.]

Mr. FRANK. I want to address a workout. Part of the government's responsibility—Mr. Tierney and I voted against the extension of the Magnuson Act done by the lame duck Congress in 2006. After the 2006 election, before control of the Congress switched, the lame duck Congress passed that. It was signed into law. We voted against it.

In particular, I have never been a fan of magic numbers and the notion that there absolutely has to be a rebuilding to a certain level in 10 years rather than in some cases 11 or 12. It makes no public policy sense. That is truly voodoo regulation to take a particular number and overfixate on it.

I want to say a word to my environmental friends. The notion that the business of fishing has to be protected from fishermen is wrong. They are working environmentalists. I do not know many fishermen who hope to be the last people ever to fish. They are people who believe in fishing as an economic activity and as a culture. It's simply very important to the area that I represent in Southeastern Massachusetts, New Bedford, and elsewhere, as it is here. It isn't just the fishermen who care. It's the whole community because it's the economy and the culture.

The notion that fishermen would put themselves out of business, put their children out of business, and end fisheries is wrong. Yes, there needs to be rules, and we have the most regulated activity, I believe, around. But there needs to be a recognition that the fisherman want to be partners of the regulations. The way it is from a law enforcement standpoint, there aren't enough law enforcement people in the world to impose on people who think it is unfair this kind of restriction. So if we do not get a better job of eliciting a belief on the part of the fishermen that this is fair, and that this is reasonable, and it takes into account the complexities they face, then we will be chasing ourselves with punitive enforcement that in the end is less enforcement than we can get in a cooperative area.

I appreciate the Administrator's being here. It is our job in the Congress to change the Magnuson Act, to put some flexibility in there, and we will be doing that, but we also have to have a recognition that we are talking here about putting rules into place that govern an industry that is full of people who are law-abiding, who want to cooperate, and the approach that has been taken, and I admire the work in getting it done.

We now have irrefutable evidence that there has been excessive, inappropriate hardship. That's got to stop; and at the same time we will be amending the law, and I would hope going forward we will get the genuine cooperative approach to law enforcement that's in everybody's interest.

Thank you, Mr. Chairman.

[Applause.]

Mr. KUCINICH. Thank you very much, Congressman Frank. As Mr. Frank said, he is not a member of this committee and without objection, his participation; and questioning and statements are included.

Mr. FRANK. Let me make clear, objections are only in order from the three of us, not from everybody else.

Mr. KUCINICH. I also want to say that in the interest of trying to facilitate a hearing so we can get the testimony from the witnesses, I would ask that members of the audience try to keep the expressions of approval or disapproval to a minimum, if you can. I would appreciate that so we could just move forward here.

I want to, if there are no additional statements, I'm going to start by introducing our witnesses.

Mr. Todd Zinser is the Inspector General of the Department of Commerce's Office of the Inspector General where he is responsible for promoting economy and efficiency in the programs in the operation of the Department of Commerce. He has served as Inspector General since December 26, 2007, after 24 years as a career civil servant beginning as an investigator for the U.S. Department of Labor in 1983.

Dr. Jane Lubchenco is Under Secretary for Commerce for Oceans and Atmosphere, Administrator at the National Oceanic and Atmospheric Administration. She is the first woman and the first marine ecologist to head NOAA. Prior to being appointed as Administrator, she was on the faculty of Oregon State University. She is a former president of the International Council for Science, and was a Presidential appointee for two terms on the National Science Board. And this is the board which advises the president and Congress and oversees the National Science Foundation.

Mr. Dale Jones has directed since 1999 the Office for Law Enforcement of the National Oceanic and Atmospheric Administration Fishery Service. In his capacity, Chief Jones oversees five regional offices consisting of 100 special agents and 35 uniformed enforcement officers, as well as 31 technical and support staff.

It is the policy of the Committee on Oversight and Government Reform to swear in all witnesses before they testify.

I would ask that the witnesses rise. Raise your right hands, please.

[Witnesses sworn.]

Mr. KUCINICH. Thank you very much. Let the record reflect that each of the witnesses answered in the affirmative.

I ask that each of the witnesses now give a brief summary of your testimony and to try to keep this summary under 5 minutes in duration. Bear in mind your complete written statement will be included in the hearing record. If you don't have a prepared written statement, you are entitled to address the committee for 5 minutes and you can just follow the lights there. You probably understand how it works.

Mr. Zinser, you will be our first witness. We ask that you proceed.

STATEMENTS OF TODD ZINSER, INSPECTOR GENERAL, DEPARTMENT OF COMMERCE, OFFICE OF INSPECTOR GENERAL; JANE LUBCHENCO, PH.D., UNDER SECRETARY OF COMMERCE FOR OCEANS AND ATMOSPHERE, ADMINISTRATOR, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; AND DALE JONES, DIRECTOR, OFFICE FOR LAW ENFORCEMENT, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION FISHERIES SERVICE

STATEMENT OF TODD ZINSER

Mr. ZINSER. Thank you, Chairman Kucinich, Congressman Tierney, Congressman Frank——

Mr. KUCINICH. Can everyone hear Mr. Zinser?

VOICE. Slightly.

Mr. ZINSER. We appreciate the invitation to be here in Gloucester today to discuss our recent report on the fisheries enforcement programs and operations of NOAA. My testimony today will briefly summarize our report.

We undertook our review at the request of Under Secretary Lubchenco. The Under Secretary's request was in response to congressional inquiries asking for a review of policies of practices of the Office for Law Enforcement within NOAA's National Marine Fishery Service and NOAA's Office of General Counsel for Enforcement in Litigation.

The Under Secretary could have chosen to undertake this review using an informal NOAA team, but she chose to ask for our independent review. It was my view then and it is still my view that the Under Secretary wants to know what the problems are with her enforcement operations and wants to fix them.

Our review included speaking with over 225 individuals in various parts of the country, including fishermen, boat captains, industry association representatives, conservation officials, fishery management counsel members, and current and former member NOAA personnel. We reviewed enforcement records and examined NOAA's management information systems. We reviewed Department of Justice policy guidelines and analyzed comparable Federal regulatory enforcement agencies.

Our report details our three principal findings. First, NOAA senior leadership and headquarters elements need to exercise substantially greater management and oversight of the agency's regional enforcement operations to include setting enforcement priorities.

Second, NOAA needs to strengthen policy guidance procedures and internal controls in its enforcement operations to address a common industry perception that its civil penalty assessment process is arbitrary and unfair. We found the process used for determining civil penalty assessments includes significant discretion on the part of individual enforcement attorneys, with minimal guidance on how to exercise that discretion. As such, it is difficult to argue with the view that the process is arbitrary and in need of reform.

Third, NOAA needs to reassess its enforcement work force composition, which is presently 90 criminal investigators, to determine if this criminal enforcement-oriented structure is the most effective for accomplishing its primary regulatory mission. Based on NOAA's

own data, its own enforcement results for the last 2½ years were about 98 percent noncriminal.

While we recognize NOAA's need to maintain a criminal investigative capacity, its caseload reflects that its current staffing is disproportionate to agency function and operational needs. This is particularly so compared with other agencies with similar mission profiles and enforcement responsibilities, such as the EPA and Interior Fish and Wildlife Service. Those agencies separate their regulatory and criminal enforcement functions with inspectors who handle regulatory enforcement and criminal investigations who handle criminal investigations.

Our report presents specific recommendations for NOAA to strengthen its enforcement programs and operations. These include, one, NOAA's leadership regularly addressing and providing input or enforcement priorities and strategies with regional management.

Two, instituting a robust ombudsman program to provide an effective interface with the commercial fishing industry.

Three, determining whether NOAA has an appropriate balance and alignment of uniformed enforcement officers and criminal investigators based on mission need.

Four, ensuring that there is an operating procedures manual for enforcement attorneys and that the operations manual for its investigators is current and provides sufficient policy guidance and procedures for its investigatory and criminal enforcement activities.

Five, ensuring follow-through on the process improvement initiatives outlined by general counsel for enforcement and litigation in December.

Six, instituting a mechanism for higher-level review of civil penalty assessment determinations.

And seven, developing and implementing reliable integrated case management information system for its enforcement mission.

We note—

VOICE. Can somebody do something about the mic?

Mr. ZINSER. We note that the Under Secretary has directed a series of—

Mr. KUCINICH. The gentleman will suspend.

That's a good suggestion. Is there anything we can do about this, Mayor? You always ask the mayor. Mayor, if you can see if we can do something about the mic.

Thank you. The gentleman may proceed.

Ms. KIRK. If he puts it to the side rather than going right on, if he puts it on side. It's the P sound. Try that.

Mr. KUCINICH. We will see what we can do. Thank you. You may continue.

Mr. ZINSER. Thank you, Mr. Chairman.

We note that the Under Secretary has directed a series of actions, some immediate and others in the near future, that are responsive to our findings and recommendations. We have asked for a specific response to our recommendations and will assess NOAA's progress by reviewing and recording on the status of these and other agency actions.

That concludes my summary, Mr. Chairman. I would be happy to answer any questions you, Mr. Tierney, or Congressman Frank may have.

[The prepared statement of Mr. Zinser follows:]

Testimony of
THE HONORABLE TODD J. ZINSER
INSPECTOR GENERAL
U.S. DEPARTMENT OF COMMERCE
before a field hearing of the
Subcommittee on Domestic Policy,
Committee on Oversight and Government Reform,
House of Representatives
Tuesday, March 2, 2010
Gloucester, Massachusetts

***The National Oceanic and Atmospheric Administration's
Fisheries Enforcement Programs and Operations***

Chairman Kucinich, Congressman Tierney, and Members of the Subcommittee:

We appreciate the invitation to be here today to discuss our recent report on the fisheries enforcement programs and operations of the National Oceanic and Atmospheric Administration (NOAA).¹ My testimony today will briefly summarize our report, and we request that our entire report be made part of the record.

We undertook our review at the request of Dr. Jane Lubchenco, the Under Secretary of Commerce for Oceans and Atmosphere, who also serves as the Administrator of NOAA. She had been contacted by the Massachusetts congressional delegation and state elected officials, as well as by both U.S. Senators and multiple Representatives from North Carolina, recounting complaints of excessive penalties and retaliatory actions by NOAA fisheries enforcement officials. Our review, then, evaluated the policies and practices of the Office for Law Enforcement (OLE) within NOAA's National Marine Fisheries Service (NMFS) and NOAA's Office of General Counsel for Enforcement and Litigation (GCEL).

¹ *National Oceanic and Atmospheric Administration: Review of NOAA Fisheries Enforcement Programs and Operations*. Final Report No. OIG-19887, January 21, 2010. OIG reports are available at our Web site: www.oig.doc.gov.



We examined their overall conduct of enforcement actions; how they prioritize actions and set penalty assessments; and their use of resources, including funds obtained through imposed penalties.

We faced two conditions that limited our ability to fully meet our objectives. First, inadequate management information systems were a significant detriment. For instance, while NOAA's data shows regional disparity in aggregate civil penalty assessments, fostering a perception that such assessments in the Northeast have been arbitrary, NOAA's lack of effective case management systems and useful data made more in-depth analysis impossible. As we further explain below, if NOAA is to succeed in bringing a greater level of management attention to its enforcement programs, it will need substantially improved data systems.

Second, we were constrained in our ability to meet our objective to examine the use and management of what NOAA calls the asset forfeiture fund. We found that despite a balance of \$8.4 million as of December 31, 2009, OLE officials were not aware of the fund's having ever been audited, and internal controls over the fund had not been tested. As a result, we have commissioned a forensic review of the fund as a follow-up action, and that review is underway.

Our review included speaking with over 225 individuals in various parts of the country, including the Northeast—fishermen, boat captains, industry association representatives, conservation officials, Fishery Management Council members, and current and former NOAA personnel. We also established a dedicated e-mail address for interested parties to use to provide potentially relevant information. Further, we reviewed numerous OLE and GCEL enforcement records and related documents, and examined OLE's and GCEL's case management information systems. Finally, we reviewed Department of Justice policy and guidelines regarding enforcement techniques, and analyzed comparable federal regulatory enforcement agencies, including the Environmental Protection Agency (EPA) and the Department of the Interior's Fish and Wildlife Service.

SUMMARY OF RESULTS

Our report details our three principal findings:

1. NOAA senior leadership and headquarters elements need to exercise substantially greater management and oversight of the agency's regional enforcement operations, to include setting enforcement priorities based on integration and coordination with headquarters fisheries management and science center elements; implementing effective management information systems; and utilizing data to inform its management decisions and enforcement activities.
2. NOAA needs to strengthen policy guidance, procedures, and internal controls in its enforcement operations to address a common industry perception that its civil penalty assessment process is arbitrary and unfair.

3. NOAA needs to reassess its OLE workforce composition (presently 90 percent criminal investigators), to determine if this criminal enforcement-oriented structure is the most effective for accomplishing its primarily regulatory mission.

An important backdrop framing the issues we examined and the results we further discuss below, is recognizing that regulation of the fishing industry is highly complex and dynamic—presenting NOAA with a particularly difficult mission. This backdrop underscores a continual need for NOAA to understand industry perspectives and changing conditions within its fisheries and the industry; establish and follow enforcement priorities that are well-grounded and involve integration with the agency’s science elements; ensure well-managed programs and operations carried out by a workforce structured solely according to operational needs; and maintain effective communication with the industry. Essential to NOAA’s overall program effectiveness is ample involvement and oversight by NOAA leadership, to include ensuring that there are adequate checks and balances for enforcement operations.

Our report presents specific recommendations for NOAA to strengthen its enforcement programs and operations, in the interest of promoting greater transparency, consistency, and oversight. These include:

- NOAA leadership’s regularly addressing and providing input to enforcement priorities and strategies with regional management, to include integration and coordination with headquarters fisheries management and science center elements.
- Instituting a robust ombudsman program to provide an effective interface with the commercial fishing industry.
- Determining whether NOAA should continue to approach enforcement from a criminal-investigative standpoint, and determining whether the agency has an appropriate balance and alignment of uniformed enforcement officers and criminal investigators, based on mission need.
- Ensuring that GCEL implements and follows an operating procedures manual that includes processes, methods, and justification for determining civil penalty assessments and fine settlement amounts; and that OLE’s enforcement operations manual is current and provides sufficient policy guidance on its authorities and procedures for civil and criminal enforcement activities.
- Ensuring follow-through on GCEL process improvement initiatives outlined in its memorandum of December 1, 2009.
- Instituting a mechanism for higher-level review of civil penalty assessment determinations by GCEL attorneys in advance (e.g., by a panel established within NOAA headquarters).

- Ensuring that GCEL and OLE develop, implement, and effectively utilize reliable, integrated case management information systems.

We note that the Under Secretary has directed a series of actions, some immediate and others in the near future, that are responsive to our findings and recommendations. We have asked for a specific response to our recommendations and will assess NOAA's progress by reviewing and reporting on the status of these and other agency actions.

FINDINGS

NOAA is entrusted with broad statutory enforcement powers to promote compliance and deter violations within the commercial fishing industry. This calls for the highest degree of oversight by NOAA leadership to ensure fairness and consistency in enforcement activities and sanctions, promote program integrity and accountability, and avoid even the appearance of abuse of authority. The agency's enforcement operations have not garnered a great deal of attention from senior management within the large, science-based organization. Yet these offices have great potential to affect the fishing industry, the livelihood of individual fishermen, and the public's confidence in NOAA and the Department of Commerce. Our three primary findings are as follows:

1. NOAA senior leadership and headquarters elements need to exercise substantially greater management and oversight of the agency's regional enforcement operations.

Given the complexities of NOAA's mission and organization, the industry, and the current enforcement climate, its establishment of enforcement priorities is essential. This should involve integration and coordination with its headquarters fisheries management and science center elements, including the Assistant Administrator for NMFS, to whom OLE reports. Such linkage, with corresponding use of both science and enforcement-related data, would better enable NOAA to establish priorities and target its enforcement operations to those areas warranting such focused attention.

We concluded that a lack of management attention, direction, and oversight led to regional enforcement elements operating autonomously. As shown in the table below, this contributed to aggregate fine assessments in the Northeast Region that are inconsistent with those in the other regions. Moreover, the substantial difference between initially assessed and settled fines in the Northeast fosters the appearance that fine assessments in that region are arbitrary.

**Table. Total Fines and Penalties, by NOAA Region
(July 1, 2004–June 30, 2009)^a**

Region	"Notice of Violation" (Initially Assessed) Amount	Settled Amount^b
Alaska	\$1,549,311	\$1,835,597
Northeast	5,471,550	1,572,275
Northwest	599,751	334,642
Pacific Islands	1,190,500	994,555
Southeast	2,245,387	1,152,445
Southwest	1,293,120	594,522
Total	12,349,619	6,484,036

^a Figures have been rounded to the nearest dollar.

^b The settled amount represents the agreed upon, reduced penalty amount between GCEL and the respondent. According to GCEL, reductions result from a variety of reasons, most notably ability to pay. Further, most of the Pacific Islands figures relate to a single large case.

Source: NOAA (Table derived from GCEL data for closed cases for the above 5-year period.)

The table shows that the Northeast Region's initial fine assessments totaled nearly \$5.5 million—an amount two-and-a-half times greater than the second highest region, and about five times or more greater than the other regions. Of further significance, the data show the Northeast as the region with the greatest percentage reduction from assessed to settled fine amounts (approximately \$5.5 million assessed to approximately \$1.6 million settled—a nearly 70-percent reduction).

GCEL's explanation for this inconsistency is that initial assessment amounts involve complex factors, which are considered on a case-by-case basis, using NOAA's Civil Administrative Penalty Schedule and accompanying internal guidelines. However, no formal process exists for sufficiently documenting decisions regarding fine assessments and settlement amounts, making GCEL's explanations for regional differences unauditible and thus unverifiable. Further, information contained in the table required substantial data manipulation, time, and effort for OLE to produce. NOAA also collects funds from asset forfeitures (e.g., fish seizures); such information is not included in the table. Inclusion of those figures would require a similarly labor-intensive manual effort.

We also found that NOAA leadership has had minimal involvement in setting enforcement priorities, linking enforcement to its fishery management goals, or evaluating enforcement program effectiveness. Similarly, regionally-established enforcement priorities, even if documented, have not typically been disseminated to headquarters.

2. NOAA needs to strengthen policy guidance, procedures, and internal controls in its enforcement operations to address a common industry perception that its civil penalty assessment process is arbitrary and unfair.

GCEL's process for determining civil penalty assessments includes significant discretion on the part of individual enforcement attorneys, with minimal guidance on how to exercise that discretion. As such, it is difficult to argue with the view that the process is arbitrary and in need of reform. One reform that NOAA should consider is instituting a process that includes higher-level review of civil penalty assessment determinations by GCEL attorneys in advance. NOAA should also revise applicable procedural regulations and penalty schedules in order to provide greater consistency and clarity, and reduce confusion among affected industry parties.

Additionally, NOAA's data for fines are inherently unreliable because of weaknesses in GCEL's and OLE's current case management information systems—in particular, data that are missing, entered into the systems inconsistently, or vague. For example, based on our comparison of “closed” case data between OLE and GCEL data systems, out of 2,726 unique case numbers in OLE's system, only about 5 percent match GCEL's system for cases closed from July 2007 through June 2009.

To its credit, in response to the results of our review, GCEL has recently initiated several steps to promote transparency, help ensure fairness, and open lines of communication with the fishing industry. They include initiatives to (1) revise procedural regulations and penalty schedules; (2) develop an internal operating procedures manual; and (3) implement a new case-tracking database, linking to OLE's case management system.²

3. NOAA must reassess its OLE workforce composition, which is now 90 percent criminal investigators, to determine if such an emphasis on criminal enforcement is the most effective for accomplishing a primarily regulatory mission.

Based on OLE's own data, its caseload from January 1, 2007 through June 30, 2009, was about 98 percent noncriminal. Ten years ago, NOAA increased its already predominantly criminal investigator workforce (then 75 percent) to today's 90 percent. There are indications in the record that this workforce composition was driven by considerations of the better pay and benefits that apply to federal criminal investigators, rather than by strict mission requirements.

OLE's fundamental mission is to assist in the protection of fisheries by enforcing resource protection and fisheries management laws. OLE caseload data for January 1, 2007 through June 30, 2009, illustrate that its mission has principally involved enforcement of the

²These efforts are detailed in a December 1, 2009, memorandum from the Assistant General Counsel for GCEL to NOAA's Deputy General Counsel.

Magnuson-Stevens Fishery Conservation and Management Act³ (65 percent of cases). The criminal provisions of the Act are narrowly-focused and nearly all are misdemeanors. Yet because the office is staffed largely with criminal investigators, OLE's orientation is to conduct criminal investigations. This despite the fact that the only felony provisions involve the use of a dangerous weapon during the commission of an act prohibited by Magnuson-Stevens and the assault of observers and officers authorized to enforce the Act.⁴ According to OLE, violations of the Act typically do not result in criminal charges; most violations (such as exceeding catch limits) result in administrative penalties alone.

While we recognize OLE's need to maintain a criminal investigative capacity, its caseload reflects that its current staffing is disproportionate to agency function and operational need, particularly compared with other agencies with similar mission profiles and enforcement responsibilities. For instance, agencies such as EPA and Interior's Fish and Wildlife Service separate their regulatory and criminal enforcement functions, with inspectors who handle regulatory enforcement and criminal investigators who handle criminal investigations.

NOAA ACTIONS IN RESPONSE TO OIG FINDINGS AND RECOMMENDATIONS

In a memorandum dated February 3, 2010, Under Secretary Lubchenco announced a two-pronged approach to addressing our findings and implementing our recommendations. This approach, which the Under Secretary characterized as initial steps, entails a series of immediate actions and other actions to be completed by March 21, 2010, summarized as follows:

A. Immediate actions:

1. Subject to compliance with applicable labor relations requirements, NOAA General Counsel shall immediately institute higher level reviews of proposed charging decisions, including proposed penalties and permit sanctions, and proposed settlements to ensure consistency and predictability.
2. An immediate freeze on the hiring of criminal investigators until NMFS completes an internal work force analysis to address the appropriate mix of enforcement personnel and it is approved by the Under Secretary.
3. An immediate shift in oversight of the NMFS Civil Monetary Penalties Fund (also known as the Asset Forfeiture Fund) from NMFS to NOAA's Comptroller.

³ The Act is codified, as amended, at 16 U.S.C. § 1801 et seq. For more information on the Act, see our January 21, 2010, report.

⁴ See 16 U.S.C. § 1859.

4. NMFS, in consultation with NOAA's Office of Communications, will direct resources to improve communications on enforcement issues, particularly in the Northeast.
 5. NOAA's General Counsel, NMFS, and NOAA's Director of External Affairs will develop specific objectives and detailed plans for a summit on law enforcement practices to be held no later than June 30, 2010.
- B. Actions to be completed by March 21, 2010:
1. NMFS' Office of Law Enforcement and NOAA's General Counsel, in cooperation with NOAA's Chief Information Officer, will develop a strategy and schedule to improve management information systems, including recommendations on actions to take advantage of the internet to increase transparency.
 2. The Assistant Administrator for Fisheries, with input from NOAA's leadership, will develop a plan and schedule to implement standardized procedures for setting enforcement priorities.
 3. NOAA's General Counsel for Enforcement and Litigation will develop a plan and schedule to strengthen its operating procedures, prosecution of charged cases, and settlement actions.
 4. The Assistant Administrator for Fisheries, in collaboration with the NOAA Communications Office and General Counsel for Enforcement and Litigation, will develop an outreach strategy to improve engagement with the local fisheries community and the public.
 5. The Assistant Administrator for Fisheries, in consultation with the Director of the Workforce Management Office, will formulate a plan to review the NMFS Office of Law Enforcement's staffing and procedures. This plan will explicitly address both civil and criminal requirements, with specific focus on ensuring that criminal procedures are not applied to civil offenses. Development of the plan should include appropriate independent review.

OFFICE OF INSPECTOR GENERAL FOLLOW-UP

We have identified three areas for additional review stemming from our results:

1. *NOAA's Retention of Civil Penalties and its Asset Forfeiture Fund.* Fishermen and other industry sources expressed concern to us that NOAA's fines are excessive, constituting a form of bounty, because the agency is able to retain the proceeds from its enforcement cases. This is not an uncommon charge against law enforcement agencies granted authority to seize assets. The most effective way to counter such charges is for the

agency to demonstrate in a transparent way how the proceeds of its enforcement actions are used. NOAA has the statutory authority to retain proceeds from the civil penalties it imposes and collects, and pursuant to asset forfeitures (such as the sale of seized fish, vessels, etc.) for Magnuson-Stevens Act violations to pay for expenses directly related to investigations and civil or criminal enforcement proceedings.⁵

We determined that has an asset forfeiture fund comprising such proceeds, the balance of which the agency reported as \$8.4 million as of December 31, 2009. However, the account under which these proceeds are maintained has weak internal controls, and we could not readily determine how NOAA has utilized these funds. This is because while the fund's balance is included in the Department's overall financial statements, internal controls over the fund are not tested as part of the Department's annual financial statement audit, due to the relatively small size of the fund; neither are they tested as part of the annual Department-wide financial audit. As mentioned, we are commissioning a forensic review of the fund, and will issue our findings upon its completion.

2. *NOAA's Progress in Addressing OIG's Results.* We will review and report on NOAA's progress in carrying out its actions in response to our findings and recommendations. Our follow-up efforts will include reviewing the above-referenced actions announced by the Under Secretary, GCEL's initiatives, and any additional measures NOAA takes to implement our recommendations.
3. *Individual Complaints.* In order to carry out this review in a timely manner, it was necessary to closely define our scope and focus on the management of the programs and operations related to fisheries enforcement. At the same time, expectations rose that we would investigate individual cases, brought to our attention or reported in the media, in which fishermen believe they were treated unfairly or were subject to overzealous enforcement. We could not accomplish both at the same time. Therefore, our initial focus was on the management issues we identified.

We received specific complaints from dozens of fishermen during our review, including alleged abuses of authority by NOAA enforcement personnel, disparate treatment, and excessive fines. We are in the process of examining these complaints and corresponding enforcement case files to determine whether any additional action is necessary or recommended, either by our office or NOAA. Based on our review to date, allegations of abusive treatment are not widespread; however, I feel that it is important that we do all we can to get to the bottom of these concerns and the facts surrounding these cases.

Mr. Chairman, this concludes my prepared statement. I would be pleased to respond to any questions that you or other Members of the Subcommittee may have.

⁵ 16 U.S.C. § 1861(e)(1)(C).

Mr. KUCINICH. I thank the gentleman.
Dr. Lubchenco, you may proceed.

STATEMENT OF JANE LUBCHENCO

Ms. LUBCHENCO. Thank you, Mr. Chairman, Congressman Tierney, Congressman Frank. I would greatly appreciate the opportunity to testify before you today on the recent Inspector General report.

NOAA, fishermen, and the public share a common goal of preserving and protecting the marine environment and our fisheries for the long-term health of both our fishery resources and fishing-dependent communities. Proper regulation and enforcement are vital to this effort and to the economic vitality of our coastal communities. For all of this to work, commercial and recreational fishermen must know the rules and thus believe that if they follow the rules, others will do so, too. But these rules must be consistently and fairly enforced. NOAA is committed to improving its enforcement program to ensure that it is both effective and fair.

I just spent a few hours this morning meeting with fishermen here in Gloucester. Doing so is part of my commitment to have an open, productive dialog with them and to understanding their perspectives, to hear their ideas about solutions and to work with them as partners.

In fact, I met with fishermen on my first full day on the job last March, almost a year ago, and heard, among other things, their frustration with NOAA's law enforcement.

A couple of months later I heard concerns from Members of Congress, including from Congressmen Tierney and Frank about NOAA's enforcement program. And in response, I requested the Department of Commerce's Inspector General conduct a review of these programs.

I requested this review because I believe in the importance of NOAA's law enforcement efforts and felt it was time to take a fresh look at how well NOAA's enforcement efforts are supporting our mission to rebuild fisheries and the associated economic opportunity within coastal and fishing communities.

The IG report released on January 21 identifies a number of very serious issues with NOAA's law enforcement program and recommends several steps we should take to address the deficiencies. I was frankly appalled to learn of the many fundamental problems identified in the report. I take the report very seriously and I'm committed to responding in a comprehensive, thoughtful, and timely manner.

To respond to the IG report, I have instructed the new NOAA General Counsel, Lois Schiffer, and the new National Marine Fishery Service Assistant Administrator, Eric Schwaab, who is with us here today, to address the IG's recommendations and continue to work to improve our outreach and engagement with the fishing community at large.

While we develop a comprehensive plan to address the report's recommendations in the allotted 60-day timeframe, we have already taken a number of actions in response to the IG report. My written testimony is more thorough, but let me briefly outline some

of the changes that have already taken place and talk about some of the longer term actions we are planning.

In terms of immediate action, first, I have instituted a freeze on the hiring of criminal investigations until an internal work force analysis is done to address the appropriate mix of criminal investigators and regulatory inspectors in the enforcement office. This action would better position the agency to address the report's observation that the Office of Law Enforcement may not have the appropriate balance in its work force.

Second, I have shifted oversight of the Asset Forfeiture Fund from NOAA's National Marine Fishery Service to NOAA's comptroller. This immediate step will begin to address the IG's criticism that internal controls over this fund are lacking. We are actively working with IG to conduct a forensic audit on this fund and will further review this issue once we have the results of that audit.

Third, I have asked the general counsel, and she has committed to institute higher level reviews for penalties, permit sanctions, and settlements to ensure consistency and predictability. This addresses the report's observation that NOAA lacks formal procedures for sufficiently documenting penalty decision resulting in the appearance of arbitrary decisionmaking.

Other actions I would like to highlight that fall into the category of improved communication and enhanced oversight, which are the major themes of the IG report, No. 1, we are planning a number of actions to improve communications and increase transparency. A top level management team is developing detailed plans for a summit on law enforcement practices to be held no later than June 30th this year. This summit will help us formulate long-range policies for properly and fairly executing the agency's enforcement action and develop forward-thinking approaches to enforcement efforts.

We are also well on our way to implementing much needed improvements in our management information systems. This effort is intended to address current system inefficiencies and data integrity issues. The improvements will enable NOAA to more effectively use information to guide its decisionmaking and increase transparency.

Two, the IG's report identified lack of oversight in several aspects of our enforcement programs. To address this, we are working on several initiatives including develop standardized procedures for settlement enforcement priorities. We are also strengthening the operating procedure for our enforcement attorneys. These steps are intended to begin to respond to the issues identified by the IG. NOAA will build upon these steps to respond to all of the IG's recommendation and to improve our enforcement programs.

Our marine and costal resources are of immense value to the Nation. Effective, fair, and transparent enforcement is critical to ensuring the long-term sustainability of these resources. I echo the sense of urgency for change and I commit to serious, measurable reforms to address the IG's recommendations and enhance our work with the fishing industry.

In conclusion, the problems identified in the IG report do not originate on my watch, but now I own them and I intend to fix them.

[The prepared statement of Ms. Lubchenco follows:]

**TESTIMONY OF
DR. JANE LUBCHENCO
UNDER SECRETARY OF COMMERCE FOR OCEANS AND ATMOSPHERE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE**

ON

NOAA FISHERIES LAW ENFORCEMENT PROGRAMS

**BEFORE THE
SUBCOMMITTEE ON DOMESTIC POLICY
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES**

GLOUCESTER, MA

MARCH 2, 2010

My name is Dr. Jane Lubchenco and I am the Under Secretary of Commerce for Oceans and Atmosphere and the Administrator of the National Oceanic and Atmospheric Administration (NOAA). Thank you for the opportunity to testify before you today on the recent Inspector General report "*Review of NOAA Fisheries Enforcement Programs and Operations, Final Report No. OIG 19887*".

BACKGROUND NOAA LAW ENFORCEMENT

NOAA has an important obligation to protect marine and coastal resources under a number of statutes. NOAA and fishermen share a common goal, captured in law, to maximize the benefits to the nation derived from our fish stocks. Proper regulation and enforcement are vital to this effort that also provides stability to coastal economies and to the marine environment on which so much depends. Commercial and recreational fishermen must believe that if they follow the rules, others will too. To be effective, the rules must be consistently — and fairly — enforced.

Congress has acknowledged the value of our marine and coastal environment through several statutes including the Magnuson-Stevens Fishery Conservation and Management Act, Endangered Species Act (ESA), Marine Mammal Protection Act, National Marine Sanctuary Act, and others. Under these statutes, NOAA has regulatory obligations to ensure the sustainability of marine resources and their habitat. A critical component of any regulatory system is enforcement.

NOAA, fishermen, and the public share a common goal of preserving and protecting the marine environment and our fisheries for the long-term health of both our fishery resources and fishing-dependent communities. NOAA's trust resources are a public resource that should be protected through proper regulation and enforcement for the benefit of Americans, coastal economies and

the ocean environment. These responsibilities range from enforcing our fisheries and national marine sanctuaries regulations to addressing violations of the ESA and other statutes. Enforcement actions, including investigations and patrols, use of technology such as vessel monitoring systems (VMS), and partnerships with other federal agencies and states, are needed to ensure effective management and deter cheating.

The NOAA Fisheries Service Office of Law Enforcement has 164 agents for its broad and complex mission. NOAA agents enforce numerous regulations, as well as over 35 different statutes, to assure the conservation and protection of marine resources. To ensure compliance with these laws and regulations, NOAA has employed a “four pillared approach.” These four pillars include:

- 1) Traditional law enforcement methods involving investigations and patrols;
- 2) Reliance upon key partnerships, particularly our coastal state and territory conservation enforcement agencies, the United States Coast Guard, and other local and internationally based enforcement organizations;
- 3) Advanced technologies, such as the satellite-based VMS program; and
- 4) Outreach and education to promote voluntary compliance.

The United States Coast Guard is responsible for the at-sea boarding and inspection of fishing vessels and fisheries enforcement as a primary component of their mission. The Coast Guard works collaboratively with NOAA’s Law Enforcement Programs. The State Cooperative Enforcement program is also integral to NOAA enforcement capabilities. Nearly every U.S. coastal state and territory (with the exception of one — North Carolina) participates in this program, thereby providing tens of thousands of hours of dockside and at-sea fisheries patrols and inspections.

NOAA General Counsel for Enforcement and Litigation attorneys are charged with the responsibility of bringing enforcement actions for violations of the living marine resource statutes which NOAA administers. NOAA’s law enforcement agents, officers, and attorneys throughout the country are critical to ensuring mission success. As we incorporate new and innovative management measures to rebuild and sustain our Nation’s fisheries, we will rely on support and cooperation from all of our partners. NOAA is committed to accomplishing its enforcement and management goals through collaborative, transparent and fair means.

INSPECTOR GENERAL REPORT

Following concerns expressed by Members of Congress and the fishing community, I requested the Department of Commerce Inspector General (IG) conduct a review of NOAA’s Office of Law Enforcement and NOAA’s General Counsel for Enforcement and Litigation in June 2009. I requested this review because I believe in the importance of NOAA’s law enforcement efforts and felt it was time to take a fresh look at how well NOAA’s enforcement efforts are supporting

our mission to rebuild fisheries and to preserve good jobs and economic opportunity within our coastal and fishing communities.

The Inspector General's report, released on January 21, 2010, identifies a number of very serious issues with NOAA's enforcement program, and recommends several steps we should take to address deficiencies. I take this report very seriously, and I am committed to responding in a comprehensive, thoughtful, and timely manner. I have instructed the NOAA General Counsel and the National Marine Fisheries Service Assistant Administrator to address the Inspector General's recommendations and continue to work to improve our outreach and engagement with the fishing community at-large. While we develop a comprehensive plan to address the report recommendations in the 60-day timeframe, we have already taken a number of actions in response to the IG report.

Let me briefly outline some of the immediate actions we have taken, the short-term actions we are currently working on, and the long-term actions we are planning.

Immediate Actions:

First, I have instituted a freeze on the hiring of criminal investigators until an internal work force analysis is done to address the appropriate mix of criminal investigators and regulatory inspectors in the enforcement office. This action will better position the agency to address the report's observation that the Office of Law Enforcement may not have the appropriate balance of criminal investigators and regulatory inspectors.

Second, I have shifted oversight of the Civil Monetary Penalties Fund (also known as the Asset Forfeiture Fund) from NOAA's National Marine Fisheries Service (NMFS) to NOAA's Comptroller. This intermediate step will begin to address the IG's criticism that internal controls over this fund are lacking, and that efforts are required to ensure proper use and verification of the funds. The IG is in the process of conducting a Forensic Audit on this fund. We will further review this issue once we have the results of that audit.

Short-Term Actions:

In addition, I have asked for the following short-term actions:

1. To address the report's observation that NOAA lacks formal procedures for sufficiently documenting decisions regarding penalty assessments and settlements resulting in a process that provides the appearance of arbitrary decision-making (subject to compliance with applicable labor relations requirements), NOAA's General Counsel will institute higher level reviews of penalties, permit sanctions, and settlements to ensure consistency and predictability.
2. To address the perception among the regulated community and the interested public that NOAA's regulatory processes and enforcement actions are arbitrary and lack transparency, the Assistant Administrator for Fisheries, working with our Office of Communications, will improve communications on enforcement issues, particularly in the Northeast. This effort will include actions to enhance understanding of fisheries regulations as well as to ensure transparency of enforcement actions.

3. To develop forward-thinking approaches to enforcement efforts (including approaches to address the regulated communities concern of complex, conflicting, and excessive administrative burdens) and to assist NOAA leadership in formulating long-range policies for properly executing the agency's enforcement actions to protect living marine resources, I have asked NOAA General Counsel, the Assistant Administrator for Fisheries and the Director of External Affairs to develop specific objectives and detailed plans for a summit on law enforcement practices to be held no later than June 30, 2010. This effort will include a list of possible chairs and co-chairs, the identification of possible facilitators, and a communications strategy.

Long-Term Actions:

In terms of longer-term actions, by March 21, NOAA will develop strategies that:

1. Improve management information systems, including recommendations on actions to take advantage of the internet to increase transparency. This effort is intended to address current system inefficiencies and data integrity issues, and it will enable NOAA to more effectively use information to guide its decision making and increase transparency in our enforcement efforts.
2. Implement standardized procedures for setting enforcement priorities. The IG's report found that NOAA leadership has had minimal involvement in setting enforcement priorities. Implementing standard procedures for setting enforcement priorities will ensure consistency among regions while addressing regional needs.
3. Strengthen enforcement attorney operating procedures, prosecution of charged cases, and settlement actions. The IG report identified a need for NOAA to undertake revisions to applicable procedural regulations and penalty schedules. This effort will provide greater consistency and clarity, and will reduce confusion among affected industry parties.
4. Develop an outreach strategy to improve engagement with the local fisheries community and the public. In addition to improving the regulated community's understanding of fishing regulations and NOAA's enforcement activities, this action is intended to increase rapport between NOAA and fishermen, and lead to improved communications and informal problem solving.
5. Review the NMFS Office of Law Enforcement's staffing and procedures including both civil and criminal requirements, with a specific focus on ensuring that criminal procedures are not applied to civil offenses. NOAA's review should include an independent review by a body familiar with administrative and operational procedures. The IG report called into question the proportion of law enforcement staff (i.e. criminal investigators versus uniformed enforcement officers), and it suggested that staffing is disproportionate to agency functions and operational need. The plan will be responsive to this concern, and will take into account information and outcomes resulting from the actions outlined above.

These ten steps are intended to begin to respond to the issues identified by the Department of Commerce's Inspector General. NOAA will build upon these steps to develop a comprehensive plan that responds to all of the Inspector General's recommendations.

Our marine and coastal resources are of immense value to the nation. Effective, fair, and transparent enforcement is critical to ensuring the long-term sustainability of these resources. This is a high priority issue for me and I am committed to addressing the IG's recommendations and enhancing our efforts to work with the fishing industry and public in a more constructive manner.

Mr. KUCINICH. Thank you, Dr. Lubchenco.
The Chair recognizes Mr. Jones for 5 minutes.

STATEMENT OF DALE JONES

Mr. JONES. Good morning, Chair, Congressman Tierney, Congressman Frank. Thank you for your invitation and opportunity to testify before you today.

The NOAA Office of Law Enforcement is dedicated to ensuring the professional and responsible enforcement of our nation's fisheries and marine resource-related laws. We recognize that in meeting those missions to facilitate commercial fishing and the mandate to conserve stocks and ensure sustainability, it is critical that we reconcile the conflicts that are inherent.

As you know, our biggest area of responsibility is the enforcement of the regulations that are created to manage domestic commercial fishing. Our role also involves the enforcement of matters involving recreational fishing, the protection of marine mammals, endangered species, and sanctuaries, as well as matters pertaining to international fisheries enforcement.

As the Director of the Office of Law Enforcement, my role is to assure that we identify and document violations of the laws and regulations enacted within these mission areas and to refer information on violations documented to the appropriate prosecutors for further action.

We also work collaboratively with others to enhance compliance and outreach in education efforts. Our ongoing challenge is to meld these extensive mission requirements into an enforcement premise and approach that allows us to cover a vast geographic jurisdiction with limited numbers of personnel.

We are, therefore, working closely and responsibly with Dr. Lubchenco and NOAA leadership to determine the most effective and appropriate actions to take in light of the Inspector General's report. We will work within the scope of Dr. Lubchenco's direction to ensure we are responsive to the report and, if necessary, any required changes to our enforcement approach.

Thank you.

Mr. TIERNEY. Mr. Chairman, I understand that we are going to have several rounds of questioning and I think we all have questions for each of these witnesses.

Mr. KUCINICH. I'm going to recognize Mr. Tierney for the first 5 minutes, and then I will recognize Mr. Frank, and then I will go last in the first round. We will take as many rounds as we need.

Mr. TIERNEY. Thank you.

Mr. Zinser, thank you for your report. We appreciate it, and I think it's been helpful as we look at these issues. You mentioned in your report to the Administrator that there were expectations that your office would further investigate individual offices, that you didn't feel it was possible for you to do that simultaneously with your broader view of what was going on nationally in law enforcement on that. You said you would followup. So my question to you is: When can we expect a report on that followup?

Mr. ZINSER. Thank you, Mr. Tierney. Our followup efforts are, we identified three followup efforts in our report. One was to do the forensic review on the Asset Forfeiture Fund. That is underway.

And we do expect something back from the audit team there probably within 30 or 45 days.

Mr. TIERNEY. I ask if you angle your mic like that so you are not necessarily speaking right into it.

Mr. ZINSER. OK.

Mr. FRANK. Make sure you do not speak straightforwardly.

Mr. ZINSER. So the Asset Forfeiture audit is underway and we do expect some results from that within 30 to 45 days.

The other thing that we committed to was following up on the actions that NOAA is taking. Based on my experience in the Inspector General community, you can make all the recommendations that you want, but if you don't follow through and make sure that the agency follows through themselves, nothing may happen. So we are committed to sticking with this issue.

The third issue is to try to identify and get to the bottom of some of the individual complaints that we heard as we went around and spoke to members of the fishing community about the way they have been treated, either by the law enforcement agents or the attorneys themselves, and it really falls into this category of how the NOAA officials exercise their discretion. We've identified between 20 and 25 such cases. We are in the process, and while it's difficult for me to pinpoint a day when we are going to be completed, we are trying to get done as soon as possible. I would say within the next 90 days.

Mr. TIERNEY. Thank you. You also talked in your report about saying you might recommend or suggest consideration of some of those cases' resolution through an ombudsman. Would you expand on that concept a little bit.

Mr. ZINSER. Yes, sir. It seemed to us that the complexities of this area for regulation is more than what an Inspector General could deal with, and there does in our view need to be some place that is independent and objective that members of a regulated community can go to with the type of grievances that we heard. It's not—in some cases, it's how fairly the regulations were interpreted. In some cases it's how fairly authority is exercised, and there are ombudsman programs in the Federal Government that deal with exactly those kinds of issues, and we think it's worth NOAA looking at whether or not that would be appropriate for this area.

Mr. TIERNEY. Dr. Lubchenco, is that something you are, in fact, considering?

Ms. LUBCHENCO. Congressman, we are considering all of the recommendations that were in the report.

Mr. TIERNEY. I just didn't happen to see any mention of yours of that particular aspect in your written memo that went out. But you are considering it?

Ms. LUBCHENCO. Everything that is in the report is on the table as far as I'm concerned.

Mr. TIERNEY. Thank you.

Mr. Zinser, you found in your report that the process for determining civil penalty assessment is, in your words, characterized by significant discretion on the part of individual enforcement attorneys. You note that there is, again in your words, minimal guidance on how to exercise that discretion. So in essence, if you put that in plain English, I think what you are saying is that the sys-

tem has been run and individual enforcement attorneys decide on their own what penalties should be and there seems to be no schedule or guideline or whatever that they are obligated to follow and no supervision or at least not adequate supervision for superiors in setting amounts. Is that an accurate statement?

Mr. ZINSER. Yes, sir, except that there is a penalty schedule, but there is a great deal of flexibility within that schedule in terms of, for example, how many violations a fisherman is cited for and then for each of these violations whether you are fined at the lower end of the schedule or at the upper end of the schedule. And we couldn't find any kind of operating procedures that would guide an attorney to try to figure those types of issues, nor did we find any records in the attorneys' files as to how they arrived at their final assessments.

Mr. TIERNEY. So I think the reason you concluded that you find it difficult to argue with those who view the process as arbitrary and in need of reform is based on the sheer lack of that structure or process for setting particular penalties for specific violations. So isn't that problem exacerbated by the fact that there is incredible complexity in the guidelines, in the process, and all that?

Mr. ZINSER. Yes, sir, I would agree with that.

Mr. TIERNEY. In your estimation, wouldn't it beg for some review of the pending cases, at least in the Northeast, and then we would maybe hold off on enforcement while that's being done?

Mr. ZINSER. I do think that it does require some review of pending cases. What we did not find was widespread abuse or information that abusive conduct was widespread. So in that regard, I don't know that our report would support a nationwide moratorium on enforcement actions, but I do think it warrants a review of pending cases.

Mr. TIERNEY. My time is up. We will get back to that later.

Mr. KUCINICH. The Chair recognizes Congressman Frank.

Mr. FRANK. To followup, Mr. Zinser, I think it is important that we have this review of pending cases with this recognition. What of the cases already adjudicated where there is a finding you made that there was a real unfairness—maybe I can address this to Dr. Lubchenco as well—we are the Federal Government. I think we should err on the side—well, not err, but just be open about this. Dr. Lubchenco, what about a procedure whereby egregious cases of abuse, they need not have been widespread to have been very negative on the individual who is the victim or individuals, can we set up a procedure whereby there can be some review and a revisiting of that, and in some cases perhaps an adjustment of the penalty? It's been done in the past. We are not talking about the courts coming in and ordering it. We are talking about us voluntarily, the Federal Government saying, you know, we think we made a mistake in this case. We were too hard on this or that individual, can we get such a procedure?

Ms. LUBCHENCO. Congressman, I didn't see anything in the Inspector General's report that would lead me to believe that there's grounds for reopening old cases. I have asked my general counsel to review the docket of current cases and ensure that they are all appropriate to go ahead.

Many of the problems that were identified in the report—well, the cases that have gone to an administrative law judge have had an independent review by the judge of the merits of the case and decided based on that. So in those circumstances there has been an independent determination.

Mr. FRANK. I understand. And I'm not talking about somebody being able to do this as a matter of right. Again, we are the Federal Government. You didn't see anything in the report that suggest you look at old cases? Well, I did. I saw some examples that were given that seemed to be unfair. Why—I will say also administrative law judges, they aren't totally independent judges.

When I first became the representative of a fishing area in 1993, we had serious problems with an inappropriately close relationship between a prosecutor and individual law judges. NOAA at the time agreed and altered that. You say you didn't see anything in your report. What would be the harm in setting up a procedure whereby extraordinary cases where there appears to have been some unfairness, of taking another look at it?

Ms. LUBCHENCO. Congressman, I would seek the Inspector General's counsel on that.

Mr. FRANK. Mr. Zinser, you are up.

Mr. ZINSER. I think the situations that you are referring to are exactly those we have agreed to look at in our followup.

Mr. FRANK. Well, you looked at them in your followup, but you are in power to relitigate them?

Mr. ZINSER. No, sir.

Mr. FRANK. But you have identified some that you think were—again, not huge amounts maybe—but you found some you think you should followup. Then, Dr. Lubchenco, if they were to followup and found to have been unfair, inappropriate, wouldn't we not, as the Federal Government, want to reopen them?

Ms. LUBCHENCO. I think if those were the circumstances, that would be appropriate.

Mr. FRANK. Thank you.

Mr. Jones, you've got a tough job. I understand that. But the report is obviously critical in some individual instances. Do you think the report was accurate, fair? Do you think it was unduly critical?

Mr. JONES. No, I don't think it was unduly critical. Again, this was a report Dr. Lubchenco requested and Mr. Zinser provided. We take it very seriously and we are going to take a look—

Mr. FRANK. You don't intend—I guess we want two sets of things. One is some overall changes. You are going to be looking at these particular cases and seeing what the subjects were that the Inspector General talked about which do appear to have been very unfair?

Mr. JONES. The question of the cases that he will be looking into, obviously I'm very anxious to see what the outcome of those will be as well because I feel very strongly that it's important to look at these cases and to do a very close analysis of what all the facts are in these cases. Because a great deal has been made of what they may represent. So I'm very anxious to find out.

Mr. FRANK. I do think we have an obligation not to simply stop mistakes going forward, but to undue them when they have happened. I will finish up.

Dr. Lubchenco, you said these did not begin on your watch, these were prior, and I appreciate your commitment to fixing them. There's one other thing that has to be done. This is a statement, not a comment. I just figured I would mention it.

Part of what we are told is that the problem with these exceptions and all these loopholes, I think that is a recognition of the fact that there is too much rigidity at the basis. When there is a problem with the basic system, too much pressure is then engendered for this exception and that exemption, etc. And that's one reason why I think we need to have flexibility in the basic statute. So instead of having to do these case by case and issue by issue, we can have more flexibility overall and that, I think, would reduce the complexity. Reducing the complexity reduces the burden of compliance both on the individual in the business and on law enforcement.

Thank you, Mr. Chairman.

Mr. KUCINICH. Thank you very much, Congressman Frank.

Now, Mr. Jones, the Inspector General's report says that about 90 percent of your investigators are criminal investigators. His report also says that given the structure of the Magnuson-Stevens Act, that the office has a disproportional number of criminal investigators. This raises a question about your own philosophy. Do you think that people who are in violation or could be in violation of regulations, where there are essentially administrative penalties, is it your opinion that they are criminals?

Mr. JONES. Absolutely not. And again, you raise the term that this is a philosophy, and I have to take a very careful look at what he's presented to us and—

Mr. KUCINICH. No, what's your philosophy, not his philosophy. Do you think these people are criminals?

Mr. JONES. No, I do not believe they are criminals.

Mr. KUCINICH. Why do you have so many criminal investigators? I don't understand that.

Mr. JONES. The reason that we have criminal investigators in this position really goes back to the overall process in terms of what's occurred over the 40 years the agency's been in existence.

Mr. KUCINICH. I'm not talking 40 years, Mr. Jones. I'm talking about your experience, why do you have so many criminal investigators? I don't understand.

Mr. JONES. The reason that we have criminal investigators is because they present to us the widest skill set and the deepest skill set that we have available to actually conduct the business that we have to conduct on the vast geographic—

Mr. KUCINICH. But the Inspector General says that according to the OLE, violations of the act typically do not result in criminal charges. Most violations, such as exceeding catch limits, result in administrative penalties alone.

I raise this question because if you bring a mind-set to a task that says, well, these are a bunch of criminals, you get criminal investigators to help confirm that, you take a whole different approach in enforcement. I just wanted to point that out.

Now, Mr. Jones, isn't it true that in December you wrote a director's note to the Office for Law Enforcement staff in which you said, "We really have nothing to fear coming as a result of the Of-

office of Inspector General review. We need not ask permission to, nor apologize for, doing our job."

Did you say that or did you write that?

Mr. JONES. Yes, I did.

Mr. KUCINICH. Now that the IG report is out criticizing the job that you have done and the NOAA Administrator has issued a reform plan, I wonder if you still feel that you and your leadership of the Office for Law Enforcement do not foresee any need to make any significant changes?

Mr. JONES. The letter was directed to our entire employee group and it was directed in a manner that was intended to encourage people that were undergoing a great deal of morale stress in terms of—

Mr. KUCINICH. What do you think, though? What do you think?

Mr. JONES. At this point, as I stated earlier, we are going to do everything to follow Dr. Lubchenco's lead to resolve the issues.

Mr. KUCINICH. Not "we." You. What do you think? Not what we think. What do you think?

Mr. JONES. As I stated, I personally am committed to following through with the direction that I'll receive and to making the appropriate changes and to go to the premise and the philosophy, if you will, that this leadership wants us to go in or directs us to go in. That's what I believe.

Mr. KUCINICH. Thank you, Mr. Jones.

Now, questions have been raised about your management in the Asset Forfeiture Fund. The IG has found that the Office for Law Enforcement did not maintain customary internal controls over the Asset Forfeiture Fund. And then they went ahead and commissioned an audit by forensic accountants.

Are you as sure and are you sure that the accountants wouldn't find any wrongdoing? Since you have custody of this for years, are you pretty sure that the Asset Forfeiture Fund was run on the up-and-up, no problems?

Mr. JONES. Yes, I'm very comfortable in that. The fund expenditures are spent in the same manner with the same protocols as are the other appropriated funds within NOAA. This money goes into a NOAA account and we follow the protocols that NOAA has in place to spend money. In fact, there are more restrictions on the expenditure of fund moneys. As you well know, the Magnuson Act specifies what that money could be spent on.

Mr. KUCINICH. Well, let me ask you, isn't it true that you've taken the Asset Forfeiture Fund, you are charging, rather, for international travel that you have taken?

Mr. JONES. My office has not much. There may be some out of the Office of Law Enforcement.

Mr. KUCINICH. Not your office, you.

Mr. JONES. Me, personally, I don't believe I've spent—I have done international travel. Most of my travel—

Mr. KUCINICH. Well, let me ask the Inspector General.

Do you have any evidence that Mr. Jones has taken any international travel using Asset Forfeiture Fund moneys?

Mr. ZINSER. Sir, the preliminary, some of the preliminary results from the forensic review that we are doing does indicate that there

has been international travel charged to that fund and I do believe that it shows it was travel charged by Mr. Jones, yes.

Mr. KUCINICH. I'm going to take that up in the second round of questioning.

Mr. Tierney, it's your time to ask questions for a second round.

Mr. TIERNEY. Thank you.

Mr. Jones, prior to your appointment as the chief of the Office of Law Enforcement, what experience did you have with regulating fisheries or enforcing fishery regulations?

Mr. JONES. None.

Mr. TIERNEY. Had you done any enforcement of civil administrative violations versus criminal activity?

Mr. JONES. Nothing extensive, no. My background is primarily in municipal law enforcement prior to my taking this position.

Mr. TIERNEY. Sir, do you recall in 2006, September 2006, former Mayor John Bell, Senator Bruce Tarr, Representative Ann-Margaret Ferrante, Louie Linquata, Jackie O'Dell, George McCabe from my office, and others came down to Washington to meet with you and at that time it was, I believe, Mr. Hogarth to talk about the improper tactics that were being complained of, the fact there were enforcement fishery regulations that seemed to be severely in question, derogatory language, imposition of inappropriately high fees and penalties, do you remember that, that visit?

Mr. JONES. I remember visiting, yes, I do.

Mr. TIERNEY. Do you remember promising at the end of that visit that you would come to Gloucester and talk with everybody? And I assume that you do.

Mr. JONES. I remember—I do not want to be argumentative, but there were some misunderstandings about the followup on that, and we did make an extensive number of attempts to follow through with our commitment in that regard.

Mr. TIERNEY. Well, did you ever come directly after that or before the auction was raided at the end of 2006?

Mr. JONES. No.

Mr. TIERNEY. So I guess to be fair to you, I think what you are saying is you tried to get here and couldn't get here for some reason?

Mr. JONES. Yeah, there was some—yes.

Mr. TIERNEY. What have you done or what did you do following that visit in September 2006 to remedy any of the problems that are raised?

Mr. JONES. I looked into the complaints that I was aware of and to determine what the background of those complaints were and to try to make some determinations as to whether there was actually any improper conduct or was any improper conduct on behalf of our employees.

Mr. TIERNEY. Could you tell me why you never established more formal guidelines for use of the forfeiture funds?

Mr. JONES. The Magnuson Act has a direct set of specific areas that it can be used for. We followed that. And second, again, as I stated earlier, our use of the fund is done in the same manner as will be used in other funds for—from throughout NOAA.

Mr. TIERNEY. You are familiar with the Inspector General's findings in his report that the Northeast area suffered fines of \$5½

million, which is two and a half times the amount for the next highest region, and five times or more higher than the other four regions. Given that, and given all the other information in the Inspector General's report, and the complaints you have heard since 2006, you didn't think that some remedial action was necessary both with the fund and with respect to responding to these complaints?

Mr. JONES. Let me just first state clearly that I do not hold responsibility for the attorneys and for the setting and establishment of funds. We investigate the cases and I pass those, my office passes those to the Office of General Counsel.

But beyond that, to say did we follow through, did we look at that, once again, the fund expenditures are done in accordance with the same as any other NOAA account. So there's checks and balances along the way for that and for looking at how appropriated money is spent as well as fund money.

The actual fines that are levied and the levels of those, we've taken a look at that and there are some numbers in there, but again, that doesn't follow directly under my responsibility, but I do not—

Mr. TIERNEY. I'm having a hard time, Mr. Jones, with when I look at all the complaints that have gone back to you directly and to NOAA from this community and others in the Northeast in particular, but elsewhere in the country, as well, how is it that you know all of those complaints, that you are familiar with all those situations, you now know the Inspector General's report and all of the grievances that he cites in there, how can you put out a director's minute to your staff indicating that you see nothing or perceive nothing will be wrong on that basis? I think it shows that you are out of touch with what's going on in your agency there.

Mr. JONES. Well, again, I have a great deal of respect for the Inspector General and what they have put forward. I have a great deal of confidence in our employees in what they did, and I wanted to be sure and just trying to encourage them through this report and where they would be at.

I have no doubt that there are, as—if you read the entire memo, that we could have made mistakes, that there would be things that we look at and maybe changes we have to make. But, again, to say individual employees had anything to fear, that was my point.

Mr. TIERNEY. You said that you had nothing to fear on that basis and you also said you respect the fishing community, but you seem to give short shrift to their allegations and their complaints.

Let me just summarize here for a second. Since 1998, the Inspector General has been reporting that the Office of Law Enforcement has a lack of policy direction and lack of mission focus. His report has recommended that NMFS develop specific enforcement priorities and goals for the OLE, which hasn't been done.

The OLE has a history of poor communication and mistrust, particularly in the Northeast; there's been, at best, only limited progress in improving transparency in the fishing management process; that under your watch, there's been continued and even exacerbated mistrust and lack of confidence and a continued lack of communication; that under your watch the civil penalty process continues to lack transparency and appears to be arbitrary and un-

fair; that there continues to be a failure to distinguish what is an appropriate penalty as opposed to what is an excessive fine in order to deter future violations and reflect the violations' harm for natural resources, particularly with regard to paper errors that are found in the face of complex rules and data issues.

Mr. Jones, why shouldn't Dr. Lubchenco take some remedial action here, some personnel actions here, to either discipline or fire you or somebody that's responsible for that continuing situation?

Mr. JONES. Well, once again, I think—once again, I think there is a lot more detail behind that and I knew that—you know, again, I will reiterate that my office is not responsible for setting the fines and penalties. However, I will say that as we look at the Inspector General's report, he has said that he would look at specific cases. To date those cases have yet to be evaluated.

I have also had a commitment to look at individual cases and follow through and hold people accountable for violations and inappropriate conduct, and my track record will show that as well, and I'm committed to follow through with what the Inspector General has recommended and the direction that leadership has and will give us, and I'm very capable and very committed to doing that.

Mr. KUCINICH. The gentleman's time has expired. We will certainly have another round. We are going to Mr. Frank. You may proceed, Congressman Frank.

Mr. FRANK. Following up on that, Mr. Jones, you said that you would take appropriate action when something was done wrong. Could we get—has law enforcement officials—I'm sure the majority of them are very hard working and decent. Law enforcement is never an easy job. People don't like to be stopped for doing things they shouldn't do, but there are occasional excesses. It's important that we have good enforcement but also be protected. Have people been disciplined for the kind of abuses that the Inspector General talks about?

Mr. JONES. Yes, they have. We have investigated 15 or 20 per year. We are an agency—

Mr. FRANK. Could we get, without naming names necessarily, but just a list of the disciplinary actions that have been taken because of abuses?

Mr. JONES. Again, I don't know whether it's appropriate with regard to that.

Mr. FRANK. What would be inappropriate about telling us the number of people that you disciplined and why, even if you leave the names aside? I'm not sure that's necessary, but I don't understand why you couldn't give us a summary of disciplinary action or a list of them.

Mr. JONES. I believe that we could probably do that. I don't have it with me, of course.

Mr. FRANK. No. Let me also ask the question: Were you surprised by the Inspector General's report? Was it more critical than you expected?

Mr. JONES. Yes, I was, actually.

Mr. FRANK. All right. But that goes to Mr. Tierney's point. You told me that you don't contest the Inspector General's report and apparently things were worse than you realized. So the question is going forward, what do you do to prevent yourself from being sur-

prised—again, if you were there—and now you acknowledge things were worse in your area than you thought they were, you have committed to looking at individual cases. What kind of structural organizational changes do we have? What do you plan to implement, what policies to prevent these abuses and get you better informed so you are not surprised by a subsequent report?

Mr. JONES. Well, we are going to conduct a work force analysis that Dr. Lubchenco has directed us to conduct and we will take a look at—

Mr. FRANK. Workforce analysis means what?

Mr. JONES. I'm sorry. That means that we are taking a look at the mix of the criminal investigators versus non-criminal—

Mr. FRANK. What about individual investigators? Some of the people apparently didn't think they should have done something, is there a process for that?

Mr. JONES. There is a process for that in place and we followup when we find out that there is—

Mr. FRANK. Again, I say to you, Mr. Jones, what I said to the bank regulators on Friday, we would ask them about individual allegations that they were too harsh and banks weren't able to lend because of the lack of lending activity is a serious problem. The gentleman from Cleveland has looked into that, as well.

You acknowledged a general problem, but every time we ask you about a specific, you say things are doing OK. So there is a disconnect there. It can't be that your procedures as you have them were good if you then were surprised by an unpopular or unfavorable report. So we need to know what changes are you making that, A, correct these things, and B, get you in a better position for them not to occur?

Mr. JONES. Well, again, we are going to be pulling additional data and information on what has occurred, what different cases are involved, and what processes, and we will be scrutinizing those more closely.

Mr. FRANK. You got some data. What do you do about it? Are you planning any structural changes? Changing the mix is one thing. But it does seem like there is some serious deficiencies in the operation that were revealed by the report that you do not contest. You said it was a fair report. You were surprised by how negative it was. It's not enough to say, well, we are just going to get more information.

Somebody, Dr. Lubchenco, and I understand you inherited this, but somebody better be thinking seriously about more than data analysis to prevent the reoccurrence of this situation. Again, it's a very critical report that surprised the man in charge. No one contested the report. So what do we do from here?

Mr. JONES. Well, again, I can only reiterate to you that we take it very seriously. We are going to follow the direction that we receive and we will be looking at every aspect of what we do and making determinations on how we can make certain that it does not happen again.

Mr. FRANK. I assume we will get some reports on that. I think there is a certain amount of skepticism. Dr. Lubchenco, I just would add again, I continue to be convinced that—let me ask you, the fact that we have—people have said, the Inspector General said

there are a lot of exemptions, it's a very complex thing to administer partly because of all the exemptions, etc. Does that not suggest going back to the basic statute because it's absolutely not ideal to have a situation where so many exemptions, exceptions, etc., have to happen? Is there some way the statute can reduce that?

Ms. LUBCHENCO. Congressman, I think that the rules are a nightmare, frankly. They are very complex. It's difficult for everyone to know exactly what the rules are. And I think it is an area that is most appropriate to pay some attention to.

Mr. FRANK. Thank you. Again, I would say we may disagree on this, part of the problem if you start with a very basic, rigid rule, then you generate a lot more exceptions. I think we put all the flexibility in, the exceptions, etc.—I think you need to go back to the statute. You can't correct an excessively rigid statute by a whole lot of regulation. I think we have to go back to the statute, as well.

Thank you, Mr. Chairman.

Mr. KUCINICH. Thank you very much, Congressman Frank.

Now, Mr. Jones, the IG's report, in talking about the Asset Forfeiture Fund, says that they were constraining your ability to examine the use of the Asset Forfeiture Fund; that they are not aware of the fund ever having been audited; that the proceeds and accounting for the proceeds seem to have weak internal controls and could not—and the IG could not readily determine how NOAA utilized the funds.

Now, Mr. Jones, the IG stated evidence suggests that you have charged the Asset Forfeiture Fund for international travel that you, yourself, have taken. Isn't it true that some or all of that travel was not case related since you don't work cases as head of Office of Law Enforcement, Mr. Jones?

Mr. JONES. I would have to, again, first await the specific findings to determine exactly what the accounting shows as to whether I personally was on the fund or on appropriated moneys that any expenses for my travel was charged to. I am not aware of my travel expenses being charged to the Asset Forfeiture Fund. I have taken international travel. I have conducted that business on behalf of NOAA and strictly on behalf of NOAA only, and so there are a number of different trips that I have taken in the 10-years plus that I've been in this job, and it is possible that some of those actual expenses were charged to the Asset Forfeiture Fund.

Now, I will say right up front there is travel that occurs within NOAA that is charged—there has been international travel charged to the Asset Forfeiture Fund, and that is in support of the effort to resolve issues involving illegal, unreported fishing on the international scale, on what they call MCS, Monitored Controlled Surveillance type, of work.

Mr. KUCINICH. But from the information we have, your travel is not case related?

Mr. JONES. Is not directly case related, but it is in support of international investigation.

Mr. KUCINICH. Thank you.

Now, didn't your office inform the Administrator of NOAA just last month that international travel charged to the Asset Forfeiture Fund was, "the majority of all travel requirements for personnel to

accommodate case-related work supported through the fund?” Now wouldn’t you have to admit that, at least as part of your international travel is concerned, this explanation that you gave the Administrator was not accurate?

Mr. JONES. It was not personal information, that’s correct. Those are general statements. Those are general statements——

Mr. KUCINICH. It was partial information?

Mr. JONES. Those are general statements to try to give an idea of what the fund expenditures were. We got a general question, what types of things, so we gave examples. That list is certainly not comprehensive. There is an extensive number of things that would not be on that list.

Mr. KUCINICH. I just want to make sure that we are clear because you are under oath.

Mr. JONES. I understand.

Mr. KUCINICH. Now, isn’t it true that you, yourself, had no fisheries experience or Federal law enforcement training before you became chief of enforcement, chief of enforcement at NOAA?

Mr. JONES. That’s correct.

Mr. KUCINICH. Now, you placed a number of state police officers in positions, in the top positions of the Office of Law Enforcement. Isn’t it true that none of those individuals had fisheries law enforcement experience either?

Mr. JONES. I’ve hired a number of people in my 10 years and some of them did have enforcement experience in the Federal level.

Mr. KUCINICH. Let’s talk about Mr. Spurrier, Mr. Paterni, and Mr. Robbins. Isn’t it true that you waived the NOAA requirement of Federal law enforcement training to give NOAA jobs to each of those individuals?

Mr. JONES. Those individuals were hired in complete compliance with the selection process within NOAA.

Mr. KUCINICH. Did you waive the NOAA requirement for Federal law enforcement training?

Mr. JONES. There was no waiver required. I did not make any specific waiver. Those applications were vetted through the human resources process of NOAA, and they were hired through that process. Those individuals were on the certification that I received.

Mr. KUCINICH. Could you tell this subcommittee then how it was that officers were hired who had none of the required credentials or fisheries experience and they ended up taking over a leadership position of a Federal resource law enforcement agency? How did that happen? How did it happen?

Mr. JONES. They were among those well-qualified applicants that we received at the time in the interview process that we did in the selecting of them, and they were very well qualified to fill the positions. Those qualifications were established and vetted through the human resources process of NOAA with no intervention on my part.

Mr. KUCINICH. Yeah, I understand you have to have some qualifications, but wouldn’t you want someone that had fishery experience?

Mr. JONES. That would be preferred if those individuals who applied who were qualified in the management areas that we needed

would have had that fisheries experience. I selected the best applicants for the positions.

Mr. KUCINICH. Everyone you selected had fisheries experience?

Mr. JONES. No, I'm not saying that. They——

Mr. KUCINICH. I just want to establish that you are not saying that they all had fisheries experience. Thank you.

Mr. JONES. Absolutely not. Several of them did not.

Mr. KUCINICH. Thank you, Mr. Jones.

Mr. Tierney.

Mr. TIERNEY. Mr. Jones, just not even going back beyond 2006, but at least since 2006 when you personally became aware of a number of complaints about the derogatory language, about the attitude, about treating fishermen as criminals, about the way warrants were being executed, sometimes searches without, at least allegedly without, warrants and all of that, did you ever order any particular investigation into any one of those incidents?

Mr. JONES. Yes, I did. We investigated several of them that we had specifics on.

Mr. TIERNEY. Did reports emanate from those investigations?

Mr. JONES. We have our OPR reports, our Office of Professional Responsibility, which is essentially our internal affairs.

Mr. TIERNEY. Will you share copies of those reports with this committee?

Mr. JONES. If it's appropriate to do so.

Mr. TIERNEY. It's appropriate. It's very appropriate.

Mr. KUCINICH. Let me state that your appearance here is voluntary. We invited you under threat of subpoena. We also have the ability to gain those documents without your cooperation, but we always appreciate your cooperation.

Thank you. You may proceed.

Mr. TIERNEY. Dr. Lubchenko, why shouldn't Congress amend the act and just have all the moneys collected on forfeiture, asset forfeiture, go to the treasury and have NOAA just ask for an appropriation every year? Why should we continue to allow that to be the way it is now?

Ms. LUBCHENCO. Congressman, I understand there is an appearance of perverse incentives operating here. I think it is useful to note that the Magnuson Act specifies the types of activities that are appropriate to be—the types of activities that are appropriate, for which it is appropriate, to use the Asset Forfeiture Fund. And I would note that those activities and the fact that the funds go to NOAA have a parallel to very similar situations in many other agencies and departments.

Mr. TIERNEY. But I'm not sure those agencies or departments have the appearance of abuse the way that we have here. You have the Northeast getting whacked with five times what other regions are getting whacked on that. It does raise a real question of perverse incentives. And I know it's prescribed how you can use it, but it's nice if the money be used for those prescribed purposes as opposed to struggle with Congress getting an appropriation every year.

Again, given the circumstances of the Inspector General report and the history here of those fines being so far out of proportion to other areas of the country, why shouldn't we at least—Members

that come from this region say enough already. We are just going to let that money go to the Treasury and you have to go through appropriation every year and we'll get rid of any appearance of impropriety.

Ms. LUBCHENCO. Congressman, I think that my preference would be to ensure that we have the kinds of checks and balances we need that the funds are being used as they were intended. And that is exactly what we intend to—

Mr. TIERNEY. Excuse me for interrupting. But I'm not concerned how the use of those funds is going. I think Mr. Kucinich has covered that area. I'm concerned about the idea that people have been getting whacked excessively to fund that account. That's the problem here. I think—we care how the money is being used and we would expect it would be used for the proper purposes, but our concern here is that in the Northeast we are getting disproportionately penalized, and on a regular basis, and I'm anxious to see the reports that Mr. Jones produces. I would like to have seen them sooner, some report back on them, but this simply can't go on.

I don't know—I hope that you're listening in the past and today, this morning, as well as here, and if you listen to the witnesses later on today, you are going to see how serious that is and why this area seems to be singled out. Why do we need cases that are delayed until this is sorted out, whether or not there is unfairness here, whether or not complexity is just overwhelming?

While I'm on that subject, what allowance is made for somebody that's been accused of a violation for the fact that these regulations may be so complex and for the fact that sometimes the data coming out of NOAA itself contributes to this situation?

Ms. LUBCHENCO. My understanding is that the vast number of violations are, in fact, settled without any penalty and they are, in fact, the large number that are misunderstandings that are—that have a written warning or verbal warning and that it's only less than 2 percent of the incidents that actually go to the more severe formal notice of violation.

So I think the focus of our discussions is really on that 2 percent, and that's a very important 2 percent, and part of my intent is that not only do we know what the funds are being used for, but we have better guidelines and procedures in place so that the fines that might be issued are, in fact, appropriate and not excessive.

Mr. TIERNEY. I hope and I invite you to stay to hear the next panel. If you can't, I invite you to read their testimony. I think added to what you heard this morning and otherwise, you will see a number of instances where people get charged and then it's very difficult for them to appeal or to challenge because of the circumstances that have been going on. My time is up.

Ms. LUBCHENCO. Could I respond just very quickly to that?

Mr. TIERNEY. Sure.

Ms. LUBCHENCO. Unfortunately, I'm not able to stay for the second hearing. I have read their testimony. And I very much look forward to hearing a report of the exchange and Q and A.

Mr. KUCINICH. If I may, who is here from your office who will take the notes back to you from the second panel?

Ms. LUBCHENCO. Thank you, Chairman. Mr. Eric Schwaab, who is my Director of NOAA Fisheries, is here with us and intends to stay.

Mr. KUCINICH. Good. I just want to make sure if you are not going to be here, someone is taking close notes. OK.

Ms. LUBCHENCO. I've charged two people with responding to the IG report, my general counsel, and Mr. Schwaab, he's here for this purpose.

Mr. KUCINICH. Thank you, Dr. Lubchenco.

The Chair recognizes Congressman Frank for 5 minutes.

Mr. FRANK. Just one question. I want to defer to my colleague, Mr. Tierney.

Mr. Zinser, two questions, for how long has this situation of disproportionately serious fines and discipline in the Northeast gone on?

Mr. ZINSER. The best we can tell, the relationship in the Northeast between the enforcement arm of NOAA and the fishing community probably goes back over 10 years.

Mr. FRANK. Then, Dr. Lubchenco, Mr. Jones, particularly Mr. Jones, you were here, for over 10 years this region has been hit disproportionately. I have a very simple question, why? Mr. Jones, can you tell me why? Have you looked into this, what the reasons were for this discriminatory approach?

Mr. JONES. Well, again, I have been here 10 years and I—

Mr. FRANK. You just thought that's the way it was?

Mr. JONES. I don't sort—again, I don't set the fines and penalties.

Mr. FRANK. No, Mr. Jones, I understand that, but it's not just fines and penalties. Apparently for 10 years we have a disproportionate negative impact on one region. Did nobody call that to your attention? Has nobody looked into that? Now that you have known this for some time, do you know why that's been the case?

Mr. JONES. Well, there are some differences in the volume of mandates and the amount of casework that goes on here to some degree and whether the enforcement—

Mr. FRANK. No, I'm not talking about proportionate. We are talking about disproportionate case by case. It's not the total volume. Apparently the findings you don't contest is there was a pattern of discriminatory or much harsher enforcement here than elsewhere taking everything else into account. Has no one in your operation tried to figure out that was the case?

Mr. JONES. Well, once again, we will look at it on a case-by-case basis, and if we get any reports whatsoever of any malfeasance or inappropriate activity—

Mr. FRANK. Mr. Jones, you said you accepted the Inspector General's report. He reports a pattern of geographical discrimination. You have that. I would say this to Dr. Lubchenco, too, I would want to know why. Is it an accident? If it was for a year, that's one thing. For over 10 years there's been this pattern of geographical discrimination. Hasn't anyone tried to figure out why that has occurred over and above the individual situations?

Ms. LUBCHENCO. Congressman, I have asked for an analysis of the penalties region by region so that I have a better understanding of exactly what the contributing factors are.

Mr. FRANK. OK. But the Inspector General, has found this already. So you reject his data. So I would hope that it will be simultaneously you would try to figure out why it happened.

Ms. LUBCHENCO. That's exactly what we are looking into, and the patterns are fairly complicated. It's partially a function of how many rules there are and how many fishermen there are in the region. It's not necessarily the same from region to region in terms of the complexities of the fishing operation.

Mr. FRANK. I understand that. Mr. Zinser, do you have any sense of why this occurred?

Mr. ZINSER. Yes, sir. It was clear to us early on that the enforcement of the rules were left to the regional enforcement officials. There was no national——

Mr. FRANK. So taking everything else into account, you are making this finding of discrimination, everything else being equal, it's not that this is more complicated here or more frequent here, given all that, there was still a pattern of discrimination?

Mr. ZINSER. It was clearly that the enforcement in the Northeast region is different than enforcement in other regions and you have to look at that specific region for the answer, I believe.

Mr. FRANK. Well, then I will repeat my question. Is anybody doing that, Dr. Lubchenco?

Ms. LUBCHENCO. Congressman, it's pretty clear to me there is a strongly adversarial relationship in New England. And I think that is particularly problematic and is one of the areas that the IG report flags and one that we need to spend a lot of time——

Mr. FRANK. I appreciate that. But you know, some of us have made some suggestions about ways you could have ameliorated that, through personnel and elsewhere. We haven't gotten anywhere with those. But I appreciate that. But that means we need to work seriously on trying to ameliorate that, that is, with personnel and other factors.

And it also maybe it's suggesting maybe our rules are more complicated than elsewhere, and that's another argument for, I think, more flexibility in the statute so that we get less monkey business in the regulations.

Thank you, Mr. Chairman.

Mr. KUCINICH. I thank Congressman Frank.

Mr. Jones, I've seen you sit through a series of questions to you and when the question relates to your conduct of office in the context of Mr. Zinser's report, you repeatedly say, Look at it, study it, but do you get it?

Mr. JONES. I get it loud and clearly, sir.

Mr. KUCINICH. Excuse me?

Mr. JONES. I get it loud and clearly. I understand your point and his point.

Mr. KUCINICH. What is it that you get?

Mr. JONES. That there is a desire for the approach to how we conduct law enforcement operations in this organization——

Mr. KUCINICH. Tell me more.

Mr. JONES. We will evaluate and see what has to be done with the criminal investigator position versus using other types of positions. We look carefully at the cases that are charged to determine the merits of those cases and assure that persons are charged fair-

ly, and we will follow through with the other direction that we get from Dr. Lubchenco in terms of management of the fund and any questions or issues that come up with regard to the fund.

I take Mr. Tierney's point directly with regard to the issues and his concerns for followup in the previous meetings, and I can assure you that any future indications such as that and some of past ones we will also be digging into and taking a very close look at.

Mr. KUCINICH. When you hear what's going on, this adversarial climate that's been described, do you take any responsibility for creating that?

Mr. JONES. I certainly do. I have to. I have been with the program for 10 years and your point that having looked at some of this more closely should have been done, I take that very directly and look at that, as well.

And again, my staff, the people that work with me, I have a great deal of confidence in. I'm not criticizing them, and I will not state directly that in evaluating the changes that we have to go forward, that I am going to place blame in any way, shape, or form below my level.

Mr. KUCINICH. So you are going to take responsibility?

Mr. JONES. I will take responsibility.

Mr. KUCINICH. And you are also looking at what you can do to try to amend some of the deficiencies that Mr. Zinser has pointed out; is that right?

Mr. JONES. That's correct.

Mr. KUCINICH. You are aware of how the fishermen feel with respect to arbitrary, even capricious, heavy-handed treatment of them, are you aware of that?

Mr. JONES. I'm aware of it. I have talked with some of them personally and on different occasions have met with them personally, and I do understand that, and obviously not as frequently as I could have or should have, but I can meet with them and spend more time with them.

Mr. KUCINICH. You understand, but what are you going to do about it?

Mr. JONES. Well, once again, we are going to make certain that our approach and our enforcement efforts are fair and direct. Again, look at what we have done right, which, again, I want to reiterate and say clearly we have done many things right.

The Attorney General or, excuse me, the Inspector General has said that they have not found widespread abuse, but he indicates specific problems. So we are going to look at what we've done right and we are going to look at what we've done wrong and try to determine exactly what we need to change to make sure that we resolve those issues.

Mr. KUCINICH. All right. The Chair recognizes Mr. Tierney.

Mr. TIERNEY. Thank you. You yield?

Mr. KUCINICH. I'm yielding the remainder of our time.

Mr. TIERNEY. Mr. Jones, I hope that part of that will be review of the individuals that are responsible for enforcement in this Northeast region, and it's through a case-by-case analysis of their behavior and conduct and attitude and be able to determine that because that seems to me it may not be widespread, but certainly is focused here in Northeast and you've certainly heard a large

number of complaints and allegations from this area. So that will be important for us.

Ms. Lubchenco, I hope you will also take a look at that in terms of the importance of making sure that analysis or review of personnel is done, because besides the complexity of regulations, that seems to be another factor in here.

With respect to the complexity of the regulations and the lack of flexibility in the statute, do you have any sympathies at all for legislation that's now pending that would provide more flexibility? Some argue that it's already in the statute, that this would be an exercise. I can give you that option, as well. Would you exercise more flexibility in allowing fishing to proceed? Or do you support a change in the statute that would allow, therefore, some of the exemptions to be changed so that when it is appropriate, people get out and fish for a living?

I know you heard from Mr. Levins this morning, that with respect to your comment that you would like to help people with job training and loans, but that's not the problem here. There's a lot of fish out there that people can get. People don't necessarily want to take a loan. They don't necessarily want to get retrained. Where there's fish out there, they want to earn their living by fishing. Can you accommodate that and support either a statute change or different way to enforce these regulations to make sure that happens?

Ms. LUBCHENCO. Congressman, I'm not sure that the complexity of the regulations is going to be fixed with increasing flexibility. I think they are both valid issues to be discussed. I understand the current economic situation and the desire of fishermen to be out fishing. It's our intent to work with them and to identify ways that we can continue to rebuild all of the stocks while still maintaining viable livelihoods for those fishermen.

Mr. TIERNEY. When you say "viable livelihood," fishing?

Ms. LUBCHENCO. Yes.

Mr. TIERNEY. Or are you talking about alternatives?

Ms. LUBCHENCO. Fishing.

Mr. TIERNEY. And you are talking about making sure—well, we can get into it in more detail later. I really wanted to know your attitude about that. I thank the chairman for allowing this time. We need to find a way to make this work, either by looking at the way we put it in practice, the existing regulations of law, or changes we need to make.

Thank you.

Mr. KUCINICH. I thank the gentlemen. This concludes the first panel. I want to thank the witnesses for appearing. The subcommittee will have additional questions which we will submit in writing. We ask for your cooperation in answering the questions. I also want to say that this subcommittee will retain jurisdiction over this matter and we will follow IG's recommendations and will see how effectively NOAA responds to them.

Again, thank you to the first panel, Mr. Zinser, Dr. Lubchenco, Mr. Jones, for your presence here. I know it hasn't been particularly easy, but the subcommittee is going to be insistent, not just getting answers, but seeing a change of direction.

Thank you.

I'm going to call the next panel. I'll start introducing them so we can keep moving here.

Mr. Stephen Ouellette, who is an attorney, has been practicing here in Gloucester for over 20 years. He represents local fishermen who are charged with violations of Federal fisheries regulations.

Richard Burgess is a fisherman and boat owner who lives with his family in Manchester, Maine—Manchester, Mass. He's fished since he was a teenager, owning fishing vessels since 1976. He currently owns four small ground fish gill net vessels, home port in Gloucester. Eight families are supported by the fleet of boats. He serves as president and director of fisherman organizations, including being founder and director of the Northeast Seafood Coalition and serving on the board of the Massachusetts Fishermen Partnership and the Massachusetts Fishery Recovery Commission.

Mr. Jim Kendall is a former New Bedford scallop boat captain and fisherman for many years, who now owns his own seafood consulting company, which counts many fishing-related businesses and organizations as its clientele. He is also a former two-term New England Fishery Council member.

As with the first panel, it's the policy of the Committee on Oversight and Government Reform to swear in all witnesses before they testify. I would ask that the witnesses rise and raise their right hands.

[Witnesses sworn.]

Mr. KUCINICH. Thank you. Let the record reflect each of the witnesses answered in the affirmative.

As with panel one, I ask that each witness give an oral summary of his testimony. Keep this summary under 5 minutes in duration. Your complete written statement will be included in the hearing records.

Mr. Ouellette, you will be our first witness. I ask that you proceed.

STATEMENTS OF STEPHEN OUELLETTE, ATTORNEY; RICHARD BURGESS, GLOUCESTER-BASED FISHERMAN; AND JIM KENDALL, NEW BEDFORD SEAFOOD CONSULTING, FORMER SCALLOP FISHERMAN, FORMER NEW ENGLAND FISHERY COUNCIL MEMBER

STATEMENT OF STEPHEN OUELLETTE

Mr. OUELLETTE. Good afternoon, Chairman Kucinich, Congressman Tierney, Congressman Frank. I want to thank you all for coming to Gloucester and for the time that you have devoted to this important issue.

At the same time, obviously, I would like to thank our host, Mayor Kirk, for all that she's done in bringing together NOAA officials and members of the fishing community. Most importantly, I would like to thank my Congressman Tierney and my representatives from the state legislature who worked together to really bring together the necessary forces to get the Inspector General to investigate the important issues of NOAA law enforcement.

And especially on behalf of the entire industry, I would like to extend our thanks to Mr. Zinser and his staff for interviewing many participants in the fishery, for the courtesies they extended

in making themselves available at odd times and odd places and to the thorough job and report that they have done and are still doing.

Initially, I had some very prepared remarks and I think I'm going to have to get off script just because of some of what I heard today.

Let me tell you that although I represent individuals in enforcement cases as an attorney, that was not my intent when I opened a practice on Cape Ann. In point of fact, it was a very small part of the practice.

When I first came up here from Boston in 1994, I got heavily involved in the management process and believed wholeheartedly that the industry, in conjunction with the National Marine Fishery Service of NOAA, could make a difference and return our fisheries to a sustainable condition.

For over 15 years I have worked alongside the hardworking fishermen of New England, an honorable group, and I'm honored to represent them. Sadly, however, over the course of 15 years of sacrifice, watching vessels disappear, watching the fleet shrink, little has been returned to this industry. Instead, all we have seen is an increasing set of complicated regulations that have increased the regulatory burden on small business owners and made conducting a business virtually impossible on a day-to-day basis.

We have seen fish stocks rebound. Currently, at least in the last fishing year, despite the availability of rebuilt stocks, approximately \$500 million worth of seafood was not landed in Massachusetts and the rest of New England that was available according to NOAA scientists, and the reason for that is the lack of flexibility in the Magnuson Act.

At the same time, I see a bunch of small businessmen who are burdened by unbelievable regulatory burden. Some of it is necessary because of the need to account for variations in the fisheries, but alongside me I have approximately 6,000 pages of permit holder letters that have been sent to each permit holder over the last 10 years.

To some individuals like Mr. Burgess, who sits alongside me, he receives between 11 and 18 sets of these notices every year. They are complicated; they are confusing; they are often conflicting.

At the same time, NOAA and NMFS, who are supposed to be working with us, have begun to enforce these regulations a manner in which can only be described as un-American. The fines are unbelievable. The minimum fine—there is a penalty schedule that's attached to my statement—starts at \$5,000 for a violation, for the first violation, up to \$80,000 for the first violation. Fines are repetitively charged.

Over the last 10 years we have seen fines change from serious fines for conservation violations to half-million dollars fines for late payment. The agency seems to have lost total touch with the people it regulates.

Some of these violations, in fact, we discovered were being observed by NOAA personnel who sat by idly knowing that somebody was not getting a report in timely and then turned it over to law enforcement who issued half-million dollars fines all for unintentional, totally understandable violations.

The situation is unbearable. And that is why eventually some of us, and for 10 years I have been writing to my congressional delegation requesting that they investigate and make changes. I'm very happy that you have. But much harm has been inflicted on these agency—on the industry over the last 10 years and something needs to be done both for the future and to address those people who were unfairly treated in the past.

I know that I have run over, but again, one of the major problems we have is the process by which fines are set. This issue of what factors go into it by NOAA attorneys, we are representing respondents, it is our responsibility to argue to an administrative law judge why the fine is inappropriate, yet we are not allowed to know the basic elements that the attorneys use in setting the fines. So we end up in an impossible situation; and as a result, many fisherman do settle. They settle at amounts they can't afford to pay. Ultimately, in 2 years, some amount comes due, they lose their boats, they lose their homes, they lose the ability to put their children through college and they lose—we lose an important part of our culture.

[The prepared statement of Mr. Ouellette follows:]

TESTIMONY OF
STEPHEN M. OUELLETTE
BEFORE THE
Domestic Policy Subcommittee
Oversight and Government Reform Committee
U.S. House of Representatives
GLOUCESTER, MASSACHUSETTS
MARCH 2, 2020

Chairman Kucinich, Congressman Frank and Congressman Tierney:

I would like to thank each of you for your service to our nation 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. 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 Gloucester and see for yourselves the difficulties we are having with the National Oceanographic and Atmospheric Administration's (NOAA) law enforcement branch. Sadly, despite years of rebuilding and the failure of the Agency to restore to the industry what it promised, we face growing difficulties from abuse of the enforcement powers you entrusted to them. We appreciate your response to the request of the fishing industry for a review of the issues raised by the Department of Commerce Office of the Inspector General (OIG) on the issues of NOAA Office of Law Enforcement (OLE) and the Office of the General Counsel for Law Enforcement (GCLE).

I have reviewed the Inspector General's Report and can attest that their findings correspond to my observations over the past fifteen years. I found little in Dr. Lubchenco's response that persuades me that the cited abuses will stop, or that sufficient, timely corrective action will be taken to correct serious flaws in management giving rise to violations or the agency's approach to dealing with its constituents. Most importantly, the response does nothing to correct serious abuses of the past that have cost fishermen their homes, businesses, livelihoods and dignity. I recognize that Dr. Lubchenco is new in the position, and has engaged some very competent people, and I hope they will hear our message and yours. The feedback we get from NOAA personnel is that many within the NOAA law enforcement community believe that they have nothing to fear and this will all blow over.

As some of you are aware, I am a maritime attorney, and for over fifteen years have represented commercial fishing interests along the eastern seaboard, from the Carolinas to Maine, primarily on regulatory matters. 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 1990s 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. I have raised these issues in meetings with NOAA personnel and attorneys and in correspondence with my congressional delegation and at fishery council meetings. 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 get Congress to address the abusive practices of NOAA and in the larger picture, restore the service aspects of the National Marine Fisheries Service. Unfortunately, many have already fallen victim to this system, and many are still paying the bill, and consideration should be given to reopening cases and correcting unjust results.

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. In some cases, it is almost as if enforcers are making sport of how large a fine they can impose or how complicated they can make a simple case appear-and one anonymous email, attached hereto as Exhibit 5, suggests there is financial incentive to do so.

There is little doubt that the fishery regulations in the Northeast are the most complex ever imposed on so many small businesses. The industry understands the need for regulations to keep fisheries sustainable, but overzealous enforcement of complex rules threatens the viability of small businesses. The rules are horribly complicated and fill volumes. Reportedly the only agency producing more regulation is the Internal Revenue Service. Rules change frequently and dramatically, with fishermen and boat owners in the Northeast receiving on average 500 pages of permit holder letters each year from the Northeast Region of NOAA alone. Many receive duplicates and multiple vessel or permit holders receive sets for each vessel they own, often in multiples. An owner, such as Mr. Burgess, who will also testify today, and owns 11 permits, receives as many as twenty sets of each letter, which must be reviewed to make sure they are actually duplicates of the same item and not new or corrected letters.

Many regulations also tend to make little sense to fishermen, as they are counterintuitive or just plain wasteful of a valuable resource. When groundfish trip daily

limits were imposed in the late 1990s, some provisions were included to allow overages to be landed by sacrificing days at sea. Although this often required a disproportionate loss of time, during which other species could be caught, fishermen availed themselves of this provision to avoid discards. Fishermen seeking to use the provision were required to call and advise NOAA Law Enforcement of the overage and have the appropriate time deducted from the vessel's days at sea. NOAA law enforcement effectively lobbied to remove this, placing fishermen in the undesirable position of having to choose between discarding valuable fish, or compromising safety and remaining at sea to allow time to accrue on their clock. Under current provisions, fishermen are now required to either remain at sea, or discard catches down to match the time they have been at sea. It is a terribly wasteful system-in 1998; "conservation" measures reduced landings from 6M lbs of codfish to 2M lbs. Discards increased by 5M lbs. Fishermen are always seeking ways to avoid wasteful discards, too often finding that their common sense solution places them in technical violation-at considerable cost. We too often receive calls from fishermen who, due to weather or mechanical issues, need to return to port, but have too much fish for their time at sea. We advise them to discard, as NOAA makes NO allowances for even life threatening emergencies. In one case, NOAA Office of the General Counsel did, too late, allow one of my client's vessels to bring in a bluefin tuna that belonged to a vessel that had foundered (whose crew was rescued by the Coast Guard). After waiting an hour for a response, with conditions deteriorating, I instructed the crew, by phone, to cut the fish loose and return to port. When the NOAA attorney finally called me, I advised him that safety considerations forced us to make a decision.

He seemed incensed and the crew was met by NOAA agents who reportedly questioned them for over three hours.

In part, the problem stems from the regulatory complexity resulting from strict rebuilding requirements imposed on a wide range of fisheries with regional variations and multiple gear and vessel types, seasonal differences, etc... Vessels are limited as to when, where and how long they can fish. Their gear is strictly regulated and their catch limited, often on a daily basis. Most vessels must notify NOAA before they leave the dock, wait for a sailing confirmation number and report again when they land. Vessels' positions are electronically monitored. Catches are reported to NMFS on vessel trip reports submitted monthly, in some cases electronically on a daily basis, and receiving dealers submit electronic reporting on a weekly basis. There is actually little opportunity to cheat, but great opportunity to make an honest mistake.

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, Exhibit 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 GCLE takes the position that Congress, in delegating unfettered authority has stated no violation, however small, should go unpunished, and that even innocent or negligent violations should be punished significantly more than “the cost of doing business,” even when no profit is alleged to have resulted from the “violation.” NOAA has been given authority to fine up to \$140,000 per violation, with each day being a separate violation. We frequently see fines of \$50,000-250,000 for reporting violations, minor overages, common misunderstandings of rules, etc that have occurred over time, even though there is no profit to the boat, ill intent or negative conservation impact. NOAA attorneys frequently cite to statutory language that allows NOAA to assess fines even if it requires a respondent to reorganize their business (more commonly referred to as bankrupt). NOAA has a penalty schedule that allows first time violations to be assessed at \$5,000-80,000 with up to 90 days of permit sanction, Exhibit 4. With most fishermen in this region making \$50-60,000 per year, and vessels limited to as few as 27 days per year, even a first time violation is significant. Fines regularly start at \$30-100,000 and paperwork violations can result in million dollar fines, as noted below.

Often, fishermen end up in violation because NMFS issues confusing or obscure regulations, some of which I will detail below. A number of violations occur because NOAA is unable to timely do such tasks as calculate a vessel’s available days at sea. Fishermen can no longer do this with new rules on differential counting and the fact that their annual allocation can be determined until NOAA figures “carry-over” DAS, which may not be done until $\frac{3}{4}$ of the way through a fishing year.

We often seek guidance from NOAA attorneys as to regulatory compliance, but their opinions often seem out of touch with the intent of regulations, generally expanding the definition of a violation. For example, consider the responsibility of a dealer to detect violations by vessel from which it acquires fish. NOAA takes the position that a dealer is not required to investigate whether vessels are in compliance, just not to assist in a violation, or ignore an obvious one. At least one dealer is being charged for conduct a NOAA Special Agent in Charge specifically told them they would not be responsible for. GCLE attorneys actually have stated to that when faced with an overage, the dealer should accept the legal limit and turn the balance back to the boat, rather than accept it and accurately report it-in effect encouraging dealers to hide overages, where such an absurd argument supports its position. In one typical episode, one NOAA attorney was citing fishermen for estimating his catch and not waiting for dealer weights before filling in his logbook, and another was citing fishermen for not estimating and waiting for his dealer's weights-these two attorneys worked out of the same building.

Fishermen feel victimized by the process, with fines for innocent violations routinely exceeding a fisherman's year's pay, leading to a climate of distrust by fishermen in their government, understandably so. In most cases, fishermen enter my office completely bewildered as to why they are being charged. Sadly, experience has shown me that few, if any, fishermen are ever in compliance with all of the regulations. Nor does the adjudicatory process instill confidence. To fully understand how the process works, let me take you through it.

A fisherman may be boarded at sea or at dockside, or be subject to an audit that reveals a potential violation. A case is opened and the fishermen and crew may be

questioned by NOAA. Boardings are conducted by Coast Guard personnel armed with automatic weapons, often accompanied by agents from other agencies, dogs, etc... at all hours of the day or night. NOAA agents routinely carry and display firearms, and announce themselves as criminal investigators. Boardings routinely extend over a period of 2 to 3 hours (but have gone as long as 8 hours), and may result in vessels being ordered to return to port for seizure of catches, including a few occasions where the vessel was later exonerated, see my letter to Senator Kennedy, attachment, detailing specific incidents. Most vessels are boarded three to five times per year-some vessels have been boarded as frequently as 30-50 times in one year. Because NOAA law enforcement is civil, fishermen are not advised of rights and are generally intimidated by the process. If any fish is believed to have been harvested illegally, e.g. from a closed area or in excess of limits, the catch is seized. Until the investigation is completed a vessel may be prevented from leaving days at sea or other rights, which can result in the vessel being prevented from fishing. In the case of audit of a vessel's landings report, etc, the fishermen is generally not advised that an investigation is underway but may be called into an interview.

Once the investigation is completed, the fisherman is issued a ticket, called an Enforcement Action Report (EAR) and the file is forwarded to the NOAA GCLE where it is assigned to an enforcement attorney. If no further investigation is required, the attorney will issue a Notice of Violation and Assessment (NOVA) and/or a Notice of Permit Sanction (NOPS). These documents state that the attorney has found a violation occurred and assesses the penalty and/or sanction. The respondent is advised of a right to hearing before an Administrative Law Judge (ALJ) but cautioned that the ALJ has the

authority to raise any fines to the statutory maximum of \$140,000. Generally a proposed offer of compromise-at 80-90% of the assessed fine, along with a copy of the regulation alleged to have been violated and a financial disclosure form, if the respondent claims inability to pay. Financial disclosure forms, annexed hereto, Exhibit 3, require extensive financial information from both a fisherman and his spouse.

The administrative process allows a hearing on the merits of the case, but NOAA regulations limit review of penalties, unless the judge finds good cause to vary from NOAA's counsel's findings, 15 CFR 904.204(m). Many cases involve few significant factual issues, other than ability to pay, and often focus is on the issue of the penalty. Agency counsel routinely take the position that since they set the penalties, as attorney they can not be forced to disclose the basis for any specific penalty as it would affect their ability to represent their client, a position upheld by ALJs, putting Respondents in a difficult position to challenge the appropriateness of a fine, not knowing what factors were taken into account. As an aside, although penalties appear to be set in a highly subjective fashion, GCLE attorneys claim inability to compromise penalties to less than 50% without supervisor approval, which usually requires proof of inability to pay.

Hearing before an ALJ offers limited opportunities for discovery. NOAA attorneys frequently fail to disclose documents they believe are "not relevant," despite a broader definition that allows discovery of discoverable documents 15CFR904.240(e)(1). The hearing process takes months, and provides no ability for interim rulings on individual counts, absent consent from the Agency. With costs for briefs, etc, the process may cost \$5-10,000 for a small case, and significantly more in complex cases. Either side may take an appeal of an ALJ's decision to the NOAA Administrator. Although

termed discretionary review, the discretionary review is required to exhaust administrative remedies before seeking review by a United States District Court, where review is conducted under the Administrative Procedures Act standard of substantial evidence. In short, it is an expensive, time consuming process, with little opportunity for a fisherman to succeed. One case, described below, has now extended over the course of 13 years, and has just reached the US District Court for the second time, (Frontier Fishing Corp).

Although defending an enforcement action is costly, most fishermen, having little faith in the administrative process and judges paid by NOAA, decide to seek a settlement because of the threat in the NOVA that by challenging it the fine can rise to \$140,000, and the mental stress from having to deal with the concept of heavy fines hanging over them for months to years. Once a fisherman has had a violation, it then serves as the basis for enhanced penalties in the future, and in order to reach compromise, NOAA attorneys often require future lump sum payments or leave penalties suspended for a year or more, which can cause a later, minor issue to have disastrous consequences. In a case that recently came to my attention, NMFS is warning boats not to hire a fisherman who is unable to pay a ten year old fine, under threat of sanction to the owner-in effect NOAA has imposed a lifetime ban on fishing from which there is no appeal, because this man can not pay an old fine.

Capt. Billie Lee

Capt. Lee was a lifelong fisherman until recently, when he ran afoul of NOAA law enforcement, due to his failure to possess the notorious yellowtail letter of authorization. Vilified by Andrew Winer of NOAA who called him a "repeat offender"-

implying criminal culpability, Capt Lee tried his best to follow the rules, but violated a rule when he entered port too early with 200 pounds of excess fish. Legally caught, he simply had to discard this dead fish at sea, or stay at sea for an additional sixteen hours-not advisable as he fished alone-to fully comply. Relying on a common sense principal formerly embodied in a rule, Capt. Lee left his vessel called into the days at sea system to account for this fish, and dutifully reported it to NOAA. In doing so, he gave up 2 of his limited fishing days, in which he could have legally landed 4,000 more pounds of fish. Sadly, the common sense rule was rescinded by NOAA and he needed to discard 200 pounds of fish to be legal, and go back and catch it-and possibly another 3,800 pounds. To NOAA, compliance is more important than conservation.

Capt. Lee also lacked the so-called yellowtail letter (LOA), intended to assist enforcement of differential yellowtail trip limits North and South of Cape Cod. At least 25 other boats landing at the Gloucester Seafood Display Auction similarly lacked the LOA. This fact came to light years after the LOA was eliminated. NOAA won't tell how many of the 500 or so active groundfish vessels lacked them-two other vessels were given warnings, not fines, for LOAs violations. The difference between them and Capt. Lee-they didn't land at the Gloucester Auction. Why 25 vessels' failed to possess an LOA which cost nothing and didn't affect their fishing remains obscure-some had them in most years- some were issued three for one year and none in the next. NOAA had no written application and has no documents recording requests, so we'll never know. NOAA says it makes no difference-simply put, produce a letter from 2002-2006 or pay the fine. Mr. Lee's case is simpler; he stopped getting the letter after a rule change in 2003 implemented a yellowtail trip limit in the Gulf of Maine, making it seem

unnecessary-he always landed under the minimum for any area. In the four years he lacked the LOA, Capt. Lee was never asked to display it when he was boarded, he complied with yellowtail trip limits, and he reported **all** of his fish to NOAA (as did the Gloucester Auction).

Capt. Lee hardly went rogue as Mr. Winer implies. Capt. Lee is a good American: a veteran and lifelong fisherman who struggled in the face of reduced catch limits under an ever increasing regulatory burden- rules that force fishermen to make choices between what is moral and makes common sense and what the agency demands. Too often, I have advised fishermen to discard their catch enter port early for safety reasons, or risk Capt. Lee's situation. This ethical dilemma stems from NOAA's elimination of the "running clock" and refusal to implement safe harbor provisions. The agency's position on the LOA, which served no conservation purpose and confused many honest fishermen (and NOAA personnel themselves), is yet another-"gotcha" for NOAA to further vilify fishermen.

Faced with these issues, at the age of 62, it made more sense for Capt. Lee to abandon his way of life and seek a new occupation.

Richard Burgess

Capt. Richard Burgess is one of the most conscientious vessel owners I have had the pleasure of working with. (His case is also detailed in my letter to Representative Tierney, annexed hereto, Exhibit 2) He apparently misjudged his available Days at Sea ("DAS")¹ on his vessel, a 42 foot gillnetter fishing from the port of Gloucester, but not without NOAA's help. This occurred, in part, because at various times NMFS has been

unable to timely provide him with DAS usage calculations for months at a time,² due to computer issues and problems calculating DAS usage based on differential counting.³ NMFS also continued to issue sailing numbers to the vessel, despite the apparent overage. Mr. Burgess had literally hundreds of available DAS that he could transfer from permits on skiffs he holds for that purpose. The NOAA attorney advised that if the Capt. Burgess agreed to forfeit \$25,000 of the total of approximately \$27,000 in catch, in addition to the DAS that would have been used, NOAA would seek no further penalty. In the interim, the boat would not be permitted to lease days to the boat and fish until he agreed to settle the case, or until the vessel received its next year's allocation in May. As a lawyer for the fishing industry, the complete lack of judicial remedy placed me in an impossible position, other than to advise him to accept what NOAA so "generously" offered.

All too often, NOAA issues vessels sailing authorization, and then sends enforcement agents to seize catches for minor DAS issues, errors in permit renewals or minor overages. Twelve years ago, honest mistakes like these required an adjustment to a vessel's DAS, or bringing ones self back into compliance. Now they result in hefty fines.

¹ As you already may know, a vessel's allotted Days at Sea are the amount of days a fishing vessel may fish in a given fishing year.

² A Montauk fishermen made a similar complaint to me. NMFS has informed him that they can not tell him how many DAS he has remaining, indicated he might be over, and apparently has held up his DAS lease application. If he can not lease his DAS before Thursday, he will lose 30 DAS, worth \$24,000 on the open market-and not be able to fish his vessel until next year.

³ As a prime example of how convoluted the system is, in November of 2007, NMFS had charged this fisherman for 35.96 monkfish DAS, in some cases TRIPLING his actual time, when they now finally advise him he has actually used only 17.98 DAS. It should not go unnoticed that NMFS made a 17 DAS error, causing this fisherman to adjust his fishing based on NMFS's false statements as to the effect of differential counting on his monkfish DAS. Of course, whether This fisherman or NMFS makes the error, the only loss is borne by This fisherman.

TESTIMONY OF STEPHEN M. OUELLETTE

3/2/2010

Page 15

Mr. Burgess also lacked a yellowtail LOA for one of his boats in one year. Although NMFS says they didn't issue him one for the 2005 fishing year, we located a duplicate they issued, inexplicably from the 2004 year, indicating that because he renewed his permit early, NMFS may have been unable to issue a new letter for the 2005 year, and just issued him a duplicate for the 2004 year. In any event, all of his fish was reported, by his boat and by the GSDA. The violation was de minimis and a common mistake, made by as many as 50% of the active vessels in the Northeast Region. The tenor of his interview by agents and offer of leniency in exchange for getting him to get him to make statement against the Gloucester Seafood Display Auction made it clear that the charges against him were only a pretext to seek information on the Auction.

HERRING REPORTING CASES

In a number of cases, in which six figure fines were handed out, and then settled for 20% of the assessed fines, a number of vessels fell out of compliance with NMFS Interactive Voice reporting systems. In most cases the vessels were reporting their catches monthly through Vessel Trip Reports and dealers were reporting purchases and attributing them to vessels weekly. IVRs had been completed by personnel at the Maine State Division of Marine Resources. When the individual gave notice she would stop doing it, some fishermen believed, incorrectly, they would be contacted by someone at NMFS. A number of vessels fell out compliance. Although NMFS claims they need the vessels' IVRs on a weekly basis to avoid precipitous shutdowns of the fishery due to quota concerns, NMFS personnel were fully aware that these vessels were landing herring-and of the quantities through dealers-but did nothing for months and then notified NOAA law enforcement. When notified, vessels came into compliance. NOAA then

issued fines of up to \$520,000, \$10,000 per violation, despite the fact NMFS personnel allowed the violations to occur. One has to ask whether the data was crucial enough to justify the fines, if NMFS personnel could be bothered to make a few phone calls to the vessels they knew had become non-compliant. While compliance is the vessel's responsibility, NOAA should not be permitted to impose repetitive fines where it is aware that fishermen are unwittingly out of compliance, but they do, and they do it frequently, at great cost to the industry.

It is quite common for fishermen to begin to fish, adjacent to a closed area, alongside a Coast Guard cutter, only to have the cutter's crew wait and watch until an offense has been unwittingly committed, and then stop the vessel-law enforcement never seems interested in stopping a fisherman from making a mistake that turns into a violation, where it can seize a catch or assess a fine.

Common Mistakes Become Big Fines

NOAA has also made sport of seizing trips where vessels make errors in renewals. In one case, a scallop vessel received new permits 30 days before its permits expired. The vessel continued to sail under NOAA sailing authorizations, but during a routine boarding, it was discovered that the "new" permit actually expired the same day as the old permit as NOAA reissued permits with a different class of herring permit. The catch, valued at \$140,000 was seized, as was the trip of the owner's other vessel for the same reason. Eventually, all but \$60,000 was returned.

In other cases, scallop vessels landing under 18,000 pound trip limits have had trips seized for variances as small as 2.5%, despite the impossibility of accurate weights on board and scientific evidence showing how scallop weights change based on water

absorption in the vessel's hold. (To the credit of GCLS, these policies have been modified based on one of our cases).

Traditionally, late logbooks resulted in refusal to renew permits. In the past few years, GCLE, in some cases, has started to review date stamps on logbooks, and charged fishermen for tardy reporting, at up to \$10,000 per page, without any notice of this change. NMFS reports that less than 25% of vessels are fully compliant!

One dealer, during a change in NMFS permit structure where he was told that his permits would all be issued by the Northeast Region, failed to note that his shark permit issued from the Southeast Region. When the permit was not renewed the first time, he fell off the notification list. Eventually, as reporting requirements changed, he was not notified and fell out of compliance on reporting. A single misunderstanding of a statement by NMFS that all of his permit were to be issued together meant all of his permits would be issued together results in 600 violations. When the issue came to light, he produced his records and showed what he had purchased and from whom. GCLE indicated an intent to fine him \$6,000,000, and suspend his permits for 2 ½ years, but eventually settled the case for \$750,000-which he has been paying for years. No ill intent, illegal profits-record keeping violations, multiplied out over years become a profit center for government.

Systematic Problems

The real issue here is NOAA's unfettered ability to issue fines, the basis of which is non-discoverable, and under the administrative law system, place the burden of proof on the Respondent to prove the penalty is inappropriate. Penalty schedules should be set with public input, and reviewed in open by fact finders limited to assessments for each

type of violation, with transparency in aggravating or mitigating factors. The Agency should not be able to disingenuously hide its decision making in assessing fines behind the attorney work product privilege, which has heretofore been the Agency's practice in these cases. Because of the gravity of these penalties, fact finding should be given to US District Court Judges, or magistrates, instead of Administrative Law Judges, if the assessments are to continue to be able to take a man's livelihood, business or home. Fact finders should be limited in the amount they can assess for any type of violation, and should have the ability to reduce or eliminate fines altogether for a violation, and not be bound at all by GCLE determination. Most importantly, fines should have some relationship to the status of the fishery, and the Agency should not be able to extort monies from fishermen by seizing trips or tying up boats without a hearing or by holding a potential \$140,000 fine over their heads for any violation. I note that fishermen have no confidence in the system.

Somewhat uncharacteristic of the American judicial system with its supposed due process protections; there is less judicial involvement, or common sense, required in NOAA's taking of a man's business assets, home and ability to earn a living, than in a challenge to a parking ticket issued on federal land.

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. Even within the NOAA enforcement community, agents are upset with NOAA's approach to fishermen, but fear for their jobs if they voice their opinions.

Unless and until NOAA management takes a new approach to the fishing industry, there will never be positive change.

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. 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. Penalty schedules should make calculations of penalties more proportionate to the violation, and not contain ranges, such as \$5-80,000 for a first time violation. Fines should reflect all issues facing fishermen, especially those created by the Agency. Agencies are granted deference because of their specialized knowledge, yet they claim ignorance of these very issues in enforcement proceedings. ALJs should be free to refine penalties and sanctions, and no burden should fall on the Respondent to overcome a penalty, but not have unfettered ability to raise them to statutory maximums.

5. Penalties need to be reviewed by managers responsible for implementation of regulations, to ensure that enforcement does not misconstrue the need for and effect of

regulations. The Agency should be required to utilize its knowledge as to the effect on businesses of fines and sanctions it imposes, something they claim they do not do at this time.

6. Respondents should be permitted complete discovery into the basis for fines and sanctions, and the Agency should be prohibited from claiming any privilege merely because it elects to have the same person who assess the fine represent it at hearing.

7. The Agency should be prohibited from seizing the catches of domestic, permitted vessels, or placing restrictions on a vessel's permits, without hearing before an ALJ or US District Judge.

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.

9. The Agency should be required to limit fines so that NOVAs do not improperly threaten respondents into settling based on fears of unwarranted increases in fines.

10. The IG should review past cases to determine whether improperly treated fishermen should have fines remitted or other corrective action taken.

11. 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 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. Where these men once faced 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 in 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

Mr. KUCINICH. Thank you very much, Mr. Ouellette.
Mr. Burgess, you may proceed.

STATEMENT OF RICHARD BURGESS

Mr. BURGESS. Thank you, Chairman.

On one of my boats, one out of my four boats over the past few years, just to make it very simple, I have had one of Mr. Jones's law enforcement agents call me into an office and say, "We have got a problem with your captain." As time went on during the short meeting, the agent wanted to know how much money I paid my captain, how much money I paid myself, how much money my wife made at her job, how much money I have in my savings account and my checkbooks, and I called Mr. Ouellette and it went from there.

Two years ago I had the same vessel that has three permits on it. We were within 2½ days of using up the first permit. We had a leasing agreement setting in the law enforcement office in NOAA. I called the woman that posts these days at sea up in her computer and lets us know, when they can, how many days we have left. She said, "Rich, I believe you have two, I'm not positive because we have been two or 3 weeks out of date on this whole computer system," but she says, "I believe you have two-and-a-half days left on your permit, on the first one out of three."

I had a personal problem. I couldn't go down to the office. She said, "There should be an agent in here at any time to sign the leasing agreement. As soon as it's signed, I'm going to post the days on the computer. If your boat goes over a day or two, don't worry about it, I will take care of that."

For some reason the agent came in, grabbed the leasing agreement, and said, "You are not to say a word," took the leasing agreement, 5 days later I was called, the vessel was red flagged, ordered back to port, the catch was seized, I was fined by Chuck Juliand \$27,000. I called Mr. Ouellette.

As the time went on, Mr. Julian said, "If you don't pay the 27 right now, if you want to go in front of one of my judges, you will be paying \$120 to \$140,000." I settled on 25,000 bucks. I was scared to death that they wouldn't give me the boat back, I couldn't get the boat back to send it fishing and pay the payments until I paid the fine.

This Yellowtail exception letter with the Gloucester Auction House we've been heavily penalized, which is totally unconstitutional, and as far as I'm concerned, unfair. I went to the Fishery Service and I asked them for the letter. I had it on three boats. I said, "I'm sending a boat Yellowtail flounder fishing." They said, "You don't need it. Discard it. We are just going to get to rid of it anyway." I said, "Are you sure?" They said, "Absolutely." The boat went fishing.

After the auction house was raided, and all they got out of that whole thing was 40 boats that had—that didn't have, somewhere around 40 boats that didn't have the Yellowtail exception letter. My captain got called in. After he was called in by Gino Morrow and another agent in a little cubical, they said, "If you tell us, rat out the auction house what it's been doing illegally, we will throw this away." That was my captain.

After that they called me. I called Mr. Ouellette. We went in. They said the same thing to me, "If you tell us what's been going on back at the auction house, we will tear this up and you won't get a fine." Well, I said, "OK. Fine. I will tell you, I was one of the first boats to go to the auction house. It's the best thing that ever happened to this region." I said, "There is nothing going on in there. If there was, I won't have my four vessels there. It's very simple."

Gino Morrow looked at me, the agent, and said, "That's not good enough." The FedEx truck came to my house about a month later, \$58,700 fine for not having a piece of paper aboard the boat that I was told I didn't need. They said that's the way law enforcement handles it. Just because someone at the Fishery Service told you you didn't need it, that's regardless. We say you needed it, you needed it, period.

This past May 1st, I always take all my permits up for every vessel, hand-deliver it to the office up here in Gloucester, make sure I have everything accounted for, all the permits are on the boats. For some reason, somehow this same vessel didn't get its yearly letter of authorization to go fishing. I thought I had to go to the board for the boat with all the other paperwork. They let the boat go 8 days fishing out of New Bedford, 100 miles offshore on a 42-foot boat because this region up here is totally shut down for April and May.

Mike Henry, the officer in charge, called up and said, "We know where your vessel is. It's 100 miles offshore. We are going to have agents in New Bedford order the vessel in. It's going to be seized." I said, "Why?"

"You don't have your Federal fishing permit." I said, "I most certainly do." Come to find out the month prior they had sent me a notice that said, "You do not have one vessel trip report from December on record." The boat was tied to the dock. The only thing we had to stay tied to the dock for the 120 days out of the season, we cannot fish with the vessel. The captain was fishing in November, he sent in November's logbooks, and he sent in the December logbook that checked off, did not fish, and he made the mistake, he wrote the 11th month, not the 12th month. They wouldn't tell me that. They did not bring that forward until Mr. Ouellette, once again, or it was probably David Smith went up and tried to figure out what took place. They didn't give me the permit. They let the boat fish 8 days and then called me up and red flagged the boat.

It is criminal. I don't care what the other people have said here. What's taking place is criminal. We have been under gestapo siege from the Fishery Service law enforcement. They don't give you the right time of day. They come down to the boat constantly with weapons. They are constantly looking for your permits day after day after day. We leave the dock at three in the morning, we come back at five or six at night. All we want to do is go home and see our wife and kids. They won't let us do it. You've got to constantly show the permit day after day. What's taking place is, just as Steve said, un-American. It's not good.

Thank you.

[The prepared statement of Mr. Burgess follows:]

TESTIMONY OF
 RICHARD E. BURGESS
 BEFORE THE
Domestic Policy Subcommittee
Oversight and Government Reform Committee
U.S. House of Representatives
 GLOUCESTER, MASSACHUSETTS
 MARCH 2, 2020

My name is Richard Burgess. I live in Manchester, Massachusetts and I am a lifelong fisherman. I began my career tub trawling and tending herring weirs in the Bay of Fundy in the 1960's. I then went to work on a herring seiner. I bought my first boat, a lobster boat, in 1976 and fished out of Manchester, MA. I also groundfished in the winter and spring. In 1985 I rigged my boat for Scottish seining and by 1985 I was groundfishing full time. In 1985 I purchased a small dragger, the EXPLORER II and bottom trawled out of Gloucester, MA. Since then, I have owned and operated a number of small groundfish boats, and currently own and oversee operations of four gillnet boats out of Gloucester which employ seven people. Because of the restrictions placed on the gillnet fleet, we utilize two boats for each crew, and rely on Days at Sea from 7 other permits which have been acquired through the years. I also own and operate a small charter-head boat, and take charters for bluefin tuna striped bass. My various titles are as follows:

Operations Manager, Owner:
 Heidi & Heather Fisheries, LLC
 Scotia Boat Too LLC
 Rock On Products LLC
 Operator Charter Vessel ROCK ON

Vessels:
 55' HEIDI & HEATHER FED PERMIT #230422
 45' RYAN ZACHARY FED PERMIT #149318
 42' SCOTIA BOAT TOO FED PERMIT #121546
 45' JULIE ANN FED PERMIT #149610
 Seven skiffs with permits to support the four vessels above
 ROCK ON (Charter) 0728

I am also President of RockOn Products, which produces an array of floating lures for targeting bluefin tuna for the recreational and commercial market. RockOn is a sponsor of the annual Tag-A-Tiny tuna tournament which donates 100% of its proceeds to Dr. Molly Lutcavage's bluefin tuna research.

I have been involved in the management process, having assisted in formation of the following groups dedicated to assisting in the development of sustainable fisheries, while ensuring the continued participation of small business like mine and the community in which I live.

Co-founder/Chairman, Mass Gillnetters' Assoc.
 Co-founder/Chairman, Gulf of Maine Fisherman's Alliance
 Co-founder/Director, Northeast Seafood Coalition
 Acting member, Choir Coalition
 Board of Directors, Mass Fisheries Recovery Comm.
 Board of Governors, Manchester Harbor Boat Club
 Member, East Coast Tuna Assocf,
 Member since 1972, Mass Lobsterman's Assoc.
 2009 Sector Leader – President Inshore Fixed Gear Sector

Duties and Responsibilities

Attended all NPMC meetings for the Gulf of Maine Fisherman's Alliance and Mass Gillnetters Assoc, as Chairman, Northeast Seafood Coalition during its conception. Reported back to Assoc. with all information from council meetings. Met personally with Andy Rosenberg, acting Director prior to Pat Kurkul for all Assoc. related business.

Every year, I receive NMFS permit holders letters for my four active boats and seven permits. Often, I receive duplicates for a number of boats and the quantity from the one region is thousands of pages per year, which I have to sort through and read. The complexity of the regulations has become unmanageable, particularly where the cost of an innocent mistake can cost me my business. In addition to the mailings from this region, I also receive regulatory letters from the Highly Migratory Division of NMFS, and the Commonwealth of Massachusetts Division of Marine Fisheries. I also get mailings from the New England Fishery Management Council and the mid-Atlantic Council. These often contain complex and conflicting interpretations of present and upcoming rules. The paperwork burden is huge.

We are frequently boarded by Coast Guard members carrying automatic weapons and questioned by NOAA agents who carry weapons and identify themselves as criminal investigators.

Over the years, I have had a number of incidents which have raised significant concern as to the commitment of personnel at the National Marine Fisheries Service's claimed commitment to ensuring the viability of the region's fisheries, which are generally conducted by small businesses.

II. Statement from Pat Kurkul

At the first NFMC meeting Pat Kurkul attended as Acting Director, I approached Pat and told her that I was representing the Gulf of Maine Fisherman's Alliance and had been through out Andy Rosenberg's stay as Director and I would like to know what she envisioned of the small vessel fleet and her intentions going forward. Pat then told me her intention was to eliminate the inshore small boat fleet as soon as possible.

I then returned to my seat and told Paul Cohan, President of the Assoc. Then I informed Attorney Ouellette as to what Ms. Kurkul had told me.

My Reaction

I was absolutely appalled at what Pat had said and from that day until the present I believe she has made every attempt to follow through with her statement.

Subsequent Discussions

Since that first council meeting Pat has refused to give me any time for discussion on this issue!!

Every time I tried to bring this in front of the NFMC I have been told it can not be discussed because of the Paperwork Reduction Act and/or it is not on their agenda.

III. Statement by Cathy Rodriquez

At one of the next couple of Council meetings, when I raised the issue of how my crew and I were expected to support ourselves, service our vessels and keep current with hundreds of thousands of dollars in loans on my vessels, I was told by Cathy Rodriguez that Burger King was hiring. Cathy at that time was working beside Pat Kurkul as an assistant administrator. I did not say much to her, I was very polite, just once again told Paul Cohan. Stephen Ouellette was sitting with me at that Council meeting.

IV. Tom Hill Statement

Nov. 16. The Tavern in Gloucester. I was trying to get the Council to discuss the issue of the small boat fleet not being allowed to fish in the western Gulf of Maine closed area after 3 years of being closed. The council Chairman Tom Hill at the start of the lunch break came to me as everyone was leaving and told me to stop trying to bring something up that was not on the agenda. Standing next to me was David Ellington (the herring guy) and Federal Cop Dick Livingston. I said it was not right to close the area forever. Tom then took his index finger in his right hand and started pushing it into my chest and saying, "You and your inshore fleet are all done." I asked him to stop pushing me and he was getting all red in the face and said, "You heard me, you little guys are all done," still pushing his finger in my chest. Once again I asked him to stop, he did not and I made a move toward him. The Cop came over, told Tom to leave and asked me not to touch him!! Ann Margaret Ferrante came in at the next moment to find out what was happening and I told her what had happened.

V. Frank Italia Statement

1997 or 1998. Special Agent Frank Italia said he did not like Captain Don's attitude and wanted to know how much I paid him and how much I and my wife made and how much money we had in the bank. I told him it was none of his business and he said he's a federal agent, it is his business, and he will find out one way or another.

VI. Violations

November of 2007. I was asked by my Captain Don Smith to call the NMFS Days at Sea monitoring person Carol Blezinsky to see how many days were left on the SCOTIA BOAT TOO. We had been trying to get this information for some time, but NMFS advised me that the system was having problems. Because DAS were calculated at different rates in different areas, it is impossible for a vessel owner to know how long he is called into an area and what NMFS will assess for DAS on any trip. I called Carol, she told me there were 2.5 days left and not to worry because I had a leasing application on her desk and as soon as it was signed by an enforcement agent she would post the days on the computer and she would then subtract days from the total if the boat went over at that time. The boat went fishing 5 days past and I got a call from agent Dan DeAmbrusio to bring the boat to port, it had been red flagged and was being seized along with the catch. After trying to discuss this with him I called Carol Blezinski. She said, "Richard, I am so sorry," and agent came and took the lease application and told her not to say anything. They did not sign the application and let the boat go over on days by $2.5 \times 2 = 5$ days.

1. Days at Sea

I was told that because the boat was now over on Days at Sea, that even though I had over 200 DAS available on other boats, I could not fish the SCOTIA BOAT TOO until I settled with NOAA. Unless I agreed to pay over the entire proceeds of the trips in question – about \$25,000 – the boat would have to remain tied to the dock until either I was issued fines of \$10,000 per day for each day the boat fished beyond its allocation – despite the pending DAS lease. I was also advised that NOAA takes the position that if I challenged a fine, it could be increased to \$140,000 for each violation. Although I had already paid the crew and the expenses for the trip in question, I agreed to pay over the proceeds of the trip to get the boat back fishing so the crew could support their families. I was also charged for the DAS, so NMFS got the DAS and the money.

2. Yellowtail Exemption Letter

Every year, I visit the National Marine Fisheries Service Permit office in Gloucester, MA to review the renewals of my permits to make sure I have all of the necessary permits, letters of authorization, etc. On my vessels RYAN ZACHARY, HEIDI & HEATHER, and BELINDA B I had the

Yellowtail Exemption Letter. I was going to send the SCOTIA BOAT TOO fishing in the area of Stellwagen Bank where the yellowtails are. Being very concerned I went to the NOAA Building and asked to get the Yellowtail Letter for the vessel SCOTIA BOAT TOO. At that time I was told by a person in Permits I did not need this letter because they were doing away with it. I said I have it on my other 3 boats and would like to get one just in case for the SCOTIA BOAT TOO. The person ensured me that it was not necessary. After the Gloucester Seafood Display Auction was raided my captain was called in by enforcement. He was told that if he told the agents what was going on at the GSDA they would drop the charges! After Don spoke to them, I was also called in and Attorney Ouellette and I went in to see Agent Mike Henry and Gino Moro. I explained to them what had taken place with the person in Permits and they told me I did not need the letter. They then told me if I tell them what the GSDA was doing illegally I would not be fined. I told them I was not aware of any illegal activity at the Auction, and they told me that wasn't good enough. Months later the boat and Captain were fined \$58,700. We have since agreed to give up 18 days at sea to resolve the case.

After paying \$25,000, I tried to explain to my wife what was in the FedEx box, \$58,700 for not having a piece of paper on the boat. She said you can't win with these bastards, what are we going to do? Then my daughter Heather came in from the other room and said, "Does this mean I can not go to college?"

During the years we possessed the LOA's we were routinely boarded by Coast Guard, NOAA and Massachusetts officials, and never asked for the LOA. I have since located the original Yellowtail LOAs for all of my vessels. Some of these have end dates before the start date. Although we could not locate the 2005 LOA for the SCOTIA BOAT TOO, I located two 2004 LOAs for the boat, the original and a "Duplicate". My belief is that when we renewed in March of 2004, they may have issued me a Duplicate 2004 letter, and I may not have noticed the difference.

May 2009

April 1st, 2009 I sent the SCOTIA BOAT TOO to New Bedford to fish 100 miles offshore, the closest area that the small boats can fish in April and May. May 9th I got a call from agent Mike Henry telling me that the SCOTIA BOAT TOO had been fishing since May 1 without a valid permit, the catch was to be seized and the boat would have to be tied up until we resolved a problem. He said they had been tracking the boat and it was in Block Canyon 100 miles out of New Bedford and in 10 hours, the time it takes for the boat to steam in, he would have agents waiting to seize it. Being on my way back from New Bedford I called Attorney David Smith and asked him immediately to go to the NOAA Building and see what was wrong. After several calls to Mike Henry he told me that because my captain had made a mistake on Vessel Trip Report for Nov. 2008 on which he had put the wrong month, they had not processed the renewal of the vessels

Testimony of Richard E Burgess.doc

permit. David Smith, after going to NOAA called back and said there was an error on the VTRs, the captain make a mistake and wrote in (x) DID NOT FISH for 10/08 instead of 11/08 DID NOT FISH. The vessel was tied to the dock Nov. Dec. Jan. Once again NMFS Law Enforcement agents let the SB TOO continue to fish for several trips before notifying myself or the captain.

As a small businessman, I try my best to comply with all regulations, and respect the laws of this great nation. But I think the National Marine Fisheries Service continues to show a lack of respect of understanding of what it takes to operate vessels in harsh environment, and the costs and expense, and impossibility of remaining in compliance. Violations are issued for Days at Sea, where NMFS is unable to give us current data, and then looking back is able to assess us fines, after they issued sailing numbers for a vessel's trips.

I am committed to this industry, my crews and their families and my community. With hundreds of thousands of dollars invested, a significant amount owed to my community bank, I can not afford repeated violations for bookkeeping errors, particularly when NOAA can't provide me the data I need, such as DAS usage, and then issues my boats sailing permission, despite permit issues for DAS issues, where they can't provide the information to me on a timely basis.

This is not the way I, or other members of the American fishing industry expect our government to treat us. We work hard to bring wholesome fish products to the American people and to support our coastal communities. We have sacrificed for the last fifteen years to rebuild fisheries, with great success, see the attached NEFMC diagram. We ask for no hand outs, just the right to work hard every day and help feed America, with dignity, to be treated reasonably and perhaps with a little respect from our government for the sacrifices we have made and make every day. Is that too much to ask?

I strongly urge this Committee to see that all victims of NOAA law enforcement, like me, are compensated and monies we were wrongly forced to pay is refunded to us. Thank you for the opportunity to speak with you today.

Richard E. Burgess
2/26/28

Mr. KUCINICH. Thank you for being here, Mr. Burgess.
Mr. Kendall, you may proceed.

STATEMENT OF JIM KENDALL

Mr. KENDALL. Thank you, Chairman Kucinich.

I would like to reiterate what Mr. Ouellette said earlier and offer my thanks for the opportunity for us to provide this testimony. I'm sorry. I'd like to offer my thanks for the opportunity to offer our testimony before you. And hopefully something can come back to offer some relief to this industry that is so much a part of our lives.

But my name is Jim Kendall and I have been a commercial fisherman, well, I have actively fished for 32 years. I was a scalloper out of New Bedford. I ran several boats. I came ashore because of a severe injury that wouldn't allow me to fish any longer. I'm lucky enough, I guess, in a manner of speaking, to stay within the industry on the fringes and work with the people that I know best.

Over these years, I have come to hear some terrible stories, as well, but I'm not here to provide anecdotal evidence, because there are people that can give you their own heartfelt grief and true testaments.

Some may wonder why I'm testifying before this committee because so many years have passed since I fished and actually had dealings with law enforcement. It's been more than 25 years since I was cited for my one and only violation in all my years of fishing. Though the years have not lessened that drama, and I was found guilty for exceeding what we called the scallop meat count. At that time it was 40 count in place, which meant that you couldn't produce scallops that were more than 40 to a pound. If you had a trip of 18,000 pounds, they would take average counts out of that trip, 10 of them, and then do the math and add them up and you had to average 40 scallops per pound or less on that.

One particular trip we didn't. It was 1985. There was particularly bad weather, scallops froze. They didn't gain any moisture and we lost. But the particularly troubling point of that case was we went to court. We were one of the first cases, I guess we were somewhat of a poster child in that manner, and at the trial I mentioned that the officers or the agents in charge forgot to write down three of the counts as they were doing their averages, and the agents never denied that. They actually admitted that they did forget to write them at the time and put them in later.

The judge said, So what? It didn't really matter. It was no consequence. We produced several other statements that we thought would help describe the problems inherent in that type of fishery management, and in the end the judge said the fine was \$14,070.71. That was 25 years ago. That was just the beginning.

That sounds small compared to what you hear here today, but that was 25 years ago, and the judge looked at me and told me we were lucky he didn't increase the fine. So there was definitely no chance of appeal of that particular judgment.

Was this an unfair enforcement action? Not with the facts I presented, but like I say, when you look at the facts and the judge dismisses not writing down the three counts, I think there was something particularly troubling about that aspect of it.

In subsequent years, I have been asked to assist other fishermen or vessel owners who have run afoul with the regulations. In each of these cases I felt, while an infraction may have occurred, it was never a willful or deliberate attempt to break the law. But the resultant penalties would belie that.

In fact, there never did seem to be any rhyme or reason to most of the penalties levied or many of final settlements. A lot of the fines are put in with the scare tactic with the intent that if you get an offer to settle up, you are much better off to take it and run. A lot of fisherman, unfortunately, have had that circumstance happen.

I've had a pretty good relationship with enforcement over the years, with many, if not most, of the law enforcement agents. It has put me at some odds sometimes with commercial fishermen. How can you deal with the guys that are hurting us so badly? Someone has to.

I was chairman of an enforcement group called The Law Enforcement Working Group, which was actually authorized by the 1996 reauthorization of Magnuson. It's been the only time that I know of that there was a working group like this established by Magnuson to take people from within the industry and work as an advisory panel with a commandant of the First U.S. Coast Guard. As such, we met usually quarterly with enforcement agents, Coast Guard enforcement, NOAA general attorneys, and fishermen. We'd all sit in a room, we'd speak informally, and get to some of the points and be able to deal with some of issues.

Unfortunately, basically, one gentleman took offense with having to deal with us in that intimate relationship and began to forget the schedule for coming meetings. Initially I think he broke the Magnuson Act by virtue of him just disbanding this group.

Because of my position as chairman there, I often appeared at a center called The Nerve Tech, which is a training center for Coast Guard law enforcement personnel and boarding officers, and we would bring industry people in to meet.

These are the kinds of interactions where these gentlemen have to get together with the fishing industry to learn a little bit more about them rather than on the other side of the table where there's a pencil and paper where they are about to charge the fisherman.

I tried over the years to encourage this, go back to this particular type of joint workmanship or cooperation, but it's failed to come back onto the table. So I went home to look at what would they consider looking at these type of arrangements to get these people at the table together.

Thank you.

[The prepared statement of Mr. Kendall follows:]

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Captain James M. Kendall

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**Testimony of James M. Kendall before
The Domestic Policy Subcommittee of the Oversight and Government Reform Committee
Tuesday, March 2, 2010
Kyrourz auditorium, Gloucester City Hall, 9 Dale Avenue, Gloucester, MA**

Good morning. My name is James M. Kendall, but I am better known within the fishing industry as Jim Kendall. I am a former commercial fisherman from New Bedford, MA, and I have been a member of the fishing industry and the fishing community for nearly 50 years. I fished actively for thirty two (32) years before a severe injury forced me ashore in 1994, and for the past 16 years I have worked & served in a variety of vocations and capacities within the fishing industry.

Some may wonder why I am testifying before this committee since so many years have passed since I last actively fished, and had actual dealings and/or interaction with law enforcement. It has been more than 25 years since I was cited for my one and only infraction, a scallop meat count violation, but the years haven't lessened the trauma of that experience. I won't go into great detail other than to point out that the infraction that I (as captain), was charged with and found guilty of, was for exceeding the 40/lbs. scallop meat count, by one (1) scallop; our final meat count average was forty one (41) scallops. A violation of the management regulations? Apparently. A criminal act? Unlikely. However, the monetary penalty for the infraction was \$14,070.71!

We had our day in court, but it did nothing to lessen that penalty, in fact the judge said "we were lucky that he didn't increase our penalty"! However, several good things did happen, with regard to enforcement procedures, following our trial. More effort was to be made to take random samples from scallop bags which also were to be randomly selected; captains were offered an opportunity to take their own counts if they felt that the agent's count was inaccurate, and an average of those two (2) counts would be used as one of the ten (10) samples taken; a tolerance range was also added to the final count. While these may be looked upon as favorable actions, the problem was what had to occur for us to get to that point.

Was this an unfair enforcement action? Not with the facts that I have presented, but there was at least one troubling issue that I raised at the trial where the agents forgot to document three (3) of the counts, which the agents admitted occurred, but the judge said was of no real consequence. Well it was to us!

In the subsequent years I have been asked to assist other fishermen or vessel owners who have run afoul of the regulations for one reason or another. In each of these cases I felt that while an infraction may have occurred, it was never a willful or deliberate attempt to break the law, but the resultant penalties would belie that. In fact there never did seem to be any rhyme or reason to most of the penalties levied, or many of the final settlements. I recall that a penalty schedule was to be developed and applied to the various NOVAs. I don't know that it ever was, but judging by the published enforcement reports it doesn't seem likely.

Now I've had what I would consider a fairly good relationship over the years with many if not most of the NOAA enforcement agents, and their Coast Guard counterparts, and I hope this testimony won't harm that, but there needs to be changes made! Fishermen are first and foremost fishermen, not criminals! Yes, there are some who undoubtedly are, but the vast majority of them are trying to provide for their families, and their crew's families. They are not looking to rape the oceans, kill the very last fish and destroy the ocean habitats as some have

proselytized. In fact, herein is where the very problems begin. Call them criminals, defile them and demean them enough, and soon you can see nothing else, so you treat them as such. Too many times fishery management regulations are designed and written with more concern for restrictions and regulations and how to enforce them, rather than for good fishery management and conservation.

There is ample evidence that even seemingly minor infractions have caused extreme, insurmountable hardships for the fishermen who are charged with them. Noncompliance of any sort is viewed as being willful, done with intent, or total disregard of the law, and many times subject to the most egregious fines and penalties. Once again, please remember that these infractions are for the most part civil infractions, not criminal.

The Magnuson-Stevens Fishery Conservation and Management Act as amended in 1996 authorized the Commander of the 1st Coast Guard District to establish the Coast Guard Law Enforcement Working Group, which was to serve "as an informal fisheries enforcement working group to improve the overall compliance with, and effectiveness of the regulations under the Northeast Multispecies Fishery Management Plan." When the group was formed, I was chosen to be the Chairman, and for 5 or 6 years I believe that the Working Group was able to follow that charter. It afforded fishermen and industry members the unique opportunity to meet and discuss issues in informal settings with the various levels of enforcement, including NOAA General Counsel, federal and state enforcement agents, USCG officers, up to and including several of the Admirals who commanded the 1st District Coast Guard.

As Chairman, I was invited to attend the opening of the USCG's Northeast Regional Fisheries Training Center (NERFTC), and soon after I was asked to address the training classes of Coast Guard law enforcement and boarding officers as an industry speaker. The intent was to try and put a face on the industry, which many of these officers had never even met before, and to help them understand what it was like to be a fisherman. While doing so I was often asked by some of the CG personnel what the fishermen thought of them. Many fishermen particularly Captain Rodney Avila, accompanied me to these classes, and met and spoke with them. I soon began to hear back from fishermen that the tenor of recent boardings had changed to a great degree, and soon even more fishermen were willing to accompany me to take part in the classes themselves.

After about 5 years the Group began to fall out of favor with one or two individuals, and the meetings with industry ceased to be scheduled, and the invitations to appear at the NERFTC classes also ended. I cite this simply as just another example of how efforts to encourage cooperation among fishermen and enforcement personnel can be undermined and destroyed by those who see fishermen only as crooks and violators who cannot be trusted, and must be constantly controlled by the threat of force or punishment.

While I hope that this hearing and other actions will bring about changes that will benefit both the fishing industry and enforcement, I fear that pending regulations implementing Catch Shares and/or sectors will soon place the New England fishing industry in a situation that will soon be totally untenable for many if not most. While we often fear the unknown, the near certainty of failure is much more terrifying. This uncertainty is particularly frightening if there is no safety net in place and failure is not an option!

Mr. KUCINICH. Thank you, Mr. Kendall.

The Chair recognizes Mr. Tierney for 5 minutes.

Mr. TIERNEY. Thank you. First of all, thank you all for your testimony here today, but thank you for consistently over time providing us with the information that we need and the firsthand factual accounts of what's been going on.

Mr. Ouellette, is it your opinion that there needs to be change in the statute, or is it your opinion that the current language, if used properly and applied properly, would allow for some remedy in the situation?

Mr. OUELLETTE. It's an interesting question. It implies that somebody is actually looking at the statute and its intent. I assume that Dr. Lubchenco and her staff would do that.

I don't believe that there is a problem with the way the statute is drafted, *per se*. The statute provides a fairly high limit for the setting of penalties. I believe the statute sets up to \$100,000, but apparently Congress has given a cost of living on fines and it's now up to \$140,000 due to that secondary state.

The difficulty that I think we have is that—and I have met with NOAA counsel about this frequently—is their statement that they believe that Congress has advised them that no violation should be the cost of doing business. Those terms come up frequently. So they read into that any violation can theoretically be a business-ending violation. They cite the language in the statute and in the regulations which allows NOAA to assess fines and to force the reorganization—force the reorganization of an individual's business, which we all know is bankruptcy.

Mr. TIERNEY. As a lawyer, did you find that language that they refer to in the statute?

Mr. OUELLETTE. The language, I mean the authority is there. It's virtually—

Mr. TIERNEY. I meant the language about not treating it as a cost of doing business.

Mr. OUELLETTE. No, it's not there. Again, we all know that there are situations, particularly you read about the category 2 fish cases where somebody, you know, pulls into a port with \$5 million worth of fish, pays the \$100,000 fine, laughs and ships off fish.

We don't have those situations in domestic fisheries. Our catches are much smaller. All of these vessels are U.S. permitted and they all have some tie to the United States so if they did commit a major violation, they lose their permit, which actually nowadays is probably the most valuable aspect. There is nothing that I see that requires them to hand out a half-million-dollar fine because somebody filed some logbooks late that actually aren't even used in the science anymore.

Mr. TIERNEY. Mr. Ouellette and Mr. Burgess on this, Mr. Kendall, you may not be able to help us, but if you can, I ask you to do so, are we talking about the same enforcements agents over and over and over again, or are we talking about who, regardless who the agent, is observing this kind of conduct?

Mr. OUELLETTE. This actually isn't the agents who are doing this in most cases. The agents investigate. I will agree that in the last 10 years I have become aware of a more aggressive form of questioning to the point that my clients—we used to cooperate with law

enforcement up until the late 1990's. My clients are prohibited from talking to NOAA enforcement agents. As soon as they call me and I know NOAA is involved, even the agents now know not to question the client.

Mr. TIERNEY. All the agents or a specific subset?

Mr. OUELLETTE. All agents.

Mr. TIERNEY. You find the attitude pervasive?

Mr. OUELLETTE. Yes. And we also found that increasing from about 1999 until I really cracked down on the policy with my clients, that every time a fisherman was charged with something, a false statement charge got thrown in. And they were pretty spurious, but they were throwing them in in every case. That's when we started seeing the criminal investigators come out and cards come out.

The difficulty with the fines is that those emanate not from the law enforcement arm, they emanate from the General Counsel for Law Enforcement, and I'm not sure that we've seen or heard anything from that branch because they seem to be independent.

But we see repeat fines, I mean ridiculous fines, out of the Northeast region on a regular basis. I mean, that's really what prompted my initial complaints to the agency and to my congressional delegation going back to the late 1990's.

Mr. TIERNEY. Thank you.

Mr. KUCINICH. Congressman Frank.

Mr. FRANK. Mr. Ouellette, I just want to clarify what the message was. Mr. Tierney asked if you had a problem with the statute throughout. You were actually talking about the enforcement part. The lack of flexibility, you weren't talking about that? So you are saying they can improve enforcement without a statute change?

Mr. OUELLETTE. I think you can improve enforcement without a statutory change. My concern is given the track record between the industry and this agency, I'm not sure that they have—

Mr. FRANK. No, I just didn't want to—we weren't talking there about flexibility?

Mr. OUELLETTE. Right.

Mr. FRANK. You talked about the disadvantage you are at because you can't get the information which they used for setting the penalties. Is that different than other law enforcement situations, or are you given less information here than you might be if you were defending people in other circumstances?

Mr. OUELLETTE. In my experience, when I've dealt with other administrative agencies—fortunately I don't do much criminal law—it's unprecedented because—

Mr. FRANK. It's different.

Mr. OUELLETTE. Right. Basically, they take the position, we are attorneys, we assess the fines. Somewhere we do have a minor set of guidelines—

Mr. FRANK. Let me cut through this, and I think Mr. Tierney and I will initiate a pretty strong request to the fishery service that they no longer do this. This is the Federal Government. We are not some individual entity in a dispute. We have an obligation for be fair to the citizens so the Federal Government acts in a way that seems to be inappropriate.

I think, if you will support us, provide us memorandum, I believe we will be able to insist that they provide you the information not for anybody to get off, but you have some kind of basis for all this.

Let me say, Mr. Jones, I appreciate your staying here. Mr. Burgess has made some pretty strong statements. I'm now asking you, Mr. Jones, to look into those and tell me if you contest, for instance, someone asking him what he made and what the captain made, and then tell me if any disciplinary action was taken or what was done about that. Because once we hear these things, it's really important for us to know that people are not going to be doing this. So everyone specific to what Mr. Burgess mentioned, I would ask that you talk to them.

Mr. Tierney asked the cost of doing business is not—this notion shouldn't be the case.

Mr. Kendall, who was it that, you know, stopped coming to those meetings?

Mr. KENDALL. Well, former Coast Guard officer by the name of Captain Raymond Brown. And I think you might recall that you asked the admiral to appear in your office one time to explain his actions at that particular point in time. Captain Brown was a difficult gentleman to get along with. He seemed to think that all fisherman were violators. Those that weren't, it was only because he hadn't caught them yet. As a matter of fact, he made that statement to Ron Avila at one point. Captain Avila took quite a bit of offense to that. Even to this day he does. I like to kid him about it. But it was a serious type of thing, because, like I say, it was a great organization or—

Mr. FRANK. Let me ask you—to the court reporter, it's A-v-i-l-a.

What's the status of that, worth trying to resuscitate? Or is that too far gone? Is that worth trying to resuscitate or is that too far gone?

Mr. KENDALL. Well, the reauthorization never reappeared in Magnuson again and it never extended to any of the other council regions. But I think yes, sir, I think it is very important that we try to rebuild those particular roads because that was a way for us to interact with them on a civil level without getting into our criminal situations. And I think it worked quite well.

Mr. FRANK. Thank you. Mr. Chairman, I will yield back.

Mr. KUCINICH. Thank you very much, Congressman Frank.

Mr. Burgess, I listened very carefully to you recounting your experience with enforcement. Do you feel like you were being treated as a criminal?

Mr. BURGESS. Pretty much, yes.

Mr. KUCINICH. Is that in talking to your colleagues who are fishermen, is that something that your experience is totally unusual, or have you ever talked to people that have had somewhat similar experience?

Mr. BURGESS. I don't think there is anybody in the industry around here that would disagree with me right now.

Mr. KUCINICH. What do you as a fisherman want to see changed here? This committee is an oversight committee, but it's also government reform. What do you want to see changed? We are here to listen to you. What do you want us to see change?

Mr. BURGESS. Right now the amount of gentlemen that are left in the industry, we all get along. It wasn't really that way years ago. Now there is only a handful of guys left. Everybody trusts each other; we work together. We want to be respected as hard-working individuals, small businessmen. We want to stay in the industry.

If you get a piece of paper and there is a date wrong or you don't have your paperwork in the boat, I don't want a \$10,000 fine. I want to be able to say, yes, I have it. It's at home with my paperwork or call the agency, everything is good.

The entire fleet, every owner, captain, the guys on deck, they are so afraid of doing one thing wrong and losing everything that they have ever worked for. That's not what we are all about. We are the environmentalists. We have rebuilt this fishery. We want to keep it that way. And we just want to be treated as honest, hardworking people.

Mr. KUCINICH. Thank you, Mr. Burgess.

Now, Mr. Ouellette, in your written testimony you have said, "Compliance, not fines should be the goal." I think we all agree. Again, can you give us three things, a reform that the Office for Law Enforcement would do differently to optimize compliance?

Mr. OUELLETTE. I would hope so and my—the concern I see now—

Mr. KUCINICH. What can they do? Give me some examples of what they can do to do it better.

Mr. OUELLETTE. For example, Mr. Burgess had an issue with days at sea. One of the problems is that NOAA, who keeps a record of vessels' days at sea, is often unable to tell us because they do an internal calculation that we don't have access to.

It may be a scalloper as to how many times he dips within the line—I'm not sure you are familiar with it, but boats are tracked. They are tracked every time they leave port by an electronic monitoring system. NOAA is unable to give us often a vessel's days at sea. Yet, if you are out there, they will continue to issue you sailing numbers and they know exactly when to meet you at port to seize the catch because they know when you are coming in.

There are many instances where NOAA personnel observe or are able to detect potential violations and they really just sit back and let them occur. That's a significant problem that I have.

A recent case we had that they were late on their logbook compliance. People at the agency knew it. They said it's a crucial issue, they had to have this data on a weekly basis, yet they waited 8 months before they took any action, and the only action they took is not to call the boat and say, can you give us the number? They called NOAA Law Enforcement who issued a quarter-million-dollar fine.

We have—there is really a very poor working relationship between the industry and the agency and that's something that needs to be improved.

Mr. KUCINICH. Let me followup on that.

Do you think serious reform of OLE is possible under the current leadership?

Mr. OUELLETTE. I'm very concerned with the ability of NOAA to work with this industry in a committed, cooperative fashion.

Mr. KUCINICH. Mr. Burgess, would you answer that question. The question is: Do you think serious reform of OLE is possible under the current leadership?

Mr. BURGESS. It hasn't taken place yet. It should have taken place years ago.

Mr. KUCINICH. Mr. Kendall.

Mr. KENDALL. I would suggest that the problem doesn't start at the bottom. It actually starts at the top, sir. If this is going to come, it's going to have to filter its way down. They can't continue to treat the industry as criminals, common criminals, and expect that the agents are going to work with them on a one-to-one basis. People just don't work that way. Once you buildup that feeling that there is something wrong with this person, you tend to look at them a little bit differently. They have.

Mr. KUCINICH. Thank you, Mr. Kendall, and I thank the panel. I'm going to ask—

Mr. FRANK. Can I just—can we get—

Mr. KUCINICH. I was going to go to closing statements.

Mr. FRANK. I will wait.

Mr. KUCINICH. Thank you, Congressman Frank.

Congressman Tierney, you are recognized for your closing statement.

Mr. TIERNEY. Thank you. First of all, thank you, Mr. Chairman. Again, we appreciate it a great deal that you were willing to come here and have this hearing in Gloucester. It means a lot to us and we appreciate that.

Barney Frank, we appreciate all the work that you have done on this issue over the years and you are continuing to do. It is important.

We appreciate the mayor and local representatives and their effort and everybody in the community here. I think what we have here today is a good example of what we have been screaming about for a period of time with varying and unsatisfactory results. We have a new Administrator. Even though I know some people thought that she was listening today and they are not quite sure she heard, we are going to keep working at it to make sure that what was said is heard, as well.

Mr. Jones, thank you for staying here. I hope you heard it, including the introspection that's necessary at the top starting with you and then right down through all your personnel and working with that. This is not something that you can continue. It's gone on for far too long.

We need to look at it legislatively. We need to look at the way the enforcement is actually exercised, and all in the record that you put forward today is going to help us to go back to our colleagues. I think the legislation is the first push on that and we can continue to push on how they are enforcing that law and take a look at it.

We will expect the reports from Mr. Jones to the incidents, individual incidents, and from Mr. Zinser, the Inspector General, individual incidents. We are not all about looking back, but it's important to make sure we identify what went wrong and make sure that's rectified so we can go forward and have some knowledge. What we are going to do then is to clarify and correct the situation.

Again, I want to thank you, Mr. Chairman, and Mr. Frank. On that, we have some work to do and we will be doing it.

Mr. KUCINICH. Thank you very much for your closing statement. The Chair recognizes Congressman Frank.

Mr. FRANK. I join my colleague—first, I appreciate Mr. Tierney taking up this issue and then for the chairman to come out from his district and from Washington, I appreciate it.

I did want to say there is occasional goodness. Mr. Kendall reminded me when I became the representative of a fishing industry, New Bedford, in 1992 and one of the first things I learned about was the meat count. We did get that abolished. So that is no longer there. But it's relevant because it was an inherently difficult means of enforcement and it reinforces my view of the notion that you have to get the law right because there's some things that are always going to lead to problems.

Beyond that, let me reiterate, law enforcement is a tough business. And no one should take this as any denigration of people who are in the law enforcement business. These are men and women who do a tough job. They do a dangerous job sometimes. It's not their fault if they are put in inappropriate situations. If people who are in law enforcement are put in a situation which primary job is to be elsewhere, it's not necessarily a criticism of them. Obviously, there are some individuals that commit abuse. So it's important, while maintaining respect for the whole operation, to be able to deal with that.

So I do look forward to hearing about how this is going to be corrected and I have to say, Mr. Jones, and to Dr. Lubchenco, Mr. Schwaab, who is here, who is going to be head of NMFS, I have not yet heard a response proportionate to the problem that has to be resolved. We will be looking at that carefully, but I think there is a natural tendency to kind of denigrate the value, the seriousness of the problem.

Finally, Mr. Tierney and I, we look forward to working with our colleagues. People say, Oh, I don't like to say I told you so. That's a lie. Everybody loves to say I told you so when you get those opportunities. I find as I get older saying I told you so is one of the few pleasures that does not diminish with age. So I like to say it.

But Mr. Tierney and I voted against the Magnuson Act in 2006 when it was passed by the lame duck Congress signed by President Bush. It was, I think, too rigid and inflexible then. I do not believe you can solve all of these problems that are also dealing with the statute. So we will continue to press for improvements in the administration within the statute, but we will also bring this back and we will be meeting soon with a group of our colleagues up and down the Atlantic coast, not just the Northeast, but from Maine to Florida and I hope elsewhere as well because we are determined to begin the process of amending the Magnuson Act. That's an essential part of fixing this problem.

Mr. KUCINICH. I thank my colleagues, and I want to say that for a congressional investigative subcommittee to have a field hearing anywhere, just doesn't happen. The reason why we came here to Gloucester is because Congressman Tierney expressed to me his great concern about arbitrary, aggressive, even abusive enforcement practices.

I agree with my colleague, Mr. Frank. We are not against law enforcement. We make laws. Laws are enforced. That's part of the cycle that government's involved in. But what brought a congressional investigative subcommittee here were a number of red flags that we saw in the IG report and that came from talking to dozens of people we interviewed prior to this hearing.

So, of course, to Mr. Frank and other Members around the seacoast, this is an ongoing interest, and as it's an ongoing interest in this investigative subcommittee, we are going to retain jurisdiction.

You know, when I heard Mr. Burgess's account, and I'll just say this to Mr. Jones, and I'm glad you stayed to listen, the gotcha climate that he portrays, if you had been treated as a witness with a gotcha, you would have been humiliated before this subcommittee, but we don't do that.

You have to realize when you have the kind of power that law enforcement does have, you enforce the law, but you also have to be careful that it's not done in a way that seems partial, arbitrary and doesn't—if you are going to put somebody out of business, you better have a damn good reason.

This subcommittee is going to continue to look at this. I want the Administrator to understand that we are not going to let this go. And I look forward to asking some more questions. We will submit some followup questions.

I want to thank you for your presence here. I want to thank Mayor Kirk and the city of Gloucester for welcoming us in this beautiful structure here, this historic structure. This town has been a part of the history of the United States and its contribution to commerce for hundreds and hundreds of years, and if this subcommittee has anything to do about it, and certainly Congressman Tierney does and will, we are going to look forward to seeing you continue to do your work for many years to come.

This subcommittee has adjourned.

[Applause.]

[Whereupon, at 1:15 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

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Congress of the United States House of Representatives

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March 4, 2010

Mr. Dale J. Jones
Director
Office for Law Enforcement
National Oceanic and Atmospheric Administration
1315 East West Highway
Silver Spring, Maryland 20910

Dear Mr. Jones:

We are writing to demand documents and answers to questions for the record, in connection with your testimony about serious problems at the Office for Law Enforcement (OLE), before a field hearing of the Domestic Policy Subcommittee held on March 2, 2010, in Gloucester, MA.

We remind you that destruction of any relevant or requested document in connection with this Committee's investigation may constitute obstruction of justice under 18 U.S.C. § 1505, as well as constitute contempt of Congress under 2 U.S.C. § 192. Please be aware that if we discover any actions undertaken by you or at your direction that obstruct our investigation, we will take action to see that those in violation are prosecuted to the fullest extent of the law.

International travel

In your testimony, you indicated that you did not remember if your international travel had been paid for out of the Asset Forfeiture Fund. The Inspector General stated that preliminary indications of his review of the Fund reveal that your international travel was charged to the Fund.

Please provide a full accounting of all international travel taken by yourself since 1999. State specifically where the travel was (provide itineraries if you have them), identifying name of city and country of travel, name of hotel or resort if applicable, total cost and duration of travel, source of funding.

Other than yourself, please provide a full accounting of all international travel taken by other top officials at OLE since 1999. State specifically where the travel was (provide itineraries if

Mr. Dale J. Jones
March 4, 2010
Page 2

you have them), identifying name of city and country of travel, name of hotel or resort if applicable, total cost and duration of travel, and source of funding (Asset Forfeiture Fund, Agency appropriation, or other (specify)).

Provide all work products related to each trip, including any and all presentations made by you and/or other top officials, and any after-action reports documenting the accomplishments achieved on each trip.

Hiring Practices

Is it true that you have hired a number of ex-Maryland police officers in executive positions in the Office for Law Enforcement, including Mark Spurrier, Mark Paterni, and Harold Robbins?

Is it true that none of those individuals had fisheries or other natural resources law enforcement experience at the time of their hiring?

Is it true that none of those individuals had federal law enforcement training at the time of their hiring?

You stated in your testimony that the hiring of the above-named individuals was done by NOAA HR, and that you did not influence the decision. Please provide the subcommittee with all documents pertaining to the hiring of Spurrier, Paterni and Robbins. Include whether any competitors for the jobs of those individuals had federal law enforcement training and/or natural resources law enforcement experience at the time of the hiring decision?

Accreditation

Is it true that shortly after you became chief, OLE pursued certification by the Commission on Accreditation for Law Enforcement Agencies (CALEA), which is an organization made up almost exclusively of state and local police departments?

Is it true that one of the criteria for accreditation by CALEA is the development of "Traffic Enforcement Activities Review" mechanism? As OLE does not enforce traffic laws, how did you meet that criterion?

Is it also true that another criterion for CALEA accreditation is a "Court Security Function" standard. As OLE does not to protect court rooms anywhere in the country, how did you meet that criterion?

Is it true that OLE is the only natural resource federal law enforcement agency that is accredited by CALEA?

Is it true that you have served as an assessor for CALEA, conducting reviews of local law enforcement agencies seeking accreditation by CALEA? If so, please indicate the years in which you served as an assessor, and your compensation from CALEA for this work?

Mr. Dale J. Jones
March 4, 2010
Page 3

Have any other top officials at OLE served as assessors for CALEA since 1999? If so, please identify them by name, the years in which they served as assessor, and any compensation they received from CALEA for that work.

OPR

Please provide a summary of investigations conducted by the Office of Personnel Responsibility (OPR) regarding allegations of misconduct by agents of OLE since 1999. Please indicate the nature of the allegation, the date of opening and closing investigation, the investigation finding(s), and any disciplinary action taken as a result.

Document Destruction

Please provide all documents, including a list of and email correspondence, that you provided to the Inspector General, relating to your admitted shredding of documents in connection with an ongoing investigation by the Department of Commerce Inspector General.

The Domestic Policy Subcommittee has broad jurisdiction, including the National Oceanic and Atmospheric Administration. The Oversight and Government Reform Committee is the principal oversight committee in the House of Representatives, with broad oversight jurisdiction as set forth in House Rule X. An attachment to this letter provides additional information about how to respond to the Subcommittee's request.

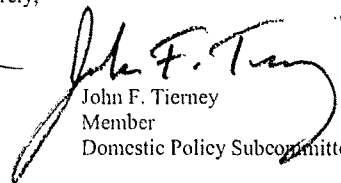
We request that you provide these answers and documents as soon as possible, but **in no case later than 5:00 p.m., Thursday, March 18, 2010.**

If you have any questions, please contact Jaron Bourke, Staff Director, at (202) 225-6427.

Sincerely,



Dennis J. Kucinich
Chairman
Domestic Policy Subcommittee



John F. Tierney
Member
Domestic Policy Subcommittee

cc: Jim Jordan
Ranking Minority Member

cc: Dr. Jane Lubchenco
Administrator
National Oceanic and Atmospheric Administration

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Domestic Policy Subcommittee Document Request Instruction Sheet

In responding to the document request from the Domestic Policy Subcommittee, Oversight and Government Reform Committee please apply the instructions and definitions set forth below.

Instructions

1. In complying with the request, you should produce all responsive documents in your possession, custody, or control.
2. Documents responsive to the request should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Subcommittee.
3. In the event that any entity, organization, or individual denoted in the request has been, or is currently, known by any other name than that herein denoted, the request should be read also to include them under that alternative identification.
4. Each document produced should be produced in a form that renders the document capable of being copied.
5. When you produce documents, you should identify the paragraph or clause in the Subcommittee's request to which the documents respond.
6. Documents produced in response to this request should be produced together with copies of file labels, dividers, or identifying markers with which they were associated when this request was issued. To the extent that documents were not stored with file labels, dividers, or identifying markers, they should be organized into separate folders by subject matter prior to production.
7. Each folder and box should be numbered, and a description of the contents of each folder and box, including the paragraph or clause of the request to which the documents are responsive, should be provided in an accompanying index.
8. It is not a proper basis to refuse to produce a document that any other person or entity also possesses a nonidentical or identical copy of the same document.
9. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, memory stick, or

10. computer backup tape), you should consult with Subcommittee staff to determine the appropriate format in which to produce the information.
11. The Committee accepts electronic documents in lieu of paper productions. Documents produced in electronic format should be organized, identified, and indexed electronically in a manner comparable to the organizational structure called for in (6) and (7) above. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page TIF files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
12. In the event that a responsive document is withheld on any basis, you should provide the following information concerning the document: (a) the reason the document is not being produced; (b) the type of document; (c) the general subject matter; (d) the date, author, and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, you should identify the document (stating its date, author, subject and recipients) and explain the circumstances by which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. This request is continuing in nature and applies to any newly discovered document. Any document not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.
16. All documents should be bates-stamped sequentially and produced sequentially. In the cover letter, you should include a total page count for the entire production, including both hard copy and electronic documents.

17. For paper productions, four sets of documents should be delivered: two sets to the majority staff and two sets to the minority staff. For electronic productions, one dataset to the majority staff and one dataset to minority staff are sufficient. Productions should be delivered to the majority staff in B-349B Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building. You should consult with Subcommittee staff regarding the method of delivery prior to sending any materials.
18. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Subcommittee or identified in a privilege log provided to the Subcommittee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail (email), contracts, cables, notations of any type of conversation, telephone calls, meetings or other communications, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto). The term also means any graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, voice mails, microfiche, microfilm, videotape, recordings and motion pictures), electronic and mechanical records or representations of any kind (including, without limitation, tapes, cassettes, disks, computer server files, computer hard drive files, CDs, DVDs, memory sticks, and recordings), and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "documents in your possession, custody, or control" means (a) documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, or representatives acting on your behalf; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that you have placed in the temporary possession, custody, or control of any third party.
3. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, telexes, discussions, releases, personal delivery, or otherwise.
4. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of the request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
5. The terms "person" or "persons" means natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures,

proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof.

6. The terms "referring" or "relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, Maryland 20910
THE DIRECTOR

The Honorable Dennis J. Kucinich
Chairman, Domestic Policy Subcommittee
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

MAR 26 2010

Dear Mr. Chairman:

In response to your cosigned letter of March 4, 2010, we have collected and are providing the documents and information that you have requested. In addition to the delivery of the documents for your review, the following comments are also provided in response to your questions and to clarify what has been submitted.

International Travel:

The documentation you have requested on international travel conducted by Director Dale Jones and other top officials of the Office for Law Enforcement (OLE) has been provided. Responsive documents are included for Mr. Jones; Deputy Director Mark Spurrier; two headquarters-based Assistant Directors, Mark Paterni and Todd Dubois; and the Special Agents in Charge (SAC) of the six OLE field divisions. The six current Division SACs are: Bill Pickering, Pacific Island Division, Honolulu, HI; Sherrie Tinsley-Myers, Alaska Division, Juneau, AK; Vicki Nomura, Northwest Division, Seattle, WA; Andrew Cohen, Northeast Division, Gloucester, MA; Don Masters, Southwest Division, Long Beach, CA; and Harold Robbins, Southeast Division, St. Petersburg, FL. Because the request was for documentation back to 1999, the OLE has sought to include information on the travel of several former SACs who have retired from the agency at various points since 1999. Some of the information is no longer available because these documents are not retained in the OLE offices, in NOAA Finance, or in archives after 6 years and 8 months. This is also true of documents related to three trips made by the current Deputy Director, Mark Spurrier. We have submitted a brief listing of the three international trips that he has taken.

In your letter of March 4, 2010, and during the hearing on March 2, 2010, your inquiries focused on the use of the Asset Forfeiture Fund to pay for foreign travel. You will see that some of the foreign travel by OLE officials was in fact paid for by the Fund. Travel for several of the trips made by Director Jones over the 10-year period reviewed was paid for through the use of the Fund. The provision of the Magnuson-Stevens Act that establishes the Fund specifies that it may be used for "... (C) any expenses directly related to investigations and civil or criminal enforcement proceedings, including any necessary expenses for equipment, training, travel, witnesses, and contracting services directly related to such investigations or proceedings." Thus the statute itself provides for the use of the Asset Forfeiture Fund for foreign travel by OLE agents and GCEI personnel in support of international enforcement initiatives and training.



Hiring Practices:

The three persons referenced in your letter—Deputy Director Mark Spurrier, Assistant Director Mark Paterni, and SAC Harold “Hal” Robbins—were formerly employed by different cities or counties in the State of Maryland during their careers. They were selected for these management positions based on merit and their overall management and law enforcement experience and qualifications. Though they did not have specific fisheries or natural resources training or specific Federal law enforcement training when hired by the OLE, they had relevant experience that met the requirements of the job announcements.

Your letter references Mr. Jones’ responses during the hearing with regard to the hiring process and the role in the selections of NOAA’s human resources office, known as Workforce Management (WFM). Mr. Jones stated correctly during the hearing that NOAA WFM reviews all applications received and makes the determination as to which applicants are qualified for the position. Under the process used by NOAA, WFM develops a list of qualified applicants from those who apply based on their screening of the applications. WFM provides that list, known as a certificate, to the agency conducting the recruitment, and that agency provides to WFM its final selection recommendation from the list. Mr. Jones does not make the decision about which candidates meet the requirements for inclusion in the certificate.

Mr. Jones confirms that, as Director, he has been the selecting official for all OLE persons hired during his tenure, including these three persons. After receiving certificates for these positions, he provided that list to a panel of two to three other staff members to review and then worked with that panel to conduct interviews of the persons determined to be the most qualified for the positions. Upon making the determination as to who would be selected, he provided that selection to WFM with the request that WFM confirm the selection and proceed with the offer. While some of the other applicants for these positions did have fisheries, natural resource, and/or Federal law enforcement training and experience, that experience was considered in the decision-making process for the final selection, along with the overall management experience of the persons selected for these positions. You have identified three of the 11 senior management officials that Mr. Jones has promoted and hired during his tenure. The eight other officials did have fisheries, natural resources, and/or Federal experience, in addition to strong management qualifications at the time of their selection.

The following is a brief overview and background for the qualifications of each of these employees for your reference:

Mark Spurrier, Deputy Director

Mark Spurrier has 34 years of law enforcement experience, joining NOAA OLE as the Deputy Director in November 1999. His law enforcement career began in 1975 with the Baltimore County Police Department, from which he retired in 1998 as the Director of Legal Services within the Office of the Chief. Immediately prior to accepting his position with NOAA OLE, Mr. Spurrier was the Director of Police and Community Programs and also served as the acting Department Chair of Interdisciplinary Programs within the School of Business and Professional Studies at Johns Hopkins University. Mr. Spurrier received his Juris Doctor degree from the University of Baltimore in 1984 and is a member of the Maryland Bar. He is a nationally

recognized authority in the areas of employee disciplinary processes, sexual harassment, and the Americans with Disabilities Act.

Mark Paterni, Assistant Director, HQ

Mark Paterni has almost 38 years of law enforcement experience, joining NOAA OLE as Assistant Director for Support Services in June 2002. Prior to joining NOAA, Mr. Paterni was a police officer with the Howard County Police Department in Howard County, MD, for 30 years, retiring in 2002 as Deputy Chief of Police. He earned his bachelor's degree from the University of Notre Dame in Indiana and his master's degree from Johns Hopkins University in Baltimore.

Hal Robbins, Special Agent in Charge, Southeast Division

Hal Robbins has served as SAC of NOAA OLE's Southeast Division since June 2004. Prior to joining NOAA, Mr. Robbins served in various positions, including deputy police chief, for the St. Petersburg, FL, Police Department for 21 years; as a chief of police in Annapolis, MD, for 5 years; and as executive director of the Florida Police Chiefs Association in Tallahassee, FL, for 8 years. He received his bachelor's and master's degrees in criminal justice from the University of South Florida. Mr. Robbins served in the United States Navy from January 14, 1966, through September 13, 1969, and was discharged honorably as an E-5. He received the Vietnam Campaign Medal (three devices), the Vietnam Service Medal, National Defense Medal, and a Meritorious Unit Commendation.

We have conferred with WFM to attempt to get copies of the certification lists and any other documents pertaining to the hiring and selection process that are responsive to your request. WFM does not retain such documents for more than 3 years. All three of these persons were hired over 5 years ago. We have provided you with the documents that WFM gave us as well as some additional documents that had been retained in the OLE office. They include an interview schedule and a draft selection letter for the Deputy Director's position from 1999 and some interview questions, notes, certificate lists, and some resumes from the SAC selection when Mr. Robbins was hired in 2004. Please note that the process in 2004 included a simultaneous recruitment for both the Southeast SAC selection and the Northeast SAC selection. Some applicants applied for both positions and some for only one or the other.

Accreditation:

The NOAA OLE applied for and began the process to be accredited by the Commission on Accreditation for Law Enforcement (CALEA) in July of 1997, nearly 2 years prior to Mr. Jones being hired as the Chief. The recruitment and advertisement for the position of Chief of the NOAA Office for Law Enforcement included experience with the accreditation process as a desirable qualification for position candidates. The agency's application to become accredited was also affirmed and cited as a management improvement in a 1998 report issued by the Office of the Inspector General pertaining to the NOAA Office for Law Enforcement, also before Mr. Jones became Chief.

The role of CALEA is to enhance law enforcement as a profession. The program is open to all law enforcement agencies, on a domestic and international basis. It provides a process to systematically conduct an internal review and assessment of the agencies' policies and

procedures, and make adjustments wherever necessary to meet a body of accepted standards. The standards upon which the Law Enforcement Accreditation Program is based reflect the current thinking and experience of law enforcement practitioners and researchers. Major law enforcement associations, leading educational and training institutions, governmental agencies, as well as law enforcement executives internationally acknowledge CALEA's Standards for Law Enforcement Agencies and its Accreditation Program as benchmarks for today's law enforcement agency.

Traffic enforcement, court security, and a number of other CALEA standards are not pertinent to the mission and role of the NOAA OLE. In the assessment process, those standards that do not apply are simply verified as such and then categorized as "not applicable by function" and the agency is not required to meet those standards. The most recent agency CALEA assessment occurred in 2009. Out of the 459 standards, the agency was in compliance with all 283 applicable standards and 176 standards were determined to be not applicable by function. CALEA standards cover a wide variety of areas within the following general categories: law enforcement role, organization, management, fiscal, personnel, operations, support, property control, evidence, and many others.

Other Federal and other natural resources law enforcement agencies participate in the program and are currently accredited. The current Federal agencies involved in the program include the Tennessee Valley Authority, United States Capitol Police, and the United States Mint Police. Participating natural resources agencies include the Hawaii Department of Land and Natural Resources Enforcement, Missouri State Water Patrol, and the Washington Department of Fish & Wildlife Enforcement Program. There are no other Federal natural resource agency participants that we are aware of.

Dale Jones has not served as an assessor for CALEA during his tenure with the Federal Government. He was trained as an assessor during his tenure with the City of Hagerstown, MD, between 1994 and 1998 and participated in only one "on site" assessment process on behalf of CALEA. That was in September of 1998. Though Mr. Jones does not know the actual honorarium amount he received for those services, the current amount paid by CALEA for such services is \$135 per day. On-site assessments are typically 3 days. Any such activity would have been approved by the city and done only on personal time. None of the other top officials with OLE have served as an assessor.

Office of Professional Responsibility:

A summary of the Office of Professional Responsibility (OPR) investigations that you have requested is provided for the period between 1999 and 2010. These incidents involve over 100 different reports of misconduct during that time frame. They involve a wide variety of incidents, which range from improper care of equipment through violations of laws. Approximately 60% of the incidents were concluded in a manner that cleared the employee and approximately 40% were concluded with some finding of fault on behalf of the employee accused. In those cases, discipline ranged from reprimand through suspensions and terminations.

Document Destruction:

You have requested a copy of documents Mr. Jones provided to the agents of the Inspector General's Office with regard to their inquiry into documents authorized to be shredded by Director Jones. The documents that you have requested are being provided. The documents consist of a series of e-mail messages, including several that were distributed by the OLE staff announcing the plans to schedule the document destruction through the services of a commercial shredding company and the subsequent plans to do so. Also included is an e-mail message to the agents of the Inspector General's office with a list attached that details a list of the files that were purged as well as a notation of those that were retained. That list includes approximately 170 files total, approximately 41 of which were retained.

Follow-up responses to questions that were raised at the hearings on March 2, 2010:

During the hearing on March 2, 2010, Representative Tierney requested information regarding the follow-up on the concerns raised at the meetings he held with NOAA in October 2005. The parties planned to meet so that the specifics of the allegations being made could be documented and investigated. However, as stated during the hearings, Mr. Jones and Ms. Ferrante were not able to meet after a number of attempts to make arrangements to do so. Because they were unable to hold the follow-up meetings to get the details of the complaints, the OLE was not able to conduct meaningful investigations of the complaints. Some limited follow-up was conducted, however most of the concerns raised at that time involved incidents related to the Gloucester Seafood Display Auction (GSDA) or associated incidents. During the course of the most recent case involving GSDA, the judge ordered that all documents and information submitted during discovery be sealed. This included the documents related to the complaints made by Ms. Ferrante and the follow-up that the OLE did actually conduct on the issues raised.

Representative Frank requested that Mr. Jones follow up on the concerns raised during the testimony of Mr. Burgess on March 2, 2010. NOAA has brought enforcement actions against Mr. Burgess at least 10 times between 1986 and 2009, for violations including, but not limited to, fishing with undersized mesh, landing fish unlawfully, and fishing in excess of his days-at-sea allocation on multiple trips. The case that he testified about on March 2 involved 13 illegal trips during which he fished in excess of his days-at-sea allocation and involved a series of communications with our office during the time period of November 20 to December 3, 2007. We are providing a time line that includes specific details regarding the events surrounding the concerns he raised in that case.

As detailed in that timeline, NOAA informed Mr. Burgess on November 20 that he had a negative days-at-sea balance of 5.23 days. Nonetheless, Mr. Burgess continued to fish during this time. On November 29, Mr. Burgess was contacted by NOAA and informed that he had exceeded his days-at-sea allocation and advised him not to fish until the matter was resolved. Three days later, Mr. Burgess's attorney contacted the Agency seeking to resolve the matter. Mr. Burgess settled the case with NOAA by admitting liability for the violation and agreeing to forfeit 10.58 days at sea from his days-at-sea allocation. In addition, Mr. Burgess agreed to pay a civil monetary penalty of \$25,000, an amount that was less than the value of fish he harvested

during the unauthorized fishing trips that he conducted without a days-at-sea balance. At Mr. Burgess's request, the case was expedited to allow him to return to fishing.

Finally, I would like to make note of some of the important steps we are taking as we further develop a more effective and fair enforcement program for all of NOAA's authorities in response to the January 21 Inspector General's report.

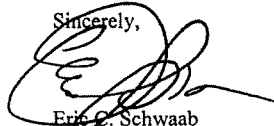
Among other things, NOAA has already transferred oversight of the Asset Forfeiture Fund, which holds fines imposed by NOAA, from NOAA's National Marine Fisheries Service to the NOAA Comptroller and proposed a rule that places the burden of justifying a particular civil penalty or permit sanction on NOAA rather than the respondent, in cases before administrative law judges. We have also instituted a freeze on the hiring of criminal investigators until a work force analysis is completed and approved by Under Secretary Jane Lubchenco that will address the appropriate mix of criminal investigators and civil enforcement officers.

Additionally, the NOAA Office of Communications and External Affairs has developed a detailed Communications Plan to improve outreach to and communications with fishermen, with particular attention in the Northeast. Proposed strategies include fishermen forums, a web-portal and repository, and compliance guides. In addition to the communications plan, we have identified a neutral, well-respected facilitator—the U.S. Institute for Dispute Resolution—and are developing plans for an Enforcement Summit to be held in June 2010.

A number of other action steps, with detailed plans, are outlined in NOAA's Response to the Inspector General Report dated March 18, 2010, and Appendices.

Thank you for your consideration of this information. If you have additional questions, please contact John Gray, Director of Legislative and Intergovernmental Affairs, at (202) 482-4981, and we will assure that you are provided with the information requested.

Sincerely,



Eric C. Schwaab
Assistant Administrator
for Fisheries

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April 13, 2010

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Ms. Lois Schiffer
General Counsel
National Oceanic and Atmospheric Administration
1315 East West Highway
Silver Spring, Maryland 20910

Ms. Barbara Fredericks
Assistant General Counsel for Administration
U.S. Department of Commerce
Fourteenth Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Dear Ms. Schiffer and Ms. Fredericks:

As you know, the Department of Commerce Inspector General reported last week on the findings of his investigation into document shredding by the Office of Law Enforcement (OLE), during a period when the agency's management was under investigation by the Office of Inspector General (OIG). OLE's management had been under OIG investigation for a variety of allegations, including abuse of power, misuse of federal resources, and hiring improprieties since June 2, 2009, when NOAA Administrator Jane Lubchenco requested the investigation in response to a request from a number of members of Congress. In November 2009, large amounts of documents were shredded at OLE headquarters, including 75-80% of the files of Director Dale Jones.

The OIG report found, *inter alia*, troubling inconsistencies in the motivations and role played by Mark Spurrier, Deputy Director of OLE. In response to questioning by OIG, Mr. Spurrier's stated reasons changed considerably to explain why he, unlike Dale Jones, Director of OLE, did not participate in the inappropriate shredding of documents. Most troubling, however, is Mr. Spurrier's apparent ignorance of applicable rules that pertain to document handling. Mr. Spurrier is an attorney; yet, none of the conflicting rationalizations he offered OIG included reference to departmental policies on document retention and on compliance with an OIG review.

Ms. Lois Schiffer and Ms. Barbara Fredericks
April 13, 2010
Page 2

The Subcommittee's investigation has uncovered additional information about Mr. Spurrier's conduct in office that raises further serious concerns.

First, our investigators have been informed that Mr. Spurrier may have repeatedly provided legal advice to OLE agents and staff on official matters. While Mr. Spurrier is an attorney, his responsibilities at OLE do not include rendering legal advice. Moreover, even if the provision of such advice were within his purview of his appointment, he is not qualified to do so given that his previous career is bereft of experience in either fisheries law or federal resource law enforcement. If the appropriate officials in the Office of the General Counsel for Enforcement and Litigation, whose responsibilities include providing legal advice to agents and staff on official matters, either did not concur with Mr. Spurrier's advice or were not consulted at all, and if OLE agents subsequently acted on Mr. Spurrier's advice, the implications for OLE's performance would be troubling.

Additionally, our investigators have been informed that Mr. Spurrier may have maintained an outside legal practice during his employment at OLE without first obtaining proper clearances, as Department of Commerce policy requires. The Office of Government Ethics (OGE) and the Department of Commerce have promulgated rules governing outside employment of federal government employees generally and lawyers in particular. Among other requirements, non-political, career government employees who are attorneys may, consistent with ethical rules applicable across agencies, practice in certain areas of law unrelated to their official work duties, and, in the case of officials of the Department of Commerce like Mr. Spurrier pursuant to departmental approval that is issued on a case-by-case basis. Mr. Spurrier is entitled to render legal services outside of his official work duties, so long as the services he renders do not violate ethics rules and he receives a Department determination on a case-by-case basis of his eligibility. Thus, Mr. Spurrier would be ineligible to pursue legal work that was either in prohibited categories or was not specifically approved by Department of Commerce.

To investigate these concerns, I hereby request the following:

- (1) All documents, including but not limited to email correspondence, memoranda, meeting notes, and records, and case files, containing legal advice or legal guidance provided by Mr. Spurrier or Mr. Jones to agents and/or staff at OLE from the start of Mr. Spurrier's employment at OLE in 1999 to the present.
- (2) A comprehensive list of all matters in which Mr. Spurrier rendered legal services outside the scope of his employment of OLE from the start of Mr. Spurrier's employment at OLE in 1999 to the present. The list should include the identity of his clients, the identity of all parties to the matters of the representations, the nature of the legal services rendered, the amount of compensation received for the provision of the legal services, and records of compliance with OGE, Department of Commerce, and other applicable ethics rules and procedures.

Ms. Lois Schiffer and Ms. Barbara Fredericks
April 13, 2010
Page 3

The Domestic Policy Subcommittee has broad jurisdiction, which includes the National Oceanic and Atmospheric Administration. The Oversight and Government Reform Committee is the principal oversight committee in the House of Representatives and has broad oversight jurisdiction as set forth in House Rule X. An attachment to this letter provides information on how to respond to the Subcommittee's request.

We request that you provide these documents as soon as possible, but in no case later than **5:00 p.m. on Tuesday, April 27, 2010.**

If you have any questions regarding this request, please contact Jaron Bourke, Staff Director, at (202) 225-6427.

Sincerely,

A handwritten signature in cursive script, reading "Dennis J. Kucinich".

Dennis J. Kucinich
Chairman
Domestic Policy Subcommittee

cc: Jim Jordan
Ranking Minority Member

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Domestic Policy Subcommittee Document Request Instruction Sheet

In responding to the document request from the Domestic Policy Subcommittee, Committee on Oversight and Government Reform, please apply the instructions and definitions set forth below.

Instructions

1. In complying with the request, you should produce all responsive documents in your possession, custody, or control.
2. Documents responsive to the request should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Subcommittee.
3. In the event that any entity, organization, or individual denoted in the request has been, or is currently, known by any other name than that herein denoted, the request should be read also to include them under that alternative identification.
4. Each document produced should be produced in a form that renders the document capable of being copied.
5. When you produce documents, you should identify the paragraph or clause in the Subcommittee's request to which the documents respond.
6. Documents produced in response to this request should be produced together with copies of file labels, dividers, or identifying markers with which they were associated when this request was issued. To the extent that documents were not stored with file labels, dividers, or identifying markers, they should be organized into separate folders by subject matter prior to production.
7. Each folder and box should be numbered, and a description of the contents of each folder and box, including the paragraph or clause of the request to which the documents are responsive, should be provided in an accompanying index.
8. It is not a proper basis to refuse to produce a document that any other person or entity also possesses a nonidentical or identical copy of the same document.

9. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, memory stick, or computer backup tape), you should consult with Subcommittee staff to determine the appropriate format in which to produce the information.
10. The Committee accepts electronic documents in lieu of paper productions. Documents produced in electronic format should be organized, identified, and indexed electronically in a manner comparable to the organizational structure called for in (6) and (7) above. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page TIF files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
11. In the event that a responsive document is withheld on any basis, you should provide the following information concerning the document: (a) the reason the document is not being produced; (b) the type of document; (c) the general subject matter; (d) the date, author, and addressee; and (e) the relationship of the author and addressee to each other.
12. If any document responsive to this request was, but no longer is, in your possession, custody, or control, you should identify the document (stating its date, author, subject and recipients) and explain the circumstances by which the document ceased to be in your possession, custody, or control.
13. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
14. This request is continuing in nature and applies to any newly discovered document. Any document not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.
15. All documents should be bates-stamped sequentially and produced sequentially. In the cover letter, you should include a total page count for the entire production, including both hard copy and electronic documents.
16. For paper productions, four sets of documents should be delivered: two sets to the majority staff and two sets to the minority staff. For electronic productions, one dataset to the majority staff and one dataset to minority staff are sufficient. Productions should be delivered to the majority staff in B-349B

Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building. You should consult with Subcommittee staff regarding the method of delivery prior to sending any materials.

17. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Subcommittee or identified in a privilege log provided to the Subcommittee.



UNITED STATES DEPARTMENT OF COMMERCE
The Under Secretary of Commerce
for Oceans and Atmosphere
Washington, D.C. 20230

NOAA

The Honorable Dennis Kucinich
U.S. House of Representatives
Washington, DC 20515

Dear Representative Kucinich:

Thank you for your letter regarding the recent announcement by the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS) of an interim Director for the NMFS Office for Law Enforcement (OLE).

I am committed to strong leadership to ensure that we have an effective, fair, and transparent enforcement program. The appointment of an interim director ensures continued enforcement operations and positions us to effectively implement the actions identified in my response to the Inspector General's report, including workforce planning, priority setting and communications improvement, as well as preparing us to recruit new leadership for the OLE Program.

With respect to your request for personnel information, I assure you that NMFS management is reviewing the situation and will take any appropriate administrative action necessary to address deficiencies in performance or conduct. However, due to Privacy Act requirements, I am unable to comment specifically on actions with respect to individual employees.

Thank you for your interest and support. If you have additional questions, please contact John Gray, Director of NOAA's Office of Legislative Affairs, at (202) 482-4981.

Sincerely,

Jane Lubchenco, Ph.D.
Under Secretary of Commerce
for Oceans and Atmosphere



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THE ADMINISTRATOR



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April 8, 2010

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The Honorable Todd J. Zinser
Inspector General
U.S. Department of Commerce
Office of Inspector General
1401 Constitution Avenue, N.W.
Room 7099 C, HCHB
Washington, DC 20230

Dear Mr. Zinser:

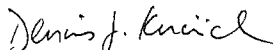
It is my understanding that the Office of Inspector General has been investigating an incident of document shredding at Office for Law Enforcement (OLE) of the National Oceanic and Atmospheric Administration. At issue is whether or not the incident was connected with a concurrent investigation by your office into the management and policies of the agency.

In connection with the Domestic Policy Subcommittee's oversight of OLE, I hereby request a copy of the OIG's report when it is completed. As you know, the Domestic Policy Subcommittee has broad jurisdiction, which includes NOAA.

The Oversight and Government Reform Committee is the principal oversight committee in the House of Representatives and has broad oversight jurisdiction as set forth in House Rule X.

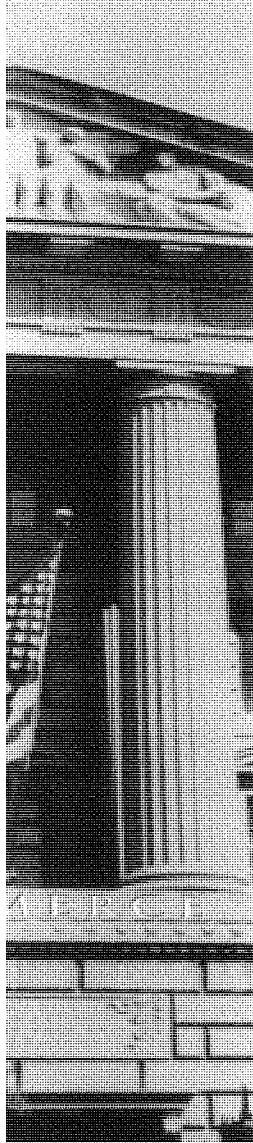
If you have any questions regarding this request, please contact Jaron Bourke, Staff Director, at (202) 225-6427.

Sincerely,



Dennis J. Kucinich
Chairman
Domestic Policy Subcommittee

cc: Jim Jordan
Ranking Minority Member



U.S. DEPARTMENT OF COMMERCE
Office of Inspector General



***National Oceanic and
Atmospheric Administration***

***Final Report — Review of NOAA
Fisheries Enforcement
Programs and Operations***

***Report No. OIG-19887-2
September 2010***

Office of Investigations

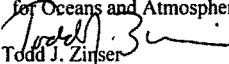




UNITED STATES DEPARTMENT OF COMMERCE
The Inspector General
 Washington, D.C. 20230

September 23, 2010

MEMORANDUM FOR: Dr. Jane Lubchenco
 Under Secretary of Commerce
 for Oceans and Atmosphere

FROM: 
 Todd J. Zinser

SUBJECT: Final Report – Review of NOAA Fisheries Enforcement
 Programs and Operations

This presents the results of our examination of 27 specific complaints raised by fishermen, during our *Review of NOAA Fisheries Enforcement Programs and Operations*, alleging unfair treatment and overzealous enforcement by NOAA's Office for Law Enforcement (OLE) and Office of General Counsel for Enforcement Litigation (GCEL). Our complaint examination is a follow-up to our January 21, 2010, report, *Review of NOAA Fisheries Enforcement Programs and Operations*, and our July 1, 2010, report, *Review of NOAA Fisheries Enforcement Asset Forfeiture Fund (AFF)*. You requested that we review these matters based on issues and concerns raised by members of the fishing industry and Congress, particularly involving OLE and GCEL enforcement practices in NOAA's Northeast Region. This is our final report in response to your June 2009 request.

Since we issued our report in January, three Congressional hearings have added significantly to the record concerning this matter. For example, the Congressional record now includes documentation that a representative of the industry in the Northeast petitioned NOAA and the Congress in 2001 articulating many of the very issues that we reported on in our January 2010 report. Our January 2010 report focused on the overall management of the programs and operations related to fisheries enforcement. To illustrate the experience some in the fishing industry have had with NOAA dating back many years, the report included examples of the many complaints we received from the fishing community. These examples also provided information about the factors that contributed to the deteriorated relationship between NOAA and the industry, especially in the Northeast. However, our report stated that allegations of abusive treatment were not widespread, and we also included a summary of NOAA's perspective about the complaints we received.

As highlighted below, this latest report is being issued against a backdrop of initiatives and reforms to NOAA's fisheries enforcement program you have directed in response to our previously reported findings and recommendations. As such, our report addresses specific complaints involving enforcement actions and circumstances that occurred in the past—before you directed the reforms currently underway. Accordingly, some issues implicated by particular complaints may be resolved or mitigated by measures taken by NOAA to date in key areas such as leadership and management; policy, process, and regulations; workforce structure; and communications and outreach.



In addition, as noted below, the Department has advised us that the Secretary has decided to put in place a process to assess whether to take action to modify or remit the penalties in cases that have come to our attention during our review using his authority under Section 308(e) of the Magnuson-Stevens Fishery Conservation and Management Act. Under such a process, the Secretary will retain ultimate authority to decide what actions to take in the cases reviewed.

As the critical findings included in this report are driven by the activities and actions of some NOAA GCEL and OLE personnel in the Northeast, it would be unfair to discredit the reputation of all GCEL attorneys and OLE agents based on these findings. The actions planned by the Secretary and the reforms you have been implementing to promote equity and even-handedness in NOAA's enforcement processes should go a long way toward precluding claims of unfairness and bias, both in the Northeast and elsewhere. Certain reforms you have undertaken, such as instituting higher level reviews of proposed charging decisions and permit sanctions, as well as for proposed settlements, provide important safeguards against unilateral and unchecked decision-making by individual enforcement officials. Notwithstanding, NOAA is at a critical juncture and, in our view, must take affirmative, equitable action to restore the reputation and soundness of its enforcement program in the Northeast and ensure that corrective actions to address systemic issues are applied nationwide.

We are continuing to devote resources and attention to NOAA fisheries enforcement matters and will continue to do so during my tenure at the Department of Commerce to ensure that this important program receives greater independent oversight than it has received in the past. Next, we will be initiating a formal review of NOAA's progress in implementing the corrective action plans to which you have committed in response to our findings and recommendations with respect to (a) our January 21, 2010 report (<http://www.oig.doc.gov/oig/reports/2010/OIG-19887.pdf>); (b) our report in April 2010 concerning the destruction of OLE documents during our review; (c) our July 1, 2010 report on NOAA's Asset Forfeiture Fund (AFF) (http://www.oig.doc.gov/oig/reports/correspondence/2010.07.01_IG_to_NOAA.pdf); and (d) actions planned in response to the recommendations included in this report.

NOAA Corrective Actions to Date

In response to the issues we have reported on over the past eight months, NOAA has taken a number of measures to improve its fisheries enforcement program with needed transparency and accountability. These include the following immediate actions and longer term strategies pertinent to our findings in this report:

- **Leadership and Management:** Appointments of NOAA General Counsel; Assistant General Counsel for Enforcement and Litigation; Assistant Administrator, National Marine Fisheries Service; Interim Director of OLE; and Acting Special Agent-in-Charge of OLE's Northeast Division. As of this date, a senior GCEL attorney in the Northeast Region, who has been the subject of numerous complaints from fishermen and their attorneys, remains in position; however, process changes identified below have curtailed the unilateral and independent nature of this attorney's enforcement actions.
- **Policy, Process, and Regulations:** Requiring high-level review of all proposed charges for alleged violations and of all settlements by the General Counsel for NOAA; finalizing a rule to

place the burden of justifying a particular civil penalty or sanction on NOAA rather than the respondent in cases before Administrative Law Judges (ALJs); developing a new penalty policy, including a revision of the penalty and permit sanction schedules; creating or reviewing and revising NOAA law enforcement and general counsel operations manuals; providing explanatory notes to enforcement case files; tracking priorities; establishing a new case tracking database that links enforcement and legal case management systems; providing public access to information on charges brought and cases concluded; shifting oversight of the AFF from NMFS to NOAA's Comptroller; and requiring justification and approval from NOAA's Comptroller for any AFF expenditure greater than \$1,000.

- **Workforce Structure:** Freezing the hiring of OLE criminal investigators until a workforce analysis is completed and approved by the Under Secretary that addresses the appropriate mix of criminal investigators and civil enforcement officers.
- **Communications and Outreach:** Developing a communications plan to provide greater outreach to fishermen and fishing communities, and other fisheries stakeholders; increasing communications with the Fishery Management Councils, especially in the Northeast; and holding a National Enforcement Summit with over 60 stakeholders, which was broadcast via the internet and remains available on NOAA's website.

The following are links to relevant NOAA website postings regarding its actions in response to the results presented in our prior reports:

http://www.noaanews.noaa.gov/stories2010/20100121_inspectorgeneral.html (January 2010)

http://www.noaanews.noaa.gov/stories2010/20100203_inspectorgeneral.html (February 2010)

http://www.noaanews.noaa.gov/stories2010/20100318_enforcement.html (March 2010)

http://www.noaanews.noaa.gov/stories2010/20100803_enforcement.html (August 2010)

<http://noaaenforcementsummit2010.ecr.gov/> (August 2010)

Summary of Complaint Examination Results

Our January 2010 report referenced 11 specific complaints and we committed to do what we could to get to the bottom of those complaints. We also identified 16 additional complaints for further review from the 131 complainants with whom we spoke during our review through December 2009 (76% of whom were in the Northeast Region). These 16 additional complaints involved some of the most serious issues and concerns raised. Of the 27 complaints we examined, 26 were from the Northeast, and all 27 combined complaints pertain to matters that fall under the Magnuson-Stevens Fishery Conservation and Management Act. Our examination of the 27 complaints included interviews with complainants and, in some instances, their attorneys, as well as OLE agents and GCEL attorneys. We also examined NOAA files and documents that were available. (See Appendix B for a description of the methodology we applied in selecting these complaints for further review.)

As depicted in the table below, of the 27 complaints we examined, we confirmed 9—including cases involving false information in an affidavit for an inspection warrant; entry into a facility for

other than authorized purposes; excessive fines, including for first-time violators; and comparatively steep assessed penalties in the Northeast Region which leverage settlement while deterring respondents from taking their cases to hearing. We found 5 complaints to be not substantiated—including one involving alleged witness intimidation and harassment by OLE agents; and a complaint in which a Northeast fisherman suspected he was being unfairly charged with exceeding his permitted days-at-sea allocation. We found 13 other complaints inconclusive, due to factors such as unreconciled, divergent accounts from witnesses on either side of the issue and lack of documentary evidence. Complaints we classified as inconclusive include an allegation that GCEL unfairly delayed the sale of a fisherman's vessel and release of the vessel's permit for two years, which, according to the fisherman, caused undue financial hardship; and a complaint by a fish dealer that OLE agents searched his desk and files without permission and were unable to articulate their legal authority for it.

We have summarized the 27 complaints and the results of our examination in Appendix A. We have indicated those that, in analysis of the facts we were able to gather, were confirmed, not substantiated, or remain inconclusive. We have taken these complaints as far as we can in our oversight role. Our review of these 27 complaints will not address the public and Congressional requests that NOAA has received to make whole those fishermen who believe they were treated unfairly, either through apparent arbitrariness in how NOAA's enforcement system functioned in their cases, or by what they view as overzealous enforcement.

Table 1. Summary of Complaint Examination Results				
Complaint Category	Classification			
	Confirmed	Not Substantiated	Inconclusive	<i>Appropriate for Further Review</i>
<i>Broad and powerful enforcement authorities led to overzealous or abusive conduct (13)</i>	3	4	6	7
<i>Regulatory enforcement processes are arbitrary, untimely and lack transparency (9)</i>	4	0	5	9
<i>Unduly complicated, unclear, and confusing fishing regulations (5)</i>	2	1	2	3
Source: OIG Total (27)	9	5	13	19

Complaints Appropriate for Further Review

Many of the individual complaints we examined are credible, have merit, and we consider appropriate for further review. As the complaints we examined vary in terms of the issues involved and their complexity, the 19 complaints we have classified as "Appropriate for Further Review" should, in our view, involve one or more of the following actions by NOAA and/or the Department:

- (a) create an independent process for equitable relief or resolution of past enforcement cases meeting appropriate eligibility criteria;
- (b) effect appropriate changes to regulations, policies, procedures, or practices; and/or

(c) timely address and remedy employee performance or conduct matters.

As we heard in March 2010 during testimony before the Domestic Policy Subcommittee of the Committee on Oversight and Government Reform, counsel for members of the fishing community in the Northeast Region have been petitioning NOAA and Congress for more equitable treatment by NOAA in its enforcement of fishing regulations since at least 2001. The primary result of our review of these cases is to confirm that the types of issues, first raised to NOAA as far back as 2001, pertaining to the Northeast Region, continued through the decade. While the reforms you have committed to will arrest those issues if effectively implemented, there is a compelling basis to look back at NOAA's enforcement cases to determine whether there are individual complaints and cases that require action to correct unfair enforcement.

The actions planned by the Secretary to establish such a process are significant and would address this finding. In addition, we are prepared to share our investigative results, as appropriate, in support of the process established by the Secretary.

Separate and apart of any independent process that may be established to look back, looking forward NOAA needs to establish some means of continual, direct interface with the fishing community to improve communications and reduce the adversarial nature of the relationship, particularly in the Northeast. As we recommended in our January 2010 report, and reinforced by our findings here, many of the complaints we heard are more suitable for resolution by an ombudsman reporting independently to the Undersecretary, and not an OIG investigation. While NOAA has concurred with and taken or announced steps to implement most recommendations we have made to date to improve its fisheries enforcement programs and operations, it has not yet acted in response to this recommendation. We recommend that this be seriously considered.

Additionally, or as an alternative to an ombudsman, NOAA's enforcement program would benefit from the establishment of an independent office empowered to advocate or advise the regulated community on violation avoidance, compliance assistance, and defense and settlement advocacy. We recommend that this also be seriously considered.

Additional Observations

Based on our examination of individual complaints and our previously reported results, we have several observations regarding NOAA enforcement practices. NOAA has a large and vital regulatory mission involving more than just the Magnuson-Stevens Act, and enforcement of the many regulations is a critical component of NOAA's successful completion of its mission. This includes sufficiently penalizing unscrupulous and recidivist operators, guarding against future violations of law through deterrence, and promoting a level playing field for the honest, hard-working members of the industry who respect the rules and support enforcement against the minority who do not. Nonetheless, some of what we have seen in our body of work suggests a new enforcement orientation within NOAA is needed to reinforce and ensure fairness. Beyond our prior findings and recommendations and what NOAA has done, or has committed to do, to implement our recommendations, NOAA also needs to focus attention on these important issues.

- ***GCEL's Northeast Division fine assessments and number of charged violations (counts) appear excessive and intended to force respondents into settlement.***

Several cases we examined, supported by GCEL data cited in our January 2010 report (pp. 13-14), evidence a troubling pattern in the Northeast Region of respondents giving up their right to due process in having their cases heard before a third party. Simply put, the higher the assessed fines and number of violation counts charged, the greater the risk for respondents if they opt for a hearing before an Administrative Law Judge (ALJ). Such risk leverages respondents into settlements with GCEL, because if they fail to prevail at hearing, they face substantial monetary liability for up to the full penalty for the total of assessed fines and counts charged. There is also a lack of confidence on the part of fishermen that the ALJ process is fair, transparent, and impartial.

In general, GCEL's standard letter to alleged violators transmitting Notices of Violation and Assessment (NOVAs) includes a paragraph informing them of their right to a hearing. The paragraph concludes with the statement, "The judge is not bound by the amount assessed in the NOVA, but may fix a penalty based upon his judgment of what is appropriate up to the statutory maximum of \$140,000 per count." This language, coupled with NOAA regulations that provided a standard presumption that NOAA's assessed fine was appropriate when brought before an ALJ, makes it understandable that fishermen have perceived the system being unfair so as to pressure them into settlement. In response to our January 2010 report, NOAA has changed the presumption requirement, now properly placing the burden on NOAA. Still, GCEL's letter transmitting NOVAs should fairly inform respondents that the ALJ may independently decide on a penalty at, below, or above the amount assessed in the NOVA.

GCEL data for closed cases between July 2004 through June 2009 shows the Northeast as the region with the greatest percentage reduction from initially assessed to settled fine amounts (approximately \$5.5 million assessed to approximately \$1.6 million settled—a nearly 70% reduction.) A senior GCEL enforcement attorney in the Northeast Region explained the strategy for settlement to us as follows:

"A 50% monetary settlement, absent an inability to pay or other mitigating factors, is a common practice. This gives the respondent an incentive to settle pre-hearing, but—as long as the initial assessment is high enough—ensures that the goals of punishment and deterrence are reached." [emphasis added]

Congressional testimony in March 2010 given by an attorney representing fishermen in the Northeast, included the following on this issue:

"Although defending an enforcement action is costly, most fishermen, having little faith in the administrative process and judges paid by NOAA, decide to seek a settlement because of the threat in the NOVA that by challenging it the fine can rise to \$140,000, and the mental stress from having to deal with the concept of heavy fines hanging over them for months to years."

Additionally, the attorney informed us that in discussing one particular case, the same senior GCEL attorney in the Northeast told him the fine could increase to \$140,000 if challenged at

hearing; this is consistent with and further evidences the disincentive, created by the senior GCEL attorney and GCEL, for respondents to take cases to hearing. In addition to changing the regulation to place the burden of justifying penalties or sanctions on NOAA rather than the respondent in cases before ALJs, NOAA has committed to reforming the penalty schedule to reduce the broad discretion of their attorneys and thereby reduce the potential for abuse of such discretion.

- *The words, and reported words, of a GCEL senior enforcement attorney in the Northeast foster a perception of predisposition against certain fishermen and their counsel. Such a perception contributes to a loss of confidence in the ALJ system.*

The below remarks by a senior GCEL attorney in the Northeast Region—in an email, selected examples from official enforcement case file notes, and a comment made in public—are, in our view, highly inappropriate. They support an adverse perception in the Northeast regarding the attorney’s mindset and posture, and thus that of GCEL, about assessing fishermen fines and penalties in NOAA’s regulatory enforcement cases. This perception, in turn, has been imputed to the ALJ system.

- In a September 2007 email to another Northeast GCEL enforcement attorney, the senior GCEL attorney stated, “**I’m definitely interested in whacking him civilly (with a kid glove?) too.**” This email was in reference to a fisherman who was convicted on a state misdemeanor charge of assaulting a state JEA officer by attempting to throw a fish overboard and struggling with and pushing the officer in the process. The state ordered the fisherman to pay a \$500 fine plus court costs, but no incarceration was imposed. The senior GCEL attorney told us that the fisherman had ample money to pay and that the \$500 state fine would not be a deterrent for assaulting an officer. Based on this expressed opinion, the senior GCEL attorney proposed a \$60,000 civil fine for one count of interference with an officer, which was ultimately settled for \$20,000. Thus, the senior GCEL attorney used NOAA’s authority to also punish the fisherman federally through a leveraged fine that was *4,000 percent greater* than that which was imposed in the previously adjudicated state case.
- In October 2007 case file notes regarding the above respondent and matter, the senior GCEL attorney annotated, “**Jack up the fine to the proper level.**” [emphasis in original]
- On a copy of a respondent’s letter to NOAA’s Northeast Regional Administrator in September 2002, the senior GCEL attorney wrote “**Bad move**” in explicit reference to the fisherman’s statement that he had consulted with a particular attorney.
- On this same letter from the respondent, the senior GCEL attorney annotated, “**You sure did fail, buddy...**”, in direct reference to a respondent’s assertion in a letter that he regrettably failed to notify NMFS that an engine upgrade had taken place. [emphasis in original]
- The senior GCEL attorney also wrote on the copy of this letter, “**Tell it to the ALJ!!!**”, in reference to the fisherman’s assertion that “NMFS had given me every reason to believe that I could proceed with the installation of the engine.” The senior GCEL attorney further

annotated, “**I think not, sir!**”, in reference to the respondent’s closing sentence that he tried to act in good faith. [emphasis in original]

- In other case file notes, the senior GCEL attorney wrote, “**Same day!?! – FAT Chance!!**”, in reference to a respondent’s reported assertion to OLE on a particular date in November 2007 that the respondent had a days-at-sea lease in process and expected it to be transacted that same day.
- Regarding this same respondent, the senior GCEL attorney also made an annotation on a NOAA document containing another person’s handwritten notes. The other handwriting included the statement, “Close friend of [attorney representing fishermen] – good guy.” The senior GCEL attorney circled this statement with a marker, drew an arrow to the name of the attorney, and wrote “**that’s gonna ‘help’ him??**”
- In a court filing, counsel for a fish dealer identified a fisherman who reported witnessing the senior GCEL attorney characterize the dealer as a “**lying piece of s*****.” We spoke with the fisherman, who gave a consistent account and also told us the senior GCEL attorney had expressed that he would “**get him [the fish dealer]**.” The senior GCEL attorney acknowledged to us that he has used words to the effect of the former term on occasion. He told us about a particular occasion where, in a public place (a gym), he read a newspaper article about an enforcement case concerning the dealer’s facility and exclaimed “**lying sack of s*****” to a NOAA colleague who was with him. He further told us that as he uttered this, someone he thought may have been a fisherman came up behind them. The senior GCEL attorney told us his use of the above term concerned an individual involved with the article (whom he declined to identify to us), but not the fish dealer, and he denied ever saying that he would “get” the dealer.

When asked about his annotations in the case file notes, the senior GCEL attorney’s reaction was telling us he had assumed nobody would ever see them. We found no comparable remarks in the case files and notes of the other two GS-15 senior enforcement attorneys in GCEL’s Northeast Region.

Beyond the foregoing statements, the Congressional record includes sworn testimony in March 2010 from one fisherman, who recounted, as follows, the senior GCEL attorney referring to the Administrative Law Judges (ALJs) who hear NOAA’s enforcement cases, as “*my judges*”:

“I was fined by [the senior GCEL attorney] \$27,000 and I called [my attorney]. As time went on, [the senior GCEL attorney] said that if you don’t pay \$27,000 right now, if you want to go in front of one of my judges, you’ll be paying \$120,000 to \$140,000. I settled for \$25,000 bucks. I was scared to death. They wouldn’t give me the boat back. I couldn’t get the boat back to fish and make payments until I paid the fine.”

Such sworn testimony implies that this senior GCEL attorney in the Northeast Region believes that the ALJs who hear NOAA enforcement cases will decide cases in NOAA’s favor regardless of the evidence. While the “*my judges*” statement was denied, the proclivity for setting fines initially high to pressure settlement, in conjunction with undeniable enforcement case file annotations exhibiting animus towards members of the regulated community and

inappropriate behavior, as shown above, lend significant credibility to this fisherman's account before Congress. Such written remarks, actions, and predispositions from a federal government attorney empowered with virtually unchecked prosecutorial discretion constitute serious lack of judgment and conduct unbecoming a federal government attorney charged with enforcing the law.

As noted in our January 2010 report, we concluded that a lack of management attention, direction, and oversight led to regional enforcement elements operating autonomously, particularly in the Northeast. When interviewed, the then-Assistant General Counsel for Enforcement Litigation told us he had afforded "maximum discretion" to GCEL's attorneys and gave them independence to apply their professional judgment and discretion. Moreover, the Deputy Assistant General Counsel for Enforcement Litigation advised us that GCEL attorneys had received inconsistent oversight and guidance.

Regardless of whether the senior GCEL attorney ever referred to the ALJs as "my judges," and, if so, whether it was uttered purposefully, as a result of arrogance, or otherwise, a perception nonetheless exists in the Northeast that the attorney—along with the office—has lost proper perspective and harbors bias. Such a perception, in turn, has resulted in loss of confidence in the ALJ process by members of the fishing community in the Northeast. In general, irrespective of motive or intent, when evidence reflects that government attorneys have lost critically important perspective on their duty and obligations, the agency must consider the impact and ramifications that such loss might have and act to safeguard the integrity of the affected program.

- ***While GCEL guidance provides for prior violations as an aggravating factor justifying increased penalties, it does not conversely identify first-time violations as a mitigating factor.***

GCEL's Penalty Schedule states, "NOAA enforcement attorneys are expected to use their prosecutorial discretion in determining the appropriateness of a recommended penalty or permit sanction, basing their decisions on the particular facts of the cases, including aggravating and mitigating circumstances." During our examination, we identified several instances in which first-time violators were assessed at the higher end of the penalty schedule. In one case we examined, a fisherman increased the horsepower of his boat's engine in violation of the regulations. Although it was his first offense, GCEL charged him with three counts totaling \$150,000 and a 270-day suspension—the maximum penalty. In another case, two fishermen operating as partners were fined a total of \$270,000 and their permits were suspended for one year for failing to file all required fishing trip reports, despite this being their first offense. While we recognize that some first-time offenses would warrant maximum assessed penalties, to address the issue of perceived excessive penalties for first-time violators, GCEL guidance should explicitly identify first-time violations as a mandatory mitigating factor.

- ***Although fishing regulations promulgated by the Fisheries Management Councils are complex and can change significantly, NOAA appears overly rigid in its interpretation and application of provisions of the regulations. This contributes to industry's negative belief that NOAA only exercises its regulatory discretion to its own benefit.***

While NOAA's fisheries enforcement program operates according to a strict liability system, an element of discretion in the issuance of some citations and in the assessment of penalties is authorized. In our examination, we found an instance where NOAA refused to exercise discretionary leniency in a case that appeared appropriate for such, citing absence of specific policy direction and taking the position that doing so leads them down a "slippery slope." Specifically, a fishing vessel experienced a mechanical breakdown and returned to port, never setting its gear to capture fish, yet NOAA charged the vessel for fishing during that time because it has no policy to credit vessel days-at-sea for mechanical breakdowns and NOAA officials did not want to set a precedent even though it would have promoted a fair implementation of the regulations.

Also, we confirmed complaints of disparate treatment and inconsistent penalties for NOAA's enforcement of restrictions on fishing in yellowtail flounder stock areas. During the approximate four-year period when fishermen were required to have a NOAA Letter of Authorization (LOA) to fish in yellowtail flounder stock areas in the Northeast Region, GCEL did not impose a single fine on any of the 7 cases that were referred to it for enforcement action. However, after the LOA requirement was eliminated, GCEL nonetheless retroactively charged 14 LOA cases—one of the original 7 and 13 new—resulting in assessed penalties ranging from \$1,600 to \$58,700. All 14 cases were charged solely for the referenced LOA violation. These cases caused many fishermen to believe that GCEL was levying fines to target a particular fish dealer facility and those who did business there, rather than enforcing statutes and regulations for the expressed purpose of protecting the fish stock.

- ***Untimely enforcement actions impair both deterrence and the ability of respondents to defend themselves.***

In our review we confirmed complaints about the time-consuming, lengthy process which makes it difficult for fishermen to defend against charges, because of such problems as having to recall details from a single incident years in the past. Delays in case disposition fuel the industry's negative perception of NOAA's motives and clearly exhibit NOAA's willingness to pursue stale claims and call into question the integrity of NOAA's adjudicatory processes. In one case we examined, nearly two years after a fisherman allegedly exceeded the limit for codfish on a single day, OLE notified him of the violation. The fisherman eventually settled the case in September 2009, forfeiting 10 days-at-sea (DAS) from his 2009 DAS allocation, nearly four years after the date of the alleged violation. As an OLE agent told us, in concurring with this observation regarding the timeliness of GCEL enforcement actions, "Justice delayed is justice denied." Our findings illustrate that NOAA needs better case management policies and guidelines for timeliness. We note that NOAA is working to reduce its backlog of enforcement cases, including for the purpose of improving timeliness.

- *OLE agents lack necessary guidance to ensure that warrantless inspections are conducted properly.*

We found that OLE agents have been provided limited training and inadequate guidance for warrantless inspections, particularly concerning the extent of their permissible access to inspect records and documents and, in at least one significant instance, to properly state the nature and purpose of their entry into a facility. As such, NOAA should review its regulations and internal guidance concerning warrantless inspections and provide detailed direction to OLE agents. While OLE internal policy addresses the administrative inspection warrant process, it does not guide the discretion of enforcement agents conducting warrantless inspections. Without such limitations, NOAA risks subjecting regulated entities to acts that could constitute unconstitutional searches and seizures. This could violate citizens' constitutional rights and result in meritorious cases being successfully challenged.

Complaint Examination Findings

See Appendix A, "OIG Examination of 27 Selected Fisheries Enforcement Complaints," for a classification breakdown and summary analysis of the 27 complaints we examined.

Recommendations

- The 19 complaints we have classified as "Appropriate for Further Review" should, in our view, involve one or more of the following actions by NOAA and/or the Department:
 - (a) create an independent process for equitable relief or resolution of past enforcement cases meeting appropriate eligibility criteria;
 - (b) effect appropriate changes to regulations, policies, procedures, or practices; and/or
 - (c) timely address and remedy employee performance or conduct matters.
- As previously recommended in our January 2010 report, NOAA must seriously consider establishing an ombudsman position for the fishing community that reports independently to the Under Secretary.
- Additionally, or as an alternative to an ombudsman, NOAA's enforcement program would benefit from the establishment of an independent office empowered to advocate or advise the regulated community on violation avoidance, compliance assistance, and defense and settlement advocacy. NOAA should consider this given the overall results of our reviews; persistent complaints about the complexity of the regulations; and the fact that the penalty assessment and defense process can put members of the fishing industry—predominantly small business owners—out of business without recourse.
- That NOAA review its regulations and internal guidance concerning warrantless inspections and provide detailed direction to OLE agents.
- That GCEL guidance explicitly identify first-time violations as a mandatory mitigating factor.

We appreciate your continued personal commitment and attention to restoring public trust and confidence in NOAA's fisheries enforcement program. Please apprise us within 60 days of any action in response to our results in this matter. If you have any questions, or if we can be of further assistance, please do not hesitate to call me at 202-482-4661.

cc: The Honorable Gary Locke, Secretary of Commerce

APPENDIX A

U.S. Department of Commerce – Office of Inspector General

OIG Examination of Selected Fisheries Enforcement Complaints (as Referenced in Accompanying Report)

The 27 individual complaints examined (classified as “Confirmed,” “Not Substantiated,” and “Inconclusive”) vary in terms of the issues involved and their complexity. Accordingly, those designated as “Appropriate for Further Review” in the table below should, in OIG’s view, involve one or more of the following actions by NOAA and/or the Department: (a) create an independent process for equitable relief or resolution of past enforcement cases meeting appropriate eligibility criteria; (b) effect appropriate changes to regulations, policies, procedures, or practices; and/or (c) timely address and remedy employee performance or conduct matters.

COMPLAINT CATEGORIES		
1. Broad and powerful enforcement authorities have led to overzealous or abusive conduct.	Complaint Category	Appropriate for Further Review
2. Regulatory enforcement processes are arbitrary, untimely, and lack transparency.		
3. Unduly complicated, unclear, and confusing fishing regulations.		
*Denotes the 11 complaints identified in OIG’s January 2016 report.		
CONFIRMED (9)		
<p>1. We confirmed an allegation that an OLE agent’s affidavit for issuance of an Administrative Inspection Warrant for a fish dealer’s records contained false information. (The warrant was executed in December 2006). While we did not find evidence of willful falsification by the agent, the affidavit nonetheless was signed upon by a Federal Magistrate to issue an Administrative Inspection Warrant, which was subsequently executed by NOAA Office for Law Enforcement (OLE). During execution of the warrant, documents were seized, which led to charges against the dealer and fisherman who used the facility. We concluded the inaccurate information resulted from a flawed database used by NOAA. We further found that the agent had intended to use a demand letter for records, which is consistent with a civil regulatory enforcement approach, and did not believe an inspection warrant was necessary, which is generally more consistent with a law enforcement approach. OLE management and/or NOAA’s Office of General Counsel for Enforcement Litigation (OGEL) did not agree with the agent, instead directing that a warrant be obtained.</p>		
	1	✓

COMPLAINT CATEGORIES	Complaint Category	Appropriate for Further Review
1. Bribed and powerful enforcement authorities have led to overzealous or abusive conduct.		
2. Regulatory enforcement processes are arbitrary, unfairly, and lack transparency.		
3. Unduly complicated, unclear, and confusing filing regulations.		
4. Denotes the 11 complaints identified in OIG's January 2018 report.		
<p><i>We confirmed the allegations that the OLE agent paid substantial amounts to a dealer family of the incident occurred in November 2006. The agent arrived at the facility, the agent began the deal, began to get some money from the side of the building where he found a driver unlocked, which he used to access the facility and proceeded to all prior, and in entering, found no workers or activity. The prosecution to the front door and opened it to let officers accompanying him into the facility. This group of officers was there to relieve other officers taking part in a joint enforcement operation at the facility, which had been conducted earlier in the day, but which now appeared to have been ended. The agent was asked if employee still at the facility who advised him they were closed for the night. The agent requested of this employee permission to give "my name a quick tour." The employee did not give permission, yet the agent still proceeded to inform a "tour" of the facility's authority pertaining to agents to conduct basic field investigations at such locations, but employees are OLE agents authorized to occur during business premises for non-official, employee purposes such as tours.</i></p>	1	✓
<p><i>An Administrative Law Judge (ALJ) ruled that CCEL's assessed penalty of \$150,000 and 90-day suspension of a fish dealer for improper recordkeeping was excessive. (The Notice of Violation and Assessment (NOVA) was issued in March 2005 and a settlement agreement was reached in March 2010.) CCEL advised that this penalty was levied because the dealer was in violation from a previous violation which involved 24 individual counts that were charged. CCEL stated that they then treated this previous case as 24 prior violations rather than as a single prior offense. The ALJ rejected CCEL's "aggravating factor" rationale of 24 prior violations, treating the prior case as a single violation, and significantly reducing the fish dealer's penalty to a \$10,000 fine and a 20-day suspension. The ALJ noted that CCEL's assessed penalty would have been "contrary to the interest of justice," and would essentially put the dealer out of business. Given the ALJ's ruling on this case we believe the CCEL analyst's charging rationale deserved further review.</i></p>	1	✓

APPENDIX A

COMPLAINT CATEGORIES:		Complaint Category	Appropriate for Further Review
1. Broad and powerful enforcement authorities have led to overzealous or abusive conduct. 2. Regulatory enforcement processes are arbitrary, unfriendly, and lack transparency. 3. Unduly complicated, unclear, and confusing fishing regulations.			
* Denotes the 11 complaints identified in OIG's January 2010 report.			
4.	<i>We conducted a comparison of the specific treatment and treatment possible for NOAA's enforcement of restrictions on fishing in yellowtail flounder stock areas. (The NOAA's for those individual cases were issued between March and May 2009.) During the four-year period (August 2007 - November 2010) when fishermen were required to have a NOAA Letter of Authorization (LOA) to fish in yellowtail flounder stock areas in the Northeast Region (CT, RI, MA, NH), did not impose a charge for any of the seven cases that were referred to it for enforcement action. After the LOA requirement was eliminated, in November 2010, NOAA investigators immediately charged 14 LOA violators, 13 of which were new, while the remaining one was repeat with one of the seven cases were withdrawn. Also resulting in increased penalties including from \$1,000 to \$50,000. All 14 cases were immediately charged based on limited second-hand information during the violation of an administrative inspection, whereas a full harbor facility (which occurred after the LOA requirement had been eliminated). All of the 14 cases were charged solely for the withdrawn LOA violation. This would likely deterrence to achieve that of a full, was leaving cases to target the facility and those who did business there, rather than enforcing measures and regulations for the purpose of protecting the fish stock.</i>	2	✓

APPENDIX A

COMPLAINT CATEGORIES:			Complaint Category	Appropriate for Further Review	
1. Biased and powerful enforcement authorities have led to overzealous or adverse conduct.					
2. Regulatory enforcement processes are arbitrary, untimely, and lack transparency.			2	✓	
3. Unduly complicated, unclear, and confusing fishing regulations.					
Denotes the 11 complaints identified in OBC's January 2010 report.					
5	We confirmed complaints that administrative errors by two fishermen led to an excessive \$270,000 assessed fine and a one-year permit sanction for failing to call in to NOAA's Interactive Voice Response (IVR) reporting system and for failure to file Fishing Vessel Trip Reports (FVTRs), despite this being their first offense. (The NOV-A was issued in October 2008.) The fishermen appealed their case to an Administrative Law Judge (ALJ), who reduced the total penalty to \$54,000 (by suspending \$216,000 for two years which would then be eliminated if no violations occurred during that time period) and a one-month suspension. In reducing the penalties, the ALJ ruled, among other findings, that (1) no over-fishing occurred as a result of the fishermen's failure to report; (2) no fishing occurred in a closed area and at no point was the total allowable catch exceeded where they were fishing; and (3) the fishermen neither sought nor obtained economic gain from their failure to file timely reports.				
6	We confirmed a fisherman's complaint that he was assessed an excessive \$150,000 fine (the maximum) and a 270-day suspension for exceeding the permissible horsepower on his boat, despite this being his first offense. (The NOV-A was issued in April 2007.) Specifically, one of the reasons in the case was related to a \$50,000 fine and a 90-day permit sanction, which was suspended as long as the fisherman suspended his fishing activities for a year, and the remaining two months assessed against warnings by the assigned ALJ, among which is attorney-in-the-case advice that the maximum suspension period was not paid in this case because he believed his fishermen intentionally violated the regulation and that was a "big mistake". However, we found this punishment supported by the evidence and we found the fishermen credible. Moreover, the former National Regional Administrator, who was responsible for promulgating the regulation, provided a letter of support for the fisherman stating he believed it was an honest mistake.				

APPENDIX A

COMPLAINT CATEGORIES:		
1. Broad and powerful enforcement authorities have led to overzealous or abusive conduct.		
2. Regulatory enforcement processes are arbitrary, untimely, and lack transparency.		
3. Unduly complicated, unclear, and confusing fishing regulations.		
*Denotes the 11 complaints identified in OIG's January 2016 report.		
7*	<p>We confirmed that NOAA applied widely, rigid interpretation of a regulation for a situation where leniency appeared appropriate but was expected to avoid setting a precedent. (The incident referenced below occurred in December 2009.) A fishing vessel that had not yet experienced a mechanical breakdown and returned to port, never setting its gear to capture fish. Yet the National Marine Fisheries Service (NMFS), not OCE, charged the vessel's owner for fishing during that time because it had no policy to allow vessels for mechanical breakdowns. OCE sought policy guidance on this case from NOAA's Northeast Region, Office of Sustainable Fisheries, on behalf of the fishermen. That office advised that a day-seas vessel for this particular situation would "lead them down a slippery slope" and should not be granted under the current regulations. This kind of regulation and interpretation contributes to the industry's belief that NOAA only exercises its regulatory discretion to its own benefit.</p>	<p>Complaint Category</p> <p>3</p> <p>Appropriate for Further Review</p> <p>✓</p>

APPENDIX A

COMPLAINT CATEGORIES:		Complaint Category	Appropriate for Further Review
1. Broad and powerful enforcement authorities have led to overzealous or abusive conduct. 2. Regulatory enforcement processes are arbitrary, untimely, and lack transparency. 3. Unduly complicated, unclear, and confusing fishing regulations.			
*Denotes the 11 complaints identified in OIG's January 2010 report.			
8. <i>We confirmed in Johnson's complaint that he was not timely notified of a violation, so that he was charged nearly three years after allegedly violating the law for conduct on a single day, thus depriving him of ability to defend himself. The NOAA was issued in April 2009, (OIG) 11-18-09. Documents from an Administrative Inspection Warrant which identified the referenced violation. At least one year had passed between the date of violation (12-1-05) and the execution of the Administrative Inspection Warrant (12-07-06). When OLE recalled the retirement of his vessel (11-03-2007), almost two years had passed since the date of the alleged violation (12-1-05) and nearly six months after the retirement of the vessel, the Fisheries indicated he could not remember facts or details of events that took place two years in the past, thus depriving him of the ability to defend himself. The charge was submitted to OIG. The enforcement action was initiated after several violations (11-03-08) and a Notice of Violation, Enforcement (NOVA) was subsequently issued (11-18-09) after that, with an assessed fine of nearly \$30,000. The Magnuson Stevens Act contains no statute of limitation for citing a delinquent for violations of the Act. However, government-wide regulations place a five-year limitation on bringing charges for civil violations of regulatory law. While NOAA is subject to this five-year statute of limitation to easily implement violations, such delay and case disposition for a regulatory violation erodes NOAA's willingness to pursue state claims.</i>		3	✓

APPENDIX A

COMPLAINT CATEGORIES:		Complaint Category	Appropriate for Further Review
1. Broad and powerful enforcement authorities have led to overreliance on abusive conduct. 2. Regulatory enforcement processes are arbitrary, unfairly, unfairly, and lack transparency. 3. Unfairly complicated, unclear, and confusing fishing regulations.			
*Denotes the 11 complaints identified in OIG's January 2018 report.			
4. We submitted that GCEI informed a fisherman that if he challenged his fine it could be increased to \$140,000 (from \$10,000 for each violation). (Before a NOAA was issued in this case, a settlement agreement was reached in February 1996.) According to the fisherman's attorney, the GCEI attorney handling this case advised him that if his client chose not to settle the case and it went to an Administrative Law Judge (ALJ) hearing, rather than face \$10,000 per caught fish originally charged, he could be subject to the ALJ imposing fines of the statutory maximum of \$140,000 per count. We found this representation consistent with GCEI/NOAA language for violations under the Magnuson-Stevens Act. For example, language in many NOAA states, "The judge is not bound by the amount assessed in the NOAA, but may fix a penalty based upon his judgment of what is appropriate up to the statutory maximum of \$140,000 per count." This language, coupled with NOAA regulations at that time that provided for presumption that a fine set by NOAA was appropriate, makes it understandable that fishermen believe the system to be unfair so as to pressure them into settlement. In fact, in response to our January report, NOAA has changed the presumption requirement, now properly placing the burden on NOAA to prove the fine is appropriate when brought before an ALJ.		2	✓

APPENDIX A

COMPLAINT CATEGORIES:		Complaint Category	Appropriate for Further Review
1. Broad and powerful enforcement authorities have led to overzealous or abusive conduct. 2. Regulatory enforcement processes are arbitrary, unfairly, and lack transparency. 3. Unfairly complicated, unclear, and confusing fishing regulations. *Denotes the 31 complaints identified in GIC's January 2010 report.			
NOT SUBSTANTIATED (5)			
10	<p>A Northeast fisherman suspected he was being unfairly charged with exceeding his days-at-sea (DAS) allocation. (The correspondence between NMFS and the fisherman occurred in March 2009.) We found correspondence from the NMFS Northeast Regional Administration to the fisherman informing him that he had exceeded his DAS and had a negative 15-day balance. The correspondence also stated that since this was an apparent violation it would be referred to CLE for review and consideration of enforcement action. Our review disclosed that there was no CLE or CLE enforcement action related to this matter.</p>	I	
11	<p>We did not substantiate a complaint of CLE oversteering alleging witness intimidation and harassment by agents during preparation for an ALJ hearing. (The alleged incident occurred in February 2009.) Several days before a scheduled ALJ hearing (related to case 11 in this chart), the names of two individuals were identified by defense counsel and provided to CLE as potential witnesses. CLE requested that CLE agents attempt to interview the witnesses to determine the facts of their testimony. In preparation for the hearing, one of the interviews was completed without incident. The second interview, which involved this particular complaint, was not completed because the complainant refused to speak with the agent. We found no evidence of harassment with CLE attempting to interview the identified witnesses and no evidence to substantiate the CLE agents attempted to control or intimidate other witnesses who appeared by an interview or providing a statement.</p>	I	

APPENDIX A

COMPLAINT CATEGORIES:		Complaint Category	Appropriate for Further Review
<p>1. Broad and powerful enforcement authorities have led to overcaution or abusive conduct.</p> <p>2. Regulatory enforcement processes are arbitrary, antithetic, and lack transparency.</p> <p>3. Unduly complicated, unclear, and confusing fishing regulations.</p> <p>*Denies the 11 complaints identified in CHG's January 2010 report.</p>			
12*	<p><i>We were unable to substantiate a fisherman's assertion that he received permission from NMFS to fish without a Vessel Monitoring System since it was being repaired, but later received a NOAA for \$100,000 for fishing without it. He advised that he settled the case for a six-month permit sanction, during which time he had no income. (A written warning was issued in June 2007.) We found that a written warning—not a NOAA—was issued in this case. We found that a non-enforcement sanction had been placed on the vessel's fishing permit during this time period. However, the sanction was unrelated to the referenced warning. Instead, the sanction was a nullification of the process by which a permit is transferred upon sale of a vessel, which occurred in this instance. We made several unsuccessful attempts to gain further clarification of this matter from the complainant.</i></p>	3	

APPENDIX A

COMPLAINT CATEGORIES:		Complaint Category	Appropriate for Further Review
1. Broad and powerful enforcement authorities have led to irregularities or abusive conduct. 2. Regulatory enforcement processes are arbitrary, arbitrary, and lack transparency. 3. Unduly complicated, unclear, and confusing filing regulations. *Denotes the 11 complaints identified in CFC's January 2010 report.			
13.	<p><i>We did not submit a full dealer's complaint that CFE failed to honor terms of a handwritten agreement to reimburse a \$145,000 fee. The NDA was issued in January 2006. In January 2006, the dealer was issued a \$145,000 NDA for failing to comply accurately and timely with regulatory requirements. In December 2006, a \$145,000 settlement agreement was reached, which provided 18 months for the dealer to make payment from the sale of real estate in order to satisfy the fee. The agreement included a provision for reimbursement of the fee should the sale of the property not occur. By April of 2008 the sale had not occurred. At that time, CFE informed the dealer's attorney in writing that more time for sale of the property to be required. In June of 2008, the sale of the property had still not occurred and CFE expressed an intention to grant another extension of time provided the dealer submitted documentation of its good faith attempts to sell the subject property. By March of 2010, no documentation had been provided by the dealer. At that time, the dealer made an offer to CFE to settle the outstanding amount for the unpaid amount of \$145,000. In March 2010, CFE responded per terms of the agreement that the dealer produce financial documentation in order to consider that offer. Documentation was provided in September of 2010 and CFE is presently reviewing it. Without commenting on the appropriateness of the initial \$145,000 assessment, we did not determine that CFE failed to honor the terms of the settlement.</i></p>	I	

APPENDIX A

COMPLAINT CATEGORIES:		Complaint Category	Appropriate for Further Review
1. Broad and powerful enforcement authorities have led to overzealous or abusive conduct. 2. Regulatory enforcement processes are arbitrary, arbitrary, and lack transparency. 3. Unduly complicated, unclear, and confusing fishing regulations.			
4 Denotes the 11 complaints identified in OIG's January 2010 report.			
14	<p><i>We did not substantiate an allegation that a fisherman was subject to retaliation by OLE after an incident during which he was arrested and charged with assault on an OLE agent. (The alleged retaliation occurred between August 2007 and August 2008.) We found that during a routine boarding in December 2006 by Delaware and Maryland state officers operating under a Joint Enforcement Agreement (JEA) with OLE, the officers found a violation for which the fisherman was cited. During that incident the JEA officers took identifying information from the passengers as witnesses to the violation, after the vessel had docked. The incident involving assault on an officer occurred during a subsequent boarding of this vessel in August of 2007 by JEA officers. The officers again found violations on the vessel and against per their procedures, took identifying information from passengers on the vessel. During this process the fisherman allegedly assaulted one of the officers, an offense for which he was charged and convicted by the State of Maryland. The state ordered the fisherman to pay a \$500 fine plus court costs, but no incarceration was imposed. OLEL issued a NOPVA for \$60,000 for one count of interference with an officer, which was ultimately settled for \$30,000. Records indicate that all subsequent interactions with this fisherman also involved JEA partners. To date, he has been boarded four times since the assault incident in August 2007 with no problems reported and no citations issued. A JEA representative reported to us that his officers typically board joint fishing vessels during a routine patrol and that this particular fisherman was boarded less than most. Since no violations were detected during these subsequent boardings no identifying information was requested from passengers.</i></p>	I	

APPENDIX A

COMPLAINT CATEGORIES:		Complaint Category	Appropriate for Further Review
1. Broad and powerful enforcement authorities have led to overreliance on abusive conduct.			
2. Regulatory enforcement processes are arbitrary, untimely, and lack transparency.			
3. Unduly complicated, unclear, and confusing fishing regulations.			
* Denotes the 11 complaints identified in OIG's January 2018 report.			
INCONCLUSIVE (13)			
15 ^a	<p><i>We found inconclusive the allegation that OLE agents would cite fishermen for violations and then use the citations as leverage to build a case against another individual or entity. (The below alleged incidents occurred in September 2007.) Multiple fishermen advised us of this allegation. One fisherman told us that two OLE agents told him they could make a fish owner disappear if the fisherman agreed to cooperate with them on another high profile case. OLE agents wrote under oath, regarding two related cases, that as a matter of basic law enforcement procedure they inform fishermen that any cooperation provided during an investigation, to include information concerning other potential violators, would be noted and conveyed to OCEI for their review and consideration as part of the fisherman's case but that they do not promise to make violations disappear. The results of our investigative efforts regarding this matter were inconclusive because of these unrecalled accounts and a lack of additional evidence. In some of the reported cases, the respondents were not charged and in others they were, meriting further review of these types of allegations.</i></p>		1 ✓

APPENDIX A

COMPLAINT CATEGORIES:		
1. Broad and powerful enforcement processes are arbitrary, inflexible, and lack transparency. 2. Regulatory enforcement processes are arbitrary, inflexible, and lack transparency. 3. Unlikely complicated, unclear, and confusing fishing regulations.		
*Denotes the 11 complaints identified in OLE's January 2010 report.		
16*	<p><i>We found inconclusive allegations that a fisherman, when requesting an attorney, he provided during his interview with an OLE agent, was denied independent that "We just made it harder on himself." (The alleged incident occurred in Jan. 1994). When we questioned that the fisherman requested the OLE agent confirm the fisherman's attorney for an interview, and that the agent agreed to do so, we could not reconcile if there is a record of the representation that took place regarding this matter. The former OLE agent told us that while he may have informed the fisherman that his particular attorney "is difficult," he never would have said that having an attorney would make it harder for the fisherman and suggested that the fisherman misinterpreted his situation. This allegation is associated with case 16 in that chart, which is a confirmed allegation.</i></p>	Complaint Category: 1 Appropriate for Further Review: ✓
17	<p><i>We found inconclusive, based on uncorroborated accounts, a complaint that at the request of OLE, a state game warden was threatened with prosecution by his supervisor if he testified as scheduled on a fisherman's behalf at a NOAA enforcement proceeding. (The alleged incident occurred around June 2001.) The Special Agent-In-Charge (SAC) of OLE's Northeast Division at the time denied, when we interviewed him, or making a request to a state game warden's supervisors that they terminate the warden's employment if he testified for the defense on a case. However, the then SAC acknowledged that he was frustrated with the state game warden in this case and communicated his frustration to the warden's supervisors. We interviewed two of the state supervisors referenced in this case who indicated they did not recall the incident. In our interview with the referenced warden he was clear in his recollection that the threat was made. Ultimately, the warden was not called and did not testify on this case. However, he did provide a report to defense counsel in support of the fisherman's position. The report was submitted by the defense as part of the official record.</i></p>	Complaint Category: 1 Appropriate for Further Review: ✓

APPENDIX A

COMPLAINT CATEGORIES:			
1. Broad and powerful enforcement authorities have led to overzealous or abusive conduct.			
2. Regulatory enforcement processes are arbitrary, untimely, and lack transparency.			
3. Unduly complicated, unclear, and confusing fishing regulations.			
*Denotes the 11 complaints identified in OIG's January 2010 report.			
18	<p>The ground investigation is completed by a fish officer that is a law enforcement officer involved in the fishing industry for purposes of the investigation. (The NOPA was issued in December 2009.) Our review did not find that during the execution of an Administrative Process Warrant on a fishing facility, two (2) agents were supported by several local and state officers, allegedly to provide perimeter security. According to the OIG agents, the local and state officers did not participate in the search but instead provided security on the outside of the facility while they conducted their search. (OIG reports that they considered the time period for its recent review to be when a vessel that was not available for our review and we were unable to identify the state and local officers who participated in the execution of the warrant, the number that participated, or the justification for the number that did participate.)</p>	1	Appropriate for Further Review
19*	<p>We found inconclusive a complaint that a fisherman in the Northwest was inappropriately fined \$75,000 for fishing in a closed area on four separate occasions and over a three-day period. (The NOPA was issued in August 2008.) According to the fishermen, Vessel Monitoring System (VMS) data did show that his vessel entered a closed area on several occasions. However, according to him it also confirmed that he could not have been fishing there because the course and speed of his vessel were inconsistent with the act of fishing. While the fisherman acknowledged being in the closed area, he asserted to us that the incursions were caused by extraordinary circumstances and were unintentional. Given the circumstances he believes that the amount of the fine was excessive, including that this was his first offense. The case was ultimately settled for \$15,000, with a further payment of \$20,000 suspended. We were unable to assess the validity of the entrepreneur's claim regarding VMS data and therefore, find this matter inconclusive.</p>	2	✓

APPENDIX A

COMPLAINT CATEGORIES:			
1. Broad and powerful enforcement authorities have led to overreliance on abusive conduct.			
2. Regulatory enforcement processes are arbitrary, untimely, and lack transparency.			
3. Unduly complicated, unclear, and confusing fishing regulations.			
*Denotes the 11 complaints identified in OIG's January 2010 report.			
20*	<p>It is found <i>inconclusive</i> that complaint that a fisherman was charged for fishing without a valid permit despite having been corrected in paperwork <i>error once a nullifier of the error by NMFS and which had rendered the permit invalid. It is found a NMFS A was issued by NMFS, a management agreement was reached by January 2010. The information in question stated to no debt while it was, NMFS required him to return to port because he had mislabeled one of his monthly Fishing Vessel Trip Reports (TVTRs) from the previous year resulting in his not having been issued a return to port valid permit. The fisherman and he returned to port, possibly signed and filed a new report, and was issued a new permit, but he was still subsequently charged for fishing without a valid permit. While we know the vessel did not and fish without a valid permit, the result of this case indicates that all TVTRs must be submitted timely to get a permit issued. The case in question for instance was delayed because of the referenced paperwork error. The case ultimately proved for a mislabeled TVTR drop in on the one of the fisherman's vessels. Given the facts and circumstances in this case we believe it merits further review.</i></p>	Complaint Category 2	Appropriate for Further Review ✓

APPENDIX A

COMPLAINT CATEGORIES:		
1. Broad and powerful enforcement authorities have led to assessments or abusive conduct.		
2. Regulatory enforcement processes are arbitrary, untimely, and lack transparency.		
3. Unduly complicated, unclear, and confusing fishing regulations.		
*Denotes the 11 complaints identified in OIG's January 2010 report.		
21	Complaint Category	Appropriate for Further Review
<p>We found inconclusive a complaint that GCCEL unfairly delayed the sale of a fisherman's vessel and release of the vessel's permit for a period of two years, causing similar financial hardship including possible foreclosure proceedings against the fisherman's family home. (The NOPA was issued in June 2009, and a settlement agreement was reached by June 2005). In order to settle this case, proceeds of the sale of the vessel and permit were to pay fines levied against the fisherman. According to the complaint, GCCEL rejected two purchase offers for the fisherman's vessel and the release of its associated permit delay the sale for a period of two years. According to the fisherman, GCCEL did not state any specific objections or reasons for rejecting the proposed transactions. The GCCEL attorney handling the matter indicated in e-mails such as this they vet purchasers of vessels and permits to ensure that any such sale is legitimate and not an attempt by a charged fisherman to maintain ownership and control of a permit they have agreed to surrender. Additionally, to ensure a sale does not go to anyone with a history of violating fisheries regulations, GCCEL ultimately allowed the fisherman to sell his vessel and the associated permit without auction, enabling him to fulfill his financial obligations under the settlement agreement.</p>		
22*	3	✓
<p>We found inconclusive a complaint made by a representative for a fisherman that a NOPA issued by NR client in the amount of \$38,000 for filing Fishing Vessel Trip Reports (FVTRs) with estimated weights that did not match more precise dealer reports was excessive and unfair. (The NOPA was issued in January 2004). The fisherman's agent argued that NOAA's refusal to issue that weight based on FVTRs and only dealer catch estimates, which was correct, was wrong because GCCEL then they generally allow the fisherman to set percent landing estimates to vessels that fishers, which are based on estimated principles. In this particular case the fisherman underrepresented his fish pounds by 20 percent. We are not in a position to judge if 5 to 10 percent or 20 percent penalties are reasonable.</p>		

APPENDIX A

COMPLAINT CATEGORIES:	Complaint Category	Appropriate for Further Review
<p>1. Broad and powerful enforcement authorities have led to overzealous or abusive conduct.</p> <p>2. Regulatory enforcement processes are arbitrary, unimply, and lack transparency.</p> <p>3. Unlawy complicated, unclear, and confusing fishing regulations.</p> <p>*Denotes the 11 complaints identified in OIG's January 2010 report.</p>		
<p>23* <i>The found inconclusive an allegation by a fish dealer that OLE agents searched his desk and files without permission and were unable to articulate their legal authority to do so. (The incident occurred in August 2004.) In this case OLE agents showed up at the fish dealer's place of business and requested access to records based on their inspection authorities found in the Magnuson-Stevens Act. The dealer questioned this authority in Constitutional grounds and contacted his attorney. The attorney also questioned the authority and requested a specific legal opinion explaining it. The agents contacted GAO's attorney who provided the dealer's counsel a letter specifically articulating the inspection authority. The agents recalled that they may have "suspected" the fish dealer's desk drawers and files cabinet after the letter from GAO's was provided and the dealer had "refused" the red envelope for them. The dealer's employees stated the agents searched through the dealer's desk and files before the letter was provided. We find this reasonable based on the agent's account. This allegation was made about our investigation of union 813 on this chart, which was an unconfirmed allegation. As a result we do not believe this case merits further review. However, we do believe it raises an issue we have previously reported on in regarding training and knowledge of agents with respect to their inspection and search authorities.</i></p>	1	

APPENDIX A

COMPLAINT CATEGORIES:		Complaint Category	Appropriate for Further Review
1. Broad and powerful enforcement authorities have led to overreaches or abusive conduct. 2. Regulatory enforcement processes are arbitrary, unduly, and lack transparency. 3. Unduly complicated, unclear, and confusing fishing regulations. Denotes the 11 complaints identified in OGC's January 2010 report.			
24	<p><i>OCLE's investigation of a complaint that a CLE attorney in the Northwest Region inappropriately attempted to leverage a violation of a rule (OCLE incident occurred in July 2008) according to a fisheries CLE attorney discussed his conduct with professional ethics advisors regarding the handling of the case. According to an email from the OCLE attorney to the defense attorney, the defense attorney was not fulfilling a professional obligation to properly represent his client in a settlement offer. According to the fisheries attorney, he told his attorney that he was not guilty and would not settle the case. The OCLE attorney indicated intent to file a motion against the defense attorney, affecting a violation of American Bar Association (ABA) rules regarding conflicts of interest. The OCLE attorney believed that the fisheries attorney was interested in settling the case and concealing that information from the defense attorney. The OCLE attorney further indicated that he had lost other clients were not being relayed to the attorney's client. The defense attorney revealed that he communicated to OCLE that client's interests to settle the case, at least in part, because of the pending OGLE Review. He further stated that his clients are always advised of options of settlement or they are perceived and that this case will be different. The OGLE is not in a position to judge the OCLE attorney's obligation to represent what can be expected would be ABA rules violations by a defense attorney, nor can we judge if the threat of these types of charges might be an attempt to harass or punish those settlement who also. This case is also relevant to some of the potential broader cases in examples set to this date, which is a continuing violation, and it is not appropriate for further review.</i></p>	1	✓

APPENDIX A

COMPLAINT CATEGORIES:		Complaint Category	Appropriate for Further Review
	<p>1. Broad and powerful enforcement authorities have led to overzealous or abusive conduct.</p> <p>2. Regulatory enforcement processes are arbitrary, untimely, and lack transparency.</p> <p>3. Unduly complicated, unclear, and confusing fishing regulations.</p> <p>*Denotes the 11 complaints identified in OIG's January 2010 report.</p>		
23	<p>The fishing licenseholder, represented by a fisheries agent, has been confused about certain fishing rules due to conflicting state and federal laws, and that on a recent day he was unfairly charged \$7,000 for unfairly paying certain overage even though he believed he was in compliance. (The NOAA was issued in March 2004). The fisheries agent stated that he attempted to contact NOAA for clarification regarding a licensing conflict between state and federal laws, and that no information was then provided to him. The regulations governing this type of scenario state that if you have a valid federal fishing permit you are bound by those restrictive federal regulations, limits, regulations of where you fish. We do not question that his concerns are genuine and that fisheries need to find a fair effort as shown, clarification regarding the regulations. However, we do find this particular regulation is relatively clear. This is the type of scenario where both NOAA and the fisheries agent would have benefited from an established system.</p>	3	
24	<p>A fisheries agent claimed that NOAA's management to increase the fine from \$10,000 to \$7,000 was not the case in an ALJ hearing. The NOAA was issued in August 2002. The NOAA's attorney responded in this case that NOAA was not in a position to increase the fine but acknowledged that NOAA's previous attorney had claimed that NOAA is limited to the highest fine the state can impose by the regulatory authority. The NOAA's attorney responded in the NOAA's attorney to state in the NOAA's attorney that the type of regulation is a NOAA's attorney to state in the NOAA's attorney with the NOAA's attorney and NOAA's attorney to state in the NOAA's attorney.</p>	2	✓

APPENDIX A

COMPLAINT CATEGORIES:		
1. Broad and powerful enforcement authorities have led to overcharges or abusive conduct.		
2. Regulatory enforcement processes are arbitrary, untimely, and lack transparency.		
3. Unduly complicated, unclear, and confusing fishing regulations.		
*Denotes the 11 complaints identified in OIG's January 2018 report.		
27. <i>A fisherman complained that when he asked GCEL for an extension to pay his fine, he was told that if an extension was granted the fine would increase to \$685,000. After NOAA was denied in December 1997.) According to the fisherman he was issued a NOAA for \$483,000. When he approached GCEL to request an extension of time by which to pay the fine, he was told one would be granted but that the fine would then rise to \$685,000. The fisherman indicated he could not pay a \$685,000 fine. Ultimately, he settled the case for \$15,000 plus a permanent restoration of a dealer permit and a ten year sanction against a second permit. The GCEL attorney who handled this case stated that the primary factor in accepting a reduced monetary amount was the fisherman's "financial inability to pay the assessed penalties." The GCEL attorney also denied making a specific threat regarding an increase to the fine if a time extension was granted. Further, that if a settlement figure is agreed upon and a payment plan is involved, agency policy requires NOAA to charge interest.</i>	2	✓

Appendix B

U.S. Department of Commerce – Office of Inspector General

Methodology for Examination of Selected Fisheries Enforcement Complaints (as Referenced in Accompanying Report)

During the course of our *Review of NOAA Fisheries Enforcement Programs and Operations*, we spoke with 131 fishermen, dealers, and various other industry representatives who believed they were treated unfairly or were subject to overzealous enforcement by NOAA enforcement officials. Some individuals had multiple complaints. The majority of the complainants were located in NOAA Fisheries' Northeast region (approximately 76 percent), while the remainder were from the Southeast (17.5 percent), Northwest (4.5 percent), and Alaska (1.5 percent) regions.

The complaints we received fell into three general categories:

- Broad and powerful enforcement authorities have led to overzealous or abusive conduct. For example, allegations were raised as to whether OLE could reasonably articulate the basis for exercising certain law enforcement authorities.
- Regulatory enforcement processes are arbitrary, untimely, and lack transparency. For example, allegations that first-time offenders being assessed civil penalties at the high end of the penalty range and GCEL attorneys being unable to articulate the rationale.
- Unduly complicated, unclear, and confusing fishing regulations. For example, allegations of rigid interpretation and enforcement of the term "engaged in fishing" contributes to industry's negative perception that NOAA only exercises its regulatory discretion to its own benefit.

Our January 2010 report referenced 11 specific complaints we found to be illustrative of the overall types of complaints we received in the course of our review. We committed to get to the bottom of these and thus included them in our follow-on detailed examination. We also considered all other complaints we received during our review (through December 2009). In putting all complaints through a methodology for further examination, we established a set of criteria and also exercised a level of discretion and judgment for selection. This ultimately resulted in our selection of 16 additional complaints, for a total sample of 27.

Our specific criteria for inclusion were:

1. All 11 complaints cited in our January 2010 report.
2. Complainant waived confidentiality.
3. Complaints had not been adjudicated in U.S. District Court.
4. Age of complaint: All but two of the 27 complaints selected were under ten years old. The two over ten years old (11 and 12 years, respectively) were included because they met the below criteria for seriousness.

Appendix B

We also applied a set of additional discretionary factors in order to identify those complaints that appeared to be the most egregious examples of unfair or abusive exercise of authority by OLE and/or GCEL. These were:

5. Seriousness of the alleged unfair/abusive conduct, specifically focusing on complaints alleging abuse of law enforcement authority.
6. Those complaints involving alleged arbitrary charges and adjudication by GCEL.
7. The vast majority of complaints we received involved complexity of regulations. As such, we selected a few that were the clearest and most representative examples.

Our review team consisted of OIG staff from across several disciplines and areas of expertise, including program evaluation, criminal investigation, forensic audit, and risk analysis. Each complaint was presented to the OIG review team and a consensus was reached as to which complaints were selected. The OIG review team routinely met to discuss the complaints, issues and concerns that were received and raised throughout the course of the review to determine if any patterns in OLE's and GCEL's enforcement activities could be identified.

Internally, our work included examining the complaints and the corresponding enforcement case files from both OLE and GCEL and pertinent statutes and regulations. We then interviewed the OLE agents and GCEL attorneys who were assigned and worked these cases. We also interviewed the supervisors of these individuals, including those in both the regional office and headquarters. Externally, we interviewed defense attorneys and witnesses, when appropriate. In some cases, the age of the case impacted the amount of information that was available and prevented us from making a determination as to the validity of the allegations.

In addition, while we did not review all of the 14 individual cases relating to complaints received involving the Yellow Tail Flounder Letter of Authorization, we did review NOAA's overall enforcement and subsequent assessments of fines and penalties associated with these violations. This included interviews with the Regional Administrator for NMFS Northeast Region, program managers in the Sustainable Fisheries Division, and staff in the Fishery Statistics Office responsible for administering the Yellow Tail Flounder Letter of Authorization endorsement.

In the course of reviewing complaints from those in the fishing industry, we faced considerable challenges and limitations, including the complexity of regulations and industry compliance with the regulations; age of cases; witness fear of retaliation for cooperating with OIG and a general unwillingness to waive confidentiality based on that same fear; poor recordkeeping by NOAA and poor data quality; and divergent, unreconciled accounts of events. Despite these challenges and limitations, we ultimately identified 27 specific cases that were conducive to further examination.

CIANCIULLI & OUELLETTE
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February 7, 2001

The Honorable Edward M. Kennedy
2400 JFK Federal Building
Boston, MA 02203

Attn. Graham Shaligan

Re: NMFS Enforcement Policies and Procedures

Dear Senator Kennedy:

I write to ask to you to address issues surrounding recent problems with the NOAA/NMFS Law Enforcement, which threaten to undermine any spirit of cooperation between NMFS and the commercial fishing industry in the Northeast. I have discussed these issues with Graham Shaligan of your office, and am providing a written account of current problems and suggestions to address them.

Undoubtedly you are aware I am both a lawyer and an advocate for hard working American fishermen. While most fishermen recognize the need for the conservation guidelines and do their best to comply with the regulations, even the most fastidious fishermen are being classified as violators due to increasingly complex regulations, and increasingly harsh enforcement procedures. Recent actions of the NMFS enforcement agents, including criminal prosecutions for common misunderstandings of the complex regulations, appear to threaten the already tenuous relationship between NOAA and the industry. On behalf of my many clients, I ask that you address serious concerns with the agency about their policies and procedures, and consider statutory changes to help an industry already staggering from the effects of the fisheries crises. We believe that many actions of the enforcement agents are directly contrary to the professional and congressional intent underlying specific provisions of the Magnuson Act.

These actions include:

1. Institution of criminal proceedings for common misunderstandings of logbook requirements

CIANCIULLI & OUELLETTE

The Honorable Edward M. Kennedy

December 5, 2003

-2-

2. Institution of criminal complaints under the Lacey Act despite explicit exceptions from the Act for Magnuson Violations
3. Improper and overzealous seizure of fishermen's catches, including refusal to consider exonerating evidence at time of seizure, inappropriate use of Coast Guard equipment and unwarranted delays in producing agency files to support seizures.
4. Undermining the validity of the data collection process through the use of data purportedly collected for scientific monitoring by enforcement, including distribution of confidential information to state law enforcement agencies to further criminal prosecution.
5. Attempts to solicit observers as informants
6. Refusal to make available such routine information as vessels call-in call-out information based upon the vessels reporting.
7. Adoption of penalty schedules without public input and prevention of inquiry into the basis for levies of fines in individual cases, in apparent violation of the due process clause of the United States Constitution
8. Creating an air of distrust in the industry to further its enforcement actions, which threatens to undermine the industry, as well as industry/agency cooperation.

We ask that you take appropriate steps to discourage NOAA/NMFS from bringing criminal prosecutions for violations for which Congress has created a comprehensive civil enforcement structure, and that you encourage the agency to revert to its traditional role of enforcing regulations to encourage compliance, not using highly technical violations and broad seizure authority to force responsible fishermen out of business, either through their mistakes, or the errors of law enforcement personnel.

We believe that congressional inquiry into the conduct of the North East Regional Office of Law Enforcement is vital to preserve the legitimacy of the entire management structure, and that the following actions be considered to prevent what appear to be abuses of agency power by

CIANCIULLI & OUELLETTE

The Honorable Edward M. Kennedy
December 5, 2003

-3-

both the United States Coast Guard¹ and the Office of Law Enforcement under the Magnuson Act. The basis for each of these complaints is as follows:

1. Institution of criminal proceedings for common misunderstandings of logbook requirement

As you are aware, in addition to reporting when vessels leave and return from trips, virtually all vessels are now required to report all fishing trips, in some cases to two or more NMFS offices.² These requirements have changed over time, with fisheries such as lobster only recently having developed reporting requirements, and groundfish (multispecies) having been instituted on a fleet wide basis in 1994. A constant area of confusion involved exactly who has to report and when they have to report. For example, our question is although multispecies fishermen clearly must report when they are engaged in a multispecies fishery, are they required to report when they engage in non-multispecies fisheries? During a recent enforcement meeting, I raised the issue and was met with blank stares by law enforcement as to whether multispecies fishermen have to file vessel trip reports during, for example, tuna fishing trips. No one appeared to know. There appears to be a common misunderstanding that because other fisheries are managed under other plans, trips in those fisheries are not to be reported under the multispecies reporting requirements. At one time, I was advised that as long as a vessel holds a multispecies permit, it must report trips even when fishing in, for example, the southeast region and complying with that region's reporting requirements. The interpretations of these rules change constantly, and are neither consistent with their stated purpose, nor are they logical or reasonable.³

In a case now pending in the United States District Court for the District of New Hampshire, a vessel owner has been charged with filing false fish reports indicating that, during periods of time when he was not ground fishing he was allegedly reporting that he was not fishing in his multispecies trip reports, despite apparent use of lobster traps. The agency is well

¹ I do note, in all fairness, that the United States Coast Guard, First District, has recently brought in a new Chief law Enforcement officer, and there appears to have been fewer problems since his arrival. I believe his views are much more reasonable than those expressed by his predecessor.

² For example, one fishermen I recently spoke with was discussing the problems with working under seven separate fishery management plans, which require permit applications and separate reporting to three separate NMFS offices, the Northeast, Southeast and Highly Migratory.

³ I note as another example the issues surrounding "incomplete" logbooks and denial of the days at sea buyback/disaster relief. Some vessels had not completed the fishing activity location in latitude and longitude, as they fished in more than one location during one trip. The confusion was so great that Andrew Rosenberg, then Regional Director, issued a letter indicating that vessels were in compliance if they stated the statistical region they were fishing. During the disaster relief program, NMFS, presumably unaware of this letter, denied relief to those who had heeded Dr. Rosenberg's advise.

CIANCIULLI & OUELLETTE

The Honorable Edward M. Kennedy
December 5, 2003

-4-

aware of an ongoing misunderstanding by the industry as to precisely who must file logbooks and when, particularly with regard to multispecies fishermen fishing under other management plans which do require vessel trip reports. Until recently, lobstermen were not required to file any logbooks, regardless of whether they fish in State or Federal waters. However, multi species fishermen are required to file log books, although the industry apparently has not understood in the past that this included each and every fishing trip, regardless of the gear fished or the species fished. As a result, there is very little logbook reporting for such species as tuna or lobster. The problem has been so endemic that the agency has repeatedly sent out letters trying to remind people or educate people of this fact. It is alleged that the fishermen involved in the New Hampshire case filed negative trip reports when called out of the groundfish fishery, believing this was necessary to indicate the lack of groundfishing activity. At some point in time, he consulted with NOAA enforcement personnel about what trip reports needed to be filed. After the agent consulted with the regional office, he was advised to file trip reports for lobster trips, and began to do so. The NOAA law enforcement agent's response to this was to institute federal criminal charges for failure to have reported those lobster fishing trips on a log book. Coincidentally, this occurred shortly after this fisherman called the Regional Administrator, Patricia Kurkul, on the carpet at a public meeting for another common misunderstanding of the complicated Northeast roles with regard to provisions of the so called running clock.

The issue surrounding the reporting requirements of the multispecies fishery extending to lobstermen who hold those permits has really only been brought directly to the attention of fishermen when NMFS started to refuse to renew permits of lobstermen who also held multispecies permits. I am aware of a number of instances where large sectors of industry groups were unaware of the extension of reporting requirements under the multispecies plan to activities under other permits and plans, as is the agency.

During a hearing on a motion to dismiss, Judge McAuliffe of the United States District Court for the District of New Hampshire specifically raised the issue of whether this prosecution for logbooks was authorized by the agency. Excerpts are included herewith. He noted the complexity, of the regulations, and the fact that there was some apparent confusion. As Judge McAuliffe noted, the agency's actions in this regard created significant difficulty and threatened cooperation between the industry and the agency. As a representative of a broad spectrum of the agency from Northern Maine to Wanchese North Carolina, I fully agree. If common misunderstandings of complex regulations result in criminal prosecutions, the industry will cease cooperating with the agency.

2. Institution of Criminal Complaints under the Lacey Act despite Explicit Exceptions for Magnuson Violations

CIANCIULLI & OUELLETTE

The Honorable Edward M. Kennedy
December 5, 2003

-5-

At the same time as the alleged logbook case, the same NOAA Law Enforcement agent referred to above instituted criminal prosecutions in the United States District Court of New Hampshire.⁴ These charges were instituted under the Lacey Act. Fishermen were accused of exceeding cod trip limits under the Magnuson Act, and placing the fish in interstate commerce. We contend that these charges are wholly inappropriate as criminal charges, given the intent of the Magnuson Act, and the nature of the violations themselves. The Lacey Act clearly excludes violations of Magnuson Act regulations as forming the basis of criminal prosecutions, 16 USC §3377. See excerpts of Lacey Act annexed hereto. We believe that these charges are frivolous and evidence overzealous enforcement personnel trying to further their own positions and justify larger budgets.⁵

These cases are also problematic based upon their nature. For over three hundred (300) years crew members have been allowed to land small quantities of fish for use either by their families, or as “shack” in many instances this quantity of fish is traditionally sold to pay minimal daily living expenses. Under the provisions of the multispecies regulations, crewmembers are permitted to bring ashore twenty-five (25) pounds of fish fillets per crewmember, although the regulation does state that it is not to be used for barter or trade. Nonetheless, despite the common practice of this occurring over the last three hundred and seventy-five (375) years, we have yet to find a criminal prosecution based upon this type of activity. Under the provisions of the present Northeast multispecies regulations and those in existence at the time of the alleged criminal actions, vessel owners were required to discard all but between thirty (30) and four hundred (400) pounds of cod. The vessel accused in the New Hampshire incident in question discarded up to five thousand (5000) pounds of cod on given days, all of which were reported. At the same time, crewmembers were allegedly bringing in twenty-five (25) pounds of codfish fillets per person per day, which was allegedly being included in the figures representing the vessel’s discard. Even if this conduct violated the regulations, we still question whether it is the intent of congress to criminally prosecute fishermen for this type of violation. Particularly where as here, NMFS mandates that large quantities of fish are to be discarded, usually dead, fishermen are torn between questionable regulations and moral judgments.

The NMFS, rather disingenuously, referred to their investigations as operation cod saver. The codfish allegedly landed represented twenty-five (25) thousand pounds of as much as eight million pounds that the government mandated be discarded. Quite interestingly, the NMFS

⁴ This agent is also involved in pressing grand jury investigation against fishermen who participated in the FIG program, or who obtained loans from federally guaranteed loans through the New Hampshire Port Authority.

⁵ Some attempt is being made to tie in some similar provisions under Maine law, however it seems a tortured attempt to create a criminal violation where Congress has clearly indicated that none exists.

CIANCIULLI & OUELLETTE

The Honorable Edward M. Kennedy
December 5, 2003

-6-

agent rather proudly proclaimed to the press that having squeezed the small boat fishermen to this point, they had turned them into criminals. We do not believe that this is the type of activity that Congress sought to criminalize through the Lacey Act, and in fact quite to the contrary, believe that Congress expressed otherwise.

We request you express your displeasure at these criminal prosecutions as being contrary to congressional intent. Further, we request that to the extent NOAA/NMFS is utilizing its budget to pursue this type of enforcement you withhold enforcement funds. It is our understanding that these "investigations" were time and budget consuming. At a time when NMFS is cutting back on scientific efforts, including curtailing observer and port agents, it is disserving to have the agency direct resources to criminalizing the rules for those who are being squeezed to the point of economic extinction.

3. Improper and Overzealous Seizure of Fishermen's Catches, including refusal to consider exonerating evidence at time of seizure, inappropriate use of Coast Guard equipment and unwarranted delays in producing agency files to support seizures.

Both the Coast Guard and NOAA/NMFS have been over zealous in seizing catches for suspected violations. In a number of cases, vessels have had catches seized, often based on highly questionable use of Coast Guard navigational radar plots from as far as 16 miles away. Vessels have been detained and their catches seized for alleged violations due to improper actions of Coast Guard crews and officers, only to be exonerated months later, having suffered significant financial burden of withholding of the vessel's and crew's funds, and the cost attended to refuting agency charges.

For example, in August 1999, the F/V JASON & DANIELLE was boarded by Coast Guard officers, who after approximately four (4) hours on board the vessel accused her of fishing in the George's Bank closed area. Despite protest of the Captain and crew, the vessel was ordered to port and her catch seized. Shortly after being informed of the allegations, while still at sea, the Captain informed Coast Guard officers that at the time of the alleged incursion, he was both plotting his position on a computer, and had a corresponding Boattracks report. As you are aware, Boattracks is the NOAA approved vessel tracking for scallop and multispecies vessels. This system cannot be adjusted by the boat owner and tracks vessel location to within 100-300 yards. Had the Coast Guard taken the time to review the available information, they would have realized that Boattracks placed the F/V JASON & DANIELLE as much as six miles away from the position claimed by the Coast Guard. Nonetheless, the catch was seized requiring the vessel owners to hire counsel, and hire an expert and after approximately one (1) month, were able to persuade the Office of General Counsel to dismiss the case. Much to the credit of Charles Juliand, Esquire of the Office of the General Counsel, a prompt meeting was held at the request

CIANCIULLI & OUELLETTE

The Honorable Edward M. Kennedy
December 5, 2003

-7-

of the vessel owners. Attorney Juliand properly assessed the case and agreed to return the seized proceeds to the owners. Nonetheless, for an excess of four (4) months the vessel was deprived the profits of the trip and lost time being escorted in (the return was delayed, apparently to create a media opportunity for the Coast Guard). All of this has been detailed in a letter previously sent to your offices, a copy of which is annexed hereto.

A number of other vessels have subsequently and similarly been wrongfully accused of incursions into the closed areas, and later exonerated in each instance losing the proceeds of sale of the catch for months. Numerous problems have since appeared with regard to the Coast Guards use of long distance radar and false statements by crew members with regard to observations of vessels "engaged in fishing" at distances of in excess of fifteen (15) miles. None of these Coast Guard vessels have the ability to ascertain whether a vessel is fishing at such a range. In a number of cases, catches have been seized for in excess of a year, with no formal charges having been issued. We believe that the use of radar systems designated for navigational awareness are not appropriate for determining the actual latitude and longitude of vessels at distances of many miles, particularly in the absence of a fixed object.

Approximately one year ago, the Gloucester based dragger F/V CONSTELLATION also had her catch seized. After preliminary meetings, the Office of the General Counsel agreed to release the proceeds of a seized trip where Coast Guard data was questionable.⁶ Unfortunately, the owners of that vessel faced with creditor suits over inability to meet short-term needs immediately after the seizure were forced to declare bankruptcy.

Given the fact that all of these vessels are vessels of the United States, will be landing in the United States ports, under close scrutiny of the Federal Government, we question whether any need exists for seizing the catch of a vessel. We believe alternate enforcement remedies, including but not limited to suspension of a vessels permits, constitutes sufficient leverage for the Federal Government so that they need not seize catches without a hearing, nor should it be presumed that the entire catch is in violation of the statute. Too many innocent crewmembers have gone without pay for a trip either because of a mistake by the Government or a mistake by their Captain. It is time for this unconstitutional action to stop. The countervailing protections, speedy hearings etc., which were used as justification for this practice in the past, no longer exist.

In one almost comical case, a Portland based dragger, F/V BLACK BEAUTY, fishing out of Gloucester at the time, was wrongfully accused of fishing in a closed area. As the vessel was escorted to port by the USCG, the fishing vessel captain was informed he would be brought

⁶ The CONSTELLATION's expert determined that the cutter's position was a constant 9 degrees different than the fishing vessel's, which corresponded to a 9 degree steering error reported on the cutter during the time period in question.

CIANCIULLI & OUELLETTE

The Honorable Edward M. Kennedy
December 5, 2003

-8-

to Portland, whereupon he objected. He had intended to terminate his trip in Gloucester, and had on board lobsters which he could not possess in Maine waters. After some consultation, the Boarding Officer indicated that because the catch was under seizure the Coast Guard could land the lobsters. A short time later the fishing vessel captain returned to the deck area as Coast Guard personnel were tossing the last of his lobsters overboard. (The rumor is the bands were not removed from the claws before they were thrown over.) Once in port the catch was sold and proceeds held by NMFS. Subsequently, the Coast Guard reversed its position and dropped the charges. Instead of paying the vessel for the lobsters discarded by the Coast Guard, the vessel is reported to have been issued additional days at sea.

In 1988 NMFS/NOAA promulgated a written policy indicating that in cases of excessive overages on trip limits, NMFS would seize entire catches. Although the percentages were not defined, NMFS indicated that for small overages warnings would be written, for intermediate overages, the excess only would be seized and in cases of excessive overages, the entire catch would be seized. With the restrictions on the Gulf of Maine cod trip limits, many fishermen not understanding the provisions of the so called running clock, a number of fishermen have been surprised to see their entire catch of two (2) to three (3) thousand pounds of fish seized. In most cases the fishermen relied on NMFS letters to permit holders indicating vessels could run their clock for one day, and landed twice the daily cod limit. In these instances entire catches are being seized-cod, haddock pollack and flounders, not just the cod overage. In fact, we are not aware of any overage being seized for at least two- (2) years-if a seizure occurs; it is always the entire trip.

Last October, the F/V LORI L landed 10,490 pounds of scallops in Barnegat Light, New Jersey, in excess of the 10,000-scallop exemption trip limit. Initially, NMFS agents chose not to seize the trip, but returned later in the day and seized the vessels entire trip. Despite the fact that prior to this seizure NMFS had only annunciated a ten (10) percent tolerance policy, apparently an non circulated and non published policy sets a two (2) percent tolerance for scallop closed area exemption vessels. Since the weight of scallops changes dramatically based upon on how they are iced and stored, we believe that in the absence of a written policy, NMFS cannot justify seizures of trips where limits are exceeded by less than five (5) percent, and that this conflicts with the October 1988 policy.

In a number of cases, including the F/V RHONDA DENISE, F/V ROLLING STONE and the F/V LILY JEAN, NMFS agents acting in conjunction with the U.S. Coast Guard seized catches from these vessels. In the case of the F/V ROLLING STONE, some eighteen (18) months later NMFS declined to proceed with charges. In the case of the F/V RHONDA DENISE, said funds were released after a motion for remissions filed, we have no indication as to whether or not the vessel would be charged with a closed area violation. With regard to the

CIANCIULLI & OUELLETTE

The Honorable Edward M. Kennedy
December 5, 2003

-9-

F/V LILY JEAN, some twenty (20) months have elapsed since the catch was seized, and neither NMFS nor the U.S. Coast Guard appears to know what the status of the case is.

The seizure of catches can have catastrophic effects on fishing vessel operations, such as occurred with F/V CONSTELLATION. We contend that the grant of authority to seize the catch of a U.S. fishing vessel without provisions for a hearing is unacceptable, and suggest that Congress require that NMFS institute a policy requiring the agencies full investigative file to be produced within fifteen (15) days of seizure, with the claimant having the ability to request a hearing on no greater than fifteen (15) days notice. NMFS and the USCG should also be required to compensate vessel for wrongful seizure and/or detention, most appropriately, from funds retained as a result of other seizures.

4. Undermining the Validity of the Data Collection Process through The use of data purportedly collected for scientific monitoring by enforcement, including distribution of confidential information to state law enforcement agencies to further criminal prosecution.

Fishermen were wary when NMFS instituted industry wide reporting, believing that it would be used primarily for enforcement. NMFS personnel initially indicated that it was solely for scientific purposes, and Congress apparently agreed when provided that

- (1) Any information submitted to the Secretary by any person in compliance with any requirement under this Act shall be confidential and shall not be disclosed, except--
(A) To Federal employees and Council employees who are responsible for fishery management plan development and monitoring...
- 16 USC §1881a (b)

Nonetheless, when NMFS adopted regulations, they added "enforcement" to the list of persons to whom information could be disseminated. We believe that this contradicts clear congressional intent. With the extensive authority of NMFS to inspect vessels and catches, we believe that fishermen should be more concerned with providing full scientific data, and should not have to worry that an honest mistake turns into a violation because they accurately report fishing activity. A number of vessel owners have been surprised to learn NMFS enforcement agents have been poring over their "scientific" trip reports for enforcement purposes. Fishermen have always been told that their logbooks were for the sole purpose of scientific data collection. Recently it has become apparent that the primary purpose of these reports is for enforcement, which appears contrary to congressional intent.

CIANCIULLI & OUELLETTE

The Honorable Edward M. Kennedy

December 5, 2003

-10-

It has now become apparent that the primary purpose of recording vessel trip reports is to further enforcement. In a number of instances NMFS has instituted enforcement proceedings based upon inconsistencies perceived in vessel trip reports. In one instance, three (3) tuna dealers were summoned into the Orleans Massachusetts District Court and charged with purchasing fish from individuals who did not hold Massachusetts State landing permits, but were Federally licensed. In each instance, the environmental police officer presented the dealers confidential log report to NMFS. Each of these documents contained a statement representing that it was collected under the Magnuson Stevens Act solely for scientific purposes, and would remain confidential, in perpetuity. A redacted version is provided herewith.

We believe that the use of scientific reporting materials to further criminal and civil prosecutions violates the very spirit of the Act, and threatens to undermine the credibility of scientific information. Vessel owners should be free to report truthfully where their fishing activity occurred and what it consisted of without fear it may later be used to further prosecution of a technical violation. We strongly urge enforcement of the confidentiality provisions, and suggest further supplementation by creating immunity for truthful reporting.

5. Attempts to Solicit Observers as Informants

It has come to our attention that a member of the office of the General Counsel appeared at a meeting of NMFS observers in Woods Hole. He is alleged to have dropped a handful dimes on the table and suggested to the observers that they knew what they should do with them, suggesting they should serve as informants and "drop dimes" on fishermen. Reportedly, the head of the observer program made it clear that this was inappropriate and that they would have nothing to do with such activity.

Nonetheless, the attempt by the office of General Counsel our office of law enforcement to utilize scientific observers in this fashion threatens to undermine the credibility of scientific information gathering. In fact, provisions of the Magnuson Act including section 401, indicate that observers should not be acting as informants, and it is questionable whether information that they gather can in any event be provided to law enforcement. We suggest investigation as to whether the conduct of this official constitutes a solicitation of a violation of the Act, and further that Congress strengthen confidentiality provisions with regard to all scientific data gathering, including observers.

6. Refusal to make available such routine information as vessels call-in call-out information based upon the vessels reporting.

CIANCIULLI & OUELLETTE

The Honorable Edward M. Kennedy
December 5, 2003

-11-

A number of fishermen have contacted me regarding NMFS refusal to provide Days At Sea call in information. Many fishermen are concerned because the call in personnel questions the type of trip a vessel is calling in for. Often fishermen just want to double check that their records agree with the governments. We believe that this information is available under the Freedom of Information Act, and can be easily printed out from NMFS computers. Nonetheless, the Agency has been refusing to make it available, in some case requiring individuals to list all of their fishing trips before the materials will be produced.

Recently the owner of the F/V FINEST KIND, concerned by NMFS agent statements that he was out of DAS, called to request his DAS information. Initially, he was told he could not obtain it, but later was told it would be sent. Despite the passage of weeks the materials were not supplied. Eventually, the owner was informed that two of the vessels' trips, worth in excess of \$10,000 had been seized, allegedly for exceeding her DAS. Even after this seizure NMFS refused to provide the information. It has now been provided, but only after a formal FOIA request.

If Congress intends to foster a cooperative effort between the industry and the agency, the agency should be directed to assist, rather than hinder, attempts of vessel owners to remain in compliance with regulatory requirements.

7. Adoption of Penalty schedules without public input and prevention of inquiry into the basis for levies of fines in individual cases, in apparent violation of the due process clause of the United States Constitution

NMFS has adopted a schedule of fines and penalties, which apparently serve as the starting point for assessments in enforcement actions. The penalties are set extremely high, and in each individual case are set by NOAA enforcement attorneys, who later handle prosecution of cases. Generally, the accused has no ability to interact with NOAA General Counsel prior to the penalty being imposed. Although the accused is afforded an opportunity for a hearing, the accused then bears the burden of proving that the penalty assessed was not appropriate. In the course of the hearing process, respondents have sought discovery into the basis of individual penalties, however the agency takes the position that discovery is impermissible as an attorney imposed the penalty, and his work is privileged as attorney work product. This issue is currently before the Deputy Administrator. We believe that the shielding of the process from inquiry violates the most basic principles of due process afforded under the United States Constitution, and should be discouraged. Respondents in fishery enforcement proceedings should be provided with a full statement as to the basis for imposition of each and every penalty in light of the facts of the case. NOAA penalty schedules should also be subject to public comment and fishery management council approval.

CIANCIULLI & OUELLETTE

The Honorable Edward M. Kennedy

December 5, 2003

-12-

8. Creating an air of distrust in the industry to further enforcement actions, which threatens to undermine the industry, as well as industry/agency cooperation.

As we discussed with Mr. Shaligan of your office, the Gloucester Seafood Display Auction (GSDA) was surprised to be informed that it is the subject of an ongoing investigation for alleged violations of reporting requirements relating to federal fisheries, including northeast multispecies. As far as the Auction was aware to that point, NMFS was pleased with its reporting, see copy of e-mail from Don Mason. The facts, as we know them are as follows:

In November of last year, the GSDA was informed that its name had appeared in a list of ongoing investigations circulated by the Office of Law Enforcement (OLE) for the Northeast Region of the National Marine Fisheries Service (NMFS) during a New England Fishery Management Council Meeting. After the issue was brought to the attention of the GSDA, Attorney Ann Margaret Ferrante, acting for the GSDA contacted Richard Livingston, Special Agent in Charge for the region. He initially indicated no investigation was pending. Shortly thereafter, he contacted Attorney Ferrante and informed her that apparently there was an ongoing investigation.

On November 28, 2000, an NMFS investigator issued an Enforcement Action Report (EAR) to the GSDA alleging some 50 violations including improper or false reporting of vessel landings by the GSDA. (An EAR is an informal statement of charges, which generally indicates that an investigation is complete and that the investigating officer believes sufficient cause exists to forward the investigation file on to the Office of the General Counsel for issuance of formal charges in the nature of a Notice of Violation (NOVA) or Notice of Permit sanction (NOPS).) At no time prior to issuance of the EAR did NMFS officers seek to interview anyone from the GSDA or request any documentation. Although the Auction is not technically buying and selling fish, and arguably not mandated to report fish offloaded and sold on its premises, it agreed, after consultations with NMFS to voluntarily assume the role of the reporting landings across its pier. As such, GSDA is required to make records upon which it bases its reports available to NMFS agents. See letter from SAIC Richard Livingston, attached.

On November 29, 2000, the NMFS agent requested documentation regarding the landings of certain vessels, including pre and post auction reports, copies of invoices and checks written to each vessel. The agent later requested documents for one additional vessel. These documents were provided as requested.

Despite requests for advise as to the nature of the charges, neither the dates of violations nor any information underlying the November 28, 2000 EAR has been forthcoming from NMFS.

CIANCIULLI & OUELLETTE

The Honorable Edward M. Kennedy

December 5, 2003

-13-

NMFS has requested open interviews with certain employees of the GSDA which to date have been declined. Permit holders are required to make documents available for inspection, but are not required to submit to interviews. Recent developments in fishery enforcement, including recent criminalization of charges such as common misunderstandings of logbook reporting requirement, militate against any prudent legal counsel permitting such interviews voluntarily. Despite confidentiality provisions of the Magnuson Act, NMFS has been using otherwise confidential information and statements made by permit holders to further both State and Federal criminal prosecutions, as outlined above.

The GSDA has traditionally had good relationships with law enforcement personnel; often calling them in when concerned that a violation might be occurring. Enforcement personnel use the GSDA premises constantly to access vessels, etc... As detailed above, despite good relationships with most law enforcement personnel, the NMFS agent involved has been a persistent problem, at one time requiring intervention from outside of the NMFS region. Reportedly, he has indicated to other fishermen accused of wrongdoing that if they can implicate the auction, he will see to it that NMFS "goes lighter on them." At a recent meeting of the New England Fishery Management Council Law Enforcement Subcommittee, OLE confirmed that they are aggressively pursuing fish dealers.

Thus, to date although NMFS OLE has indicated that it believes cause existed for charges to be made, GSDA has not been advised of what it is alleged to have done in terms of false reporting. GSDA believes it will be vindicated, but is concerned that the damage from this, and other similar investigations, will strain a tenuous relationship between the industry and the Agency. There appears to be a competition to see which NOAA/NMFS agent can "fry the largest fish," regardless of actual merit of a case.

We have attempted to piece together the limited information available to us. It appears that two vessels may have been landing fish in different ports and evading trip limits. The belief is that these vessels may have offloaded some fish at the GSDA and at the Portsmouth fishermen's Cooperative or at a town dock in Newburyport. Fish delivered from Portsmouth would not be reported by the GSDA, as the GSDA is not the offloading entity. In such a case the Coop would be required to report. (NMFS has requested the GSDA not report this fish, as it would result in dual reporting). Fish trucked in from a vessel by its owner would be reported based on the representation by the trucker as to which vessel landed the fish and where.

The GSDA concerns are being reflected throughout the industry. In the face of increasing mandates for regulatory discards, fishermen are being placed under increased scrutiny for alleged trip limit violations. As noted above, the NMFS Office of Law enforcement has

CIANCIULLI & OUELLETTE

The Honorable Edward M. Kennedy

December 5, 2003

-14-

begun a series of criminal prosecutions for trip limit violations and violations resulting from common misunderstandings of logbook regulations. NMFS appears fixated on proving conspiracy to evade trip limits. It is obvious that NMFS law enforcement is making a significant push to elevate violations to a higher level, both civilly and criminally. Whether this is to eliminate as many fishermen or permits as possible, or to strengthen the position of the Office of Law Enforcement are unclear at this time.

Conclusion

The fishing industry is undergoing an evolution from the least to the most regulated industry in America. Most of the participants are small owner operators and uneducated crews, who traditionally provided food to a hungry country, putting their vessels and their lives at risk. Regulations have become so complex that even NMFS personnel, including enforcement, are unable to agree on the there meaning, and fishermen are being held to the highest standard of any industry. In other areas of regulation, such as occupational safety, violations as serious as death of workers are assessed at \$10,000 to \$20,000. In commercial fishing, a common misunderstanding of a rule, or a momentary navigational lapse, provides a minimum fine of \$35,000, loss of catch of \$50,000 to \$60,000 (which deprives totally innocent crewmembers of their share) and possible suspension or loss of permit. Often, permanent harm is inflicted on innocent fishermen through seizures, without the opportunity for a hearing. Despite this, NOAA is attempting to further raise the stakes by expanding the use of criminal prosecutions. On behalf of my clients, I say enough is enough. Congress should take steps to make clear fisheries violations are civil matters, except where explicitly set forth in the Magnuson Act. Congress should set guidelines for seizures, immediate hearings before Article III judges, and provide redress where government agents seize product in error, for crewmembers as well as owners. Congress should revise the method by which penalties are set and imposed, and generally should require that NOAA take into account the speed with which regulations have been imposed and their complexity in the setting of penalties. While we believe that virtually all fishermen attempt to comply with the regulations, and honestly believe they are doing so, they will all be found out of compliance in one way or another, and eventually driven out of business. If Congress truly intends for the food resources in the ocean to be available to the general public, continuation of a commercial fishing industry is essential. The present enforcement climate, which threatens to destroy industry/agency cooperation and undermine the validity of the scientific data upon which all fishery management plans rely, is making this virtually impossible.

For these reasons, we ask that you, as a member of Congress, begin discussions or an investigation into redefining the objectives of and procedures for enforcing regulations, which takes into account the issues facing commercial fishermen. As hardworking Americans, risking

CIANCIULLI & OUELLETTE

The Honorable Edward M. Kennedy
December 5, 2003
-15-

their lives to provide food for America, they deserve to be treated with dignity and respect, in addition to being afforded the most basic rights of citizens of this great nation.⁷

I thank you for your time, and would be happy to sit down with you or members of your staff to further discuss these matters.

Very truly yours,

Stephen M. Ouellette

SMO/kab
Enclosures

cc The Honorable Senator John F. Kerry
 The Honorable Congressman John F. Tierney
 The Honorable Congressman Barney Frank
 The Honorable Congressman William Delahunt
 The Honorable State Senator Bruce Tarr
 The Honorable State Senator Mark Montigney
 The Honorable State Senator Theresa Murray
 The Honorable State Senator Robert Hedland
 The Honorable State Representative Frank Hynes
 The Honorable State Representative Anthony Verga

⁷ Fishermen often ask why they are not afforded basic rights, such as freedom from warrantless search and seizure on their vessels, and are told these protections do not apply in the civil context of fisheries and vessel enforcement. This has generated the rather said, but true, joke-What is the difference between an American fisherman and a Columbian drug smuggler? The drug smuggler has constitutional rights.

OUELLETTE & SMITH
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February 27, 2008

VIA EMAIL

The Honorable John Tierney
2238 Rayburn House Office Building
Washington, DC 20515
Attn. Mr. George McCabe

Re: NOAA Office of the General Counsel

Dear John:

As on of your constituents, both a fisherman and my client, has apparently related to you, he is currently facing a stiff penalty from the National Oceanic and Atmospheric Administration ("NOAA") for exceeding his Days at Sea allocation. This is yet another example of NOAA's unfair and draconian treatment of fishermen, which unfortunately, in my experience is a surprisingly mild example of how far I have seen NOAA go. Once again, NOAA attorneys, by freezing a vessel's ability to fish, and holding out the potential of significant fines, which according to NOAA's determination of congressional intent, can be set at up to \$140,000 for any violation, has left a vessel owner no option other than to surrender his catch, for a technical violation.

This fishermen/vessel owner, whom I consider to be one of the most conscientious vessel owners I have had the pleasure of working with, apparently misjudged his available Days at Sea ("DAS")¹ on his vessel, a 42 foot gillnetter fishing from the port of Gloucester. This occurred, in part, because at various times NMFS has been unable to timely provide him with NMFS's DAS usage calculations,² due to computer issues and problems calculating DAS usage based on differential counting.³ NMFS also continued to issue sailing numbers to the vessel, despite the

¹ As you already may know, a vessel's allotted Days at Sea are the amount of days a fishing vessel may fish in a given fishing year.

² Even as I write this letter, I received a call from a Montauk fisherman in the same situation. NMFS has informed him that they can not tell him how many DAS he has remaining, indicated he might be over, and apparently has held up his DAS lease application. If he can not lease his DAS before Thursday, he will lose 30 DAS, worth \$24,000 on the open market-and not be able to fish his vessel until next year.

³ As a prime example of how convoluted the system is, I am attaching two DAS printouts for monkfish DAS, showing that in November of 2007, NMFS had charged this fisherman for 35.96 monkfish DAS, in some cases

OUELLETTE & SMITH

The Honorable John Tierney

February 27, 2008

-2-

apparent overage. NOAA Enforcement Attorney, Charles Juliand has advised that if the fisherman agrees to forfeit \$25,000 of the total of approximately \$27,000 in catch, in addition to the DAS that would have been used, NOAA will seek no further penalty. Based on my experience with NOAA Office of the General Counsel, this places this owner in a legal quandary. As a lawyer for the fishing industry, the complete lack of judicial remedy places me in an impossible position, other than to advise him to accept what NOAA so "generously" offers as a settlement.

Facts

As you are aware, this fisherman, through two LLCs owns four fishing vessels, and through these entities or individually, owns a number of additional permits on skiffs, which are available to lease DAS to support the operation which sustains 7-8 families. By constant checking with regulators as to the effects of the rules, and continual reinvestment, he has been able to keep his crew fishing, and to provide a high value protein food source for the American public.

In November of 2007, this fisherman called NMFS Office of Law Enforcement to inquire as to how many DAS his vessel had on her allocation. He was advised that he had exceeded his DAS by 3 or 4 days, and was told that since he had additional DAS on a number of skiffs available to lease DAS, he should file an application to lease DAS to the vessel in question, and he would be fine. He immediately filed a DAS lease application, and continued to fish the boat, assuming NMFS would process the application.

Shortly thereafter, the lease application was denied due to the overage, and the vessel, without available DAS was forced to cease fishing, and has remained tied to the dock since late November of 2007.

During the entire period, the vessel continued to use its NOAA mandated VMS and was issued appropriate sailing numbers, indicating NMFS was kept apprised of the vessel's activity, and more importantly, NMFS continued to issue the vessel sailing numbers, even though the vessel had utilized its DAS allocation.

TRIPLING his actual time, when they now finally advise him he has actually used only 17.98 DAS. It should not go unnoticed that NMFS made a 17 DAS error, causing This fisherman to adjust his fishing based on NMFS's false statements as to the effect of differential counting on his monkfish DAS. Of course, whether This fisherman or NMFS makes the error, the only loss is borne by This fisherman.

OUELLETTE & SMITH

The Honorable John Tierney

February 27, 2008

-3-

The Regulatory Problem

NMFS contends that only its official record of DAS may be utilized to determine the number of DAS a vessel has remaining. NMFS offers no automated method for obtaining this information, such as a web site, and provides no advance guidance as to DAS status. Their computerized system continues to issue sailing information for vessel regardless of the number of DAS remaining on a vessel's allocation. Efforts to obtain this information are frequently frustrated, as the NMFS computers are often down when fishermen call in to find out their DAS information, and at various times the protocols for obtaining the information have changed. When we handle transfers of vessels or permits we submit written requests which are generally responded to on the same day, but we have had had delays of three or four days before we receive information. Fishermen who do not usually submit written requests frequently complain that they either receive an answering machine when they call, and do not get a call back, or are told the system is unavailable. In my opinion, NMFS employees responding to DAS requests are doing their best to work with an inadequate system, but often fishermen are unable to get the information they need when they need it. It is unfathomable to me why NMFS can not make this information available to fishermen on a real time basis, since fishermen, through their VMS are providing their information on a real time basis to NMFS.

NMFS's ability to provide DAS information has also been complicated by the inability of the system to accurately calculate DAS differentials in the 2006 and 2007 fishing year, since DAS were counted at different rates in different areas at different times of the year, most recently under Framework 42. This has resulted in significant confusion over DAS usage, as days in the 2006 fishing year might be charged at 1 to 1, or 1.2 to 1. NMFS was unable at the end of the 2006 fishing year to accurately advise fishermen as to their true DAS usage. In the 2007 fishing year, DAS were charged at a differential rate of 2 to 1, depending on the area fished, even when vessels merely were passing through an area and not engaged in any fishing therein.

For gillnetters the DAS usage became even more complicated with the interim monkfish rules, which, beginning in May of 2007 for the first time required them to use monkfish DAS in the Northern management area. An overlooked aspect of the rule was that under the New England Fisheries Management Council ("NEFMC") proposed rule, gillnetters could start a trip on a groundfish DAS, using 6.5 inch gillnets, and then switch to a monkfish DAS to take advantage of higher trip limits. Under the interim rule, gillnetters, to take advantage of the higher directed monkfish trip limits had to utilize only 10 inch monkfish nets. During these monkfish trips, they were required to utilize groundfish DAS, on the 2 to 1 rate in the inshore Gulf of Maine. This caused an unanticipated usage of groundfish DAS when a vessel was on a monkfish trip.

OUELLETTE & SMITH

The Honorable John Tierney
February 27, 2008

-4-

In short, NMFS has repeatedly modified the various controls in the fishery, and in particular the differential DAS system. Unfortunately, NMFS has, at various times, been unable to provide vessel owners with DAS usage information due to problems with their computers' inability to calculate DAS given the differential counting issues. (In point of fact, NMFS as late as November of last year could not provide monkfish DAS with any degree of accuracy and was incorrectly doubling and tripling DAS usage, as set forth in footnote 1, above.) As a result of the constantly changing DAS usage rules, fishermen are dependent upon NMFS to provide the Agency's calculation of DAS, with the various differential counting rules applied.

In the Northeast fisheries, the regulations are so complicated and seemingly arbitrary, that we are reluctant to issue an opinion about what fishermen can and can't do, and generally submit written questions to agency personnel. The situation as it stands is intolerable and flies in the face of sound government.

Enforcement Status and Procedure

As a direct result of the Agency's ineptness coupled with draconian regulatory and enforcement practices, the subject vessel remained tied to the dock, in limbo, in a sort of virtual permit sanction for almost three months. Approximately seven weeks after NMFS denied the DAS lease, Attorney Juliand of the Office of General Counsel for Law Enforcement advised that the fisherman could return the vessel to service if he agreed to forfeit the entire catch of the vessel during the period it fished beyond its DAS allocation, and also that it forfeit the DAS overage of 9.6 DAS. (This fisherman will have to fund this money from his own pocket, as he had already paid his crew, as well as all trip expenses, etc). We offered to give up additional DAS, which was rejected, as NOAA only wants the cash.

In the absence of such an agreement, the fisherman faces fines of up to \$140,000 per day fished, which could exceed \$1,600,000, plus potential sanctions of his fishery permit. The normal fine for a DAS overage for a first time violation is \$5,000 to \$50,000 and up to a 90 day permit sanction, per violation (the NOAA Office of General Council has recently changed its position that a 90 day permit sanction means 90 DAS from a vessel's allocation). When sending a notice of violation (NOVA), NOAA attorneys always advise that if a fisherman challenges an Agency assessment, the Administrative Law Judge may raise the fine to the congressionally established maximum of \$140,000 per violation.⁴

⁴ NOAA attorneys claim that fines have remained consistent over the past ten years. This is a surprising statistic, since the groundfish fleet has declined by over 60%, and the number of days fished has been reduced from over 200,000 to less than 40,000, and even less when you factor in differential counting. Given the use of VMS, and that Congress recently authorized data mining of vessel trip reports for violations, this indicated that fines have

OUELLETTE & SMITH

The Honorable John Tierney
February 27, 2008

-5-

Systematic Problems

The real issue here is NOAA's unfettered ability to issue fines, the basis of which is non-discoverable, and under the administrative law system, non-reviewable. Penalty schedules should be set with public input, and reviewed in open by fact finders limited to assessments for each type of violation, with transparency in aggravating or mitigating factors. The Agency should not be able to disingenuously hide its decision making in assessing fines behind the attorney work product privilege, which has heretofore been the Agency's practice in these cases. Further, because of the gravity of these penalties, fact finding should be given to US District Court Judges, or magistrates, instead of Administrative Law Judges, if the assessments are to continue to be able to take a man's livelihood, business or home.⁵ Fact finders should be limited in the amount they can assess for any type of violation, and should have the ability to reduce or eliminate fines altogether for a violation, and not be bound at all by Agency determination. Most importantly, fines should have some relationship to the status of the fishery, and the Agency should not be able to extort monies from fishermen by holding a potential \$140,000 fine over their heads for any violation.

I note that fishermen have **no** confidence in the system. ALJs generally find for the Agency - probably exceeding 98% of the time.⁶ As noted in the recent Frontier Fishing Decision by Judge Woodcock, ALJs do conform facts to a predetermined finding of guilt. In those few instances where a fisherman prevails before an ALJ, the Agency can appeal to its own administrator. Fines are set by the Agency attorneys, so the basis of the fine in any particular case is deemed non-discoverable by the agency, which makes a challenge difficult, and the fisherman has the burden at hearing of persuading the ALJ that the fine is not appropriate. In light of the penalty schedule, which is given great deference by the ALJs, a fisherman such as this fisherman could expect a fine after hearing of \$60,000 to \$600,000, although as noted above, the NOAA Notice of Violation and Assessment would advise him that the fines could be raised by the ALJ to \$140,000 per count, or \$1,680,000 for a simple mistake made in good faith. Working through a system that offers him no protection exposes him to loss of his entire business, home, etc. Indeed, the process is long and requires extensive legal expense. So-called "hearings" conducted by USCG ALJs, regardless of the merits of the Agency's case, almost

increased more than five-fold per day fished. I note that we anticipate as many as 60-100 vessels will be charged with "minor" violations resulting from the ongoing persecution of the Gloucester Fish Auction, which will threaten the survival of the inshore fleet, without Congressional involvement.

⁵ Hearings before Coast Guard ALJs are inappropriate tribunals for these cases not only because of the gravity of the fines and penalties the judicial propriety of the USCG ALJ system is currently subject to Congressional review.

⁶ In their defense, in most cases the facts of the violation are not usually in dispute. The issue is more often the appropriate penalty, which according to the attached NOAA penalty schedule is always crippling, and over which the ALJs have little authority.

OUELLETTE & SMITH

The Honorable John Tierney

February 27, 2008

-6-

always result in a decision for the agency. The only recourse a fisherman has after a negative decision from an ALJ is an appeal to a mandated "Discretionary Review" process that to my knowledge has NEVER resulted in a reversal of an ALJ opinion in favor of a fisherman (but has in favor of Agency counsel) and at best results in a second hearing before an ALJ. Only after considerable expense of bringing his case to an Agency twice, may a fisherman appeal to a US District Court, though a tribunal independent from the agency may only overturn an agency decision if it is not based on substantial evidence. The effective result of this system is that a fisherman is guilty until proven innocent beyond all reasonable doubt of his innocence, and receives the chance to prosecute such a case before an independent tribunal only after expending enormous resources at the agency level.

The penalties imposed have no relation to the "harm" caused, nor do they take into account the actual economics of the fishery. Fines generally exceed a fisherman's annual earnings, and often their net worth, even before factoring in that they must be paid in after tax dollars. In discussing settlement, OGC attorneys often justify fines based on equity in a family home (most often through long term ownership resulting in asset appreciation), retirement accounts, etc. When fishermen raise the issues of such needs as their children's college needs or financial pressures, they are simply told this is not the Agency's problem, or to downsize their housing. Generally, if they agree to withdraw from the fishery, the fines will be dramatically reduced. In short, the effect of the current enforcement strategy is to force honest fishermen from the business, over fears, fully justified, that eventually even the most fastidious of fishermen will unwittingly violate the growing complexity of the regulations, and NMFS will mercilessly extract years of profit for even the most minor of mistakes. In doing so, NOAA attorneys confidently state they are doing exactly what Congress has directed them to, which is make sure that no violation results in a simple cost of doing business. It is clear to me that NOAA/NMFS values a pound of fish more than a fishermen's life. NMFS fines for possession of a single illegal fish often exceed OSHA fines for regulatory violations resulting in death. NMFS is happy to take a fisherman's livelihood for any mistake, no matter how minor or understandable in light of the current regulatory quagmire. It is almost as if NMFS attorneys are working hard to recover fines equal to the disaster relief that our Congressional delegation worked hard to obtain to support our fishermen, and to make sure that enforcement puts as many fishermen out of business as the relief monies would otherwise save.

Somewhat uncharacteristic of the American judicial system with its supposed due process protections; there is less judicial involvement, or common sense, required in NOAA's taking of a man's business assets, home and ability to earn a living, than in a challenge to a parking ticket issued on federal land.

OUELLETTE & SMITH

The Honorable John Tierney
February 27, 2008

-7-

Conclusion

In short, this fisherman now faces an all too common problem. He has exceeded his allocated DAS, and the Agency holds him accountable. This is true, even though they themselves contributed to his miscalculation of DAS by issuing sailing numbers and not being able to provide him with accurate DAS usage information. Under the minimum penalty schedule, he faces a \$60,000 fine and up to 1,080 days of permit sanction, for a minor bookkeeping error. He is now offered the option of forfeiting his catch of \$25,000. If he chooses not to forfeit the catch, the fines will issue in a minimum amount of \$60,000 accompanied by a DAS sanction, with a warning that a challenge could increase the fines to \$1,680,000. The NOVA will most likely offer the option of settling for an amount in excess of \$50,000, together with some type of permit sanction. However much the offer to this fisherman contradicts basic notions of American justice, in NOAA's maddening scheme of things the offer is reasonable. The quasi-judicial system in place offers no prospect of a reasonable outcome, and certainly not of a more favorable outcome, and the expense of the congressionally established "appeal," which is little more than a sham, far exceeds any theoretical reduction in a proposed penalty.

I hope this helps you to understand this fisherman's, and the entire fishery's, frustration with the NOAA law enforcement system. NOAA/NMFS continue to exhibit its inability to deal with the day to day workings of fishermen and the fisheries of the Northeast, and the enforcement issues are currently forcing more honest, hard working fishermen from the fishery than the condition of the fisheries themselves. One would think that as regulations became more complex and less understandable, and fishermen were facing more economic hardship, NOAA would work to help them-instead NOAA has only increased its enforcement efforts and escalated its fines. I would be pleased to meet further with you to discuss particular cases, or the systematic problems in general and the need for, and potential solutions to, the ongoing injustices inflicted by NOAA on our hard working fishermen and their families. Thank you.

Very truly yours,

/s/ Stephen M. Ouellette
Stephen M. Ouellette, Esq.

INDIVIDUAL(S) INFORMATION AND FINANCIAL STATEMENT

Note: If additional space is required, please use additional sheets

Privacy Act Notice

This request for information is authorized by Title 46 U.S.C. 1274(h) and 1279(b) and 50 C.F.R. 255. All information received will be used primarily for the evaluation of financial conditions of the applicant, and will not be released for other uses.

Case Number: _____ Vessel Name: _____ Official NBR: _____

IDENTIFICATION DATA**APPLICANT IDENTIFICATION DATA**

Name (Last, First, Middle): _____

Street Address: _____

City, State, Zip: _____ Social Security Number: _____-____-____

Date of Birth (Mo/D/Yr): _____ Home Phone Number: () _____-____-____

SPOUSE IDENTIFICATION DATA

Name (Last, First, Middle): _____

Street Address: _____

City, State, Zip: _____ Social Security Number: _____-____-____

Date of Birth (Mo/D/Yr): _____ Home Phone Number: () _____-____-____

The foregoing affords NOAA the ability to assess penalties for alleged violations. With knowledge of the penalties for false or incomplete statements as provided by 18 U.S.C. 1001, \$10,000 fine and/or five years imprisonment, I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Respondent Signature _____

Date: _____, 20____

Spouse Signature _____

Date: _____, 20____

Case Number: _____

APPLICANT NAME: _____

EMPLOYMENT DATA**APPLICANT EMPLOYMENT DATA**

Present Occupation: _____ Employment Dates - From: _____ To: _____

Present Employer: _____

Supervisor's Name: _____

Employer Street Address: _____

City, State, Zip: _____ Phone Number: () _____ - _____

Other Employment (within past three years): _____ Employment Dates - From: _____ To: _____

Name of Employer: _____

Employer Street Address: _____

City, State, Zip: _____ Phone Number: () _____ - _____

Attach additional sheets, if necessary.

SPOUSE EMPLOYMENT DATA

Present Occupation: _____ Employment Dates - From: _____ To: _____

Present Employer: _____

Supervisor's Name: _____

Employer Street Address: _____

City, State, Zip: _____ Phone Number: () _____ - _____

Other Employment (within past three years): _____ Employment Dates - From: _____ To: _____

Name of Employer: _____

Employer Street Address: _____

City, State, Zip: _____ Phone Number: () _____ - _____

Attach additional sheets, if necessary.

The foregoing affords NOAA the ability to assess penalties for alleged violations. With knowledge of the penalties for false or incomplete statements as provided by 18 U.S.C. 1001, \$10,000 fine and/or five years imprisonment, I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Respondent Signature _____

Spouse Signature _____

Date: _____, 20____

Date: _____, 20____

CASE NUMBER: _____

APPLICANT NAME: _____

MONTHLY SOURCES OF INCOME (attach additional sheets, if necessary)

	<u>APPLICANT</u>	<u>SPOUSE</u>
Salary/Wages	\$ _____	\$ _____
Bonus/Commissions	_____	_____
Unemployment	_____	_____
Dividends/Interest	_____	_____
Real Estate Income	_____	_____
Lease/Rental Income (non-real estate)	_____	_____
All Other Income (itemize - include	_____	_____
partnerships, social security income,	_____	_____
disability payments, alimony payments	_____	_____
received, and any other sources of income)	_____	_____
TOTAL	\$ _____	\$ _____

MONTHLY EXPENSES

(attach additional sheets, if necessary)

Rent/Mortgage	\$ _____	Food	\$ _____
Telephone	_____	Electric	_____
Water/Sewer	_____	Loan monthly pmts	_____
Car Payment	_____	Credit card monthly pmts	_____
Personal Insurance (if paid personally)	_____		
Other monthly expenses	_____		

TOTAL MONTHLY EXPENSES: \$ _____

Other Periodic Obligations: _____

The foregoing affords NOAA the ability to assess penalties for alleged violations. With knowledge of the penalties for false or incomplete statements as provided by 18 U.S.C. 1001, \$10,000 fine and/or five years imprisonment, I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Respondent Signature _____

Spouse Signature _____

Date: _____, 20____

Date: _____, 20____

CASE NUMBER: _____

APPLICANT NAME: _____

PERSONAL FINANCIAL STATEMENT (attach additional sheets, if necessary)ASSETS: (list market value, unless otherwise specified)

Cash on hand: \$ _____ Cash in checking and savings accounts (Schedule A): _____

Certificates of deposit: _____ Life insurance/cash value: _____

Accounts and notes Receivable: _____ Real Estate owned (Schedule C): _____

Fishing vessels (Schedule E): _____ Automobiles (Schedule G): _____

Securities (such as stocks, bonds, mutual funds - Schedule D): _____

Retirement account(s) (other than those listed in Schedule D): _____

Other assets (w/market value in excess of \$1,000 – itemize): _____

Assets currently held by others: _____

TOTAL ASSETS: \$ _____

LIABILITIES:

Fishing vessels (Schedule E): _____

Loans (including credit card debt - Schedule F): _____

Accounts and bills payable (Schedule F): _____

Mortgages on real estate owned (Schedule C): _____

Loans secured by automobiles (Schedule G): _____

Accrued interest and taxes: _____

Other debts (itemize): _____

TOTAL LIABILITIES: \$ _____

NET WORTH (Total Assets – Total Liabilities) : \$ _____

CONTINGENT LIABILITIES:

As guarantor or co-maker: _____

Leases or contracts: _____

Legal Claims: _____

TOTAL LIABILITIES: \$ _____

The foregoing affords NOAA the ability to assess penalties for alleged violations. With knowledge of the penalties for false or incomplete statements as provided by 18 U.S.C. 1001, \$10,000 fine and/or five years imprisonment, I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Respondent Signature _____

Spouse Signature _____

Date: _____, 20____

Date: _____, 20____

CASE NUMBER: _____

APPLICANT NAME: _____

GENERAL INFORMATION

1. Are you a defendant in any suits or legal action? _____ Location/Case # _____
2. Have you ever declared bankruptcy? _____ Location of filing: _____ date: _____
3. Sale(s) or transfer (s) of assets with market value greater than \$5,000 within the past five years? _____
- Purchaser's name: _____ date: _____
- Item(s) sold or transferred: _____

SCHEDULE A: Banking Relations (list all bank accounts, including savings and loans; attach additional sheets, if necessary)

Name and Address of Bank _____

Account Number: _____ Type of Account: _____

Average Balance: _____ High Balance in past six months: _____

Name and Address of Bank _____

Account Number: _____ Type of Account: _____

Average Balance: _____ High Balance in past six months: _____

Name and Address of Bank _____

Account Number: _____ Type of Account: _____

Average Balance: _____ High Balance in past six months: _____

SCHEDULE B - Accounts and Notes Receivable (Attach additional sheets, if necessary)

Due from: _____ Relationship to you: _____

Collateral (higher of cost or market value): _____ Due date/Maturity date: _____

Monthly Payment: _____ Balance due: _____

Is there documentation (e.g. note signed)? _____

Due from: _____ Relationship to you: _____

Collateral (higher of cost or market value): _____ Due date/Maturity date: _____

Monthly Payment: _____ Balance due: _____

Is there documentation (e.g. note signed)? _____

The foregoing affords NOAA the ability to assess penalties for alleged violations. With knowledge of the penalties for false or incomplete statements as provided by 18 U.S.C. 1001, \$10,000 fine and/or five years imprisonment, I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Respondent Signature _____

Spouse Signature _____

Date: _____, 20____

Date: _____, 20____

CASE NUMBER: _____

APPLICANT NAME: _____

SCHEDULE C – Real Estate Owned (attach additional sheets, if necessary)**Property Description:** _____

Owner Name: _____

Street Address: _____

City, State, Zip: _____

Year Acquired: _____

Original Cost: _____

Market Value: _____

Tax Assessment: _____

Original Mortgage Amount: _____

Balance: _____

Name of Mortgage holder: _____

Loan Account #: _____

Street Address: _____

City, State, Zip: _____

SCHEDULE D – Stocks/Bonds/Mutual Funds Owned – attach schedule of all securities, including IRA and other assets

Name and Type: _____

Year purchased: _____

In the name of: _____

Number of Shares: _____

Market value per share _____

Total Market Value: _____

Name of Stockbroker(s): _____

Street Address: _____

City, State, Zip: _____

Account Numbers: _____

SCHEDULE E – Fishing Vessels (attach additional sheets, if necessary)

Name: _____

Size: _____

Year Built: _____

Ownership in the name of: _____

Original Cost: _____

Market Value: _____

Mortgage Outstanding: _____

Your % Ownership: _____

Mth/Qtr Repay: _____

Insured Value: _____

SCHEDULE F – Loans/Bills Payable (include SBA and government loans - Attach additional sheets if necessary.)

Name of Company: _____

Original Amount: _____

Type: _____

Account Number: _____

Monthly Payments: _____

Balance Owed: _____

Maturity date: _____

The foregoing affords NOAA the ability to assess penalties for alleged violations. With knowledge of the penalties for false or incomplete statements as provided by 18 U.S.C. 1001, \$10,000 fine and/or five years imprisonment, I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Respondent Signature _____

Spouse Signature _____

Date: _____, 20____

Date: _____, 20____

CASE NUMBER: _____

APPLICANT NAME: _____

SCHEDULE G – Motor Vehicles

Make: _____ Model: _____ Year: _____

Cost/Market Value: _____ Amount Owed: _____ Loan Number: _____

Name of Lender: _____

Street Address: _____

City, State, Zip: _____

FEDERAL INCOME TAX INFORMATION – (Attach Copies)

1. For what period did you last file an income tax return? _____

2. Where was it filed? _____

3. Amount of gross income reported: _____

Year	Total Income	Taxable Income	Tax Paid
20____	_____	_____	_____
20____	_____	_____	_____
20____	_____	_____	_____

* Attach complete copies of your last three federal income tax returns. If you do have copies to submit, complete and sign the enclosed form 4506, "Request for copy of Tax Form."

The foregoing affords NOAA the ability to assess penalties for alleged violations. With knowledge of the penalties for false or incomplete statements as provided by 18 U.S.C. 1001, \$10,000 fine and/or five years imprisonment, I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Respondent Signature _____

Spouse Signature _____

Date: _____, 20____

Date: _____, 20____

BANK CONFIRMATION

(To be completed by your bank)

1. At the close of business on _____, 20____, our records showed the following balance(s) to the credit of the subject customer. In the event that we could readily ascertain whether there were any balances to the credit of the customer not designated in this request, the appropriate information is given below.

Account Number: _____ Account Name: _____
 Amount: _____ Subject to Withdrawal by Check: _____

Account Number: _____ Account Name: _____
 Amount: _____ Subject to Withdrawal by Check: _____

Account Number: _____ Account Name: _____
 Amount: _____ Subject to Withdrawal by Check: _____

2. The customer was directly liable to us in respect to loans, acceptances, etc., at the close of business on the above date as follows:

Collateral Amount: _____ Date of loan: _____ Rate: _____
 Payment: _____ Maturity: _____ Mo/Qtr: _____

3. The customer was contingently liable as endorser of notes and/or as guarantor at the close of business on the above date as follows:

Collateral Amount: _____ Date of loan: _____ Rate: _____
 Payment: _____ Maturity: _____ Mo/Qtr: _____
 Current? _____ Present Balance: _____

4. Other direct or contingent liabilities (include collateral): _____

5. Security agreements under the Uniform Commercial Code or any other agreements providing for restrictions, not noted above, were as follows (if recorded, indicate date and office of filing): _____

Date: _____

By: _____
 (Authorized Signature)

FINANCIAL VERIFICATION REQUEST AND AUTHORIZATION

Case Number: _____

To Whom It May Concern:

The United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service is hereby authorized to inquire and request information from any person, corporation, or other entity as to our accounts and credit standing with regard to any transaction so far as any person shall know.

The National Marine Fisheries Service shall have the right to duplicate this authorization as required.

Signature

Date Signed

Print Name

Title

Sworn to and subscribed before me, the undersigned authority, this ____ day
of _____, 20____.

Notary Public

Commission Expiration Date

NORTHEAST REGION CIVIL ADMINISTRATIVE PENALTY SCHEDULE

VIOLATION	VIOLATION HISTORY -- PENALTY AMOUNT		
	FIRST	SECOND	THIRD
VIOLATIONS REGARDING GEAR			
All violations regarding gear and methods of fishing, including but not limited to: mesh or trap size; mesh or trap configuration, constriction/obstruction; the number of pots, hooks or traps; type of gear; marking and tagging of gear; gear molestation; theft number of crew; etc.	\$5,000 - \$80,000 and/or up to 90 day permit sanction or denial	\$10,000 - Statutory Maximum and/or up to 365 day permit sanction or denial, up to loss of 50% allocation/year	\$20,000 - Statutory Maximum and/or up to permit revocation or denial and/or vessel seizure up to loss of 100% allocation/year or total loss
Violations regarding Weakfish & Horseshoe Crab Fishery gear and methods of fishing, including but not limited to: mesh or trap size; mesh or trap configuration, constriction/ obstruction; the number of pots, hooks or traps; type of gear; marking and tagging of gear; gear molestation; theft number of crew; etc.	\$2,500-\$15,000	\$5,000-\$25,000	\$15,000- statutory maximum

VIOLATION	VIOLATION HISTORY -- PENALTY AMOUNT		
	FIRST	SECOND	THIRD
VIOLATIONS REGARDING PERMITS, REPORTING, DOCUMENTATION, EXEMPTION PERMIT REQUIREMENTS			
All violations including, but not limited to: providing false statements or supporting documentation on an application or report; late or non-reporting; record or report retention; fishing without a valid permit; failing to maintain a permit in the legible form; fishing without a valid letter of authorization/exemption; failing to comply with a permit condition/ restriction / letter of authorization or exemption; providing false statements and or failing to comply with VMS/ DAS requirements (tampering, etc.). (Technical or minor violations may result in a written warning, fix it ticket or summary settlement where appropriate for first, second and third time offenses.)	\$5,000 - \$80,000 (and/or up to 90 day permit sanction or denial)	\$10,000 - Statutory Maximum (and/or up to 365 day permit sanction or denial and/or forfeiture of the vessel)	\$20,000 - Statutory Maximum (and/or up to permit revocation or denial or permanent ban on entry and/or forfeiture of vessel)
VIOLATIONS REGARDING TIME AND AREA RESTRICTIONS			
All violations including, but not limited to: exemption areas, closed fisheries, area closures, closed seasons, restricted gear/management areas and Days at Sea violations.	\$5,000 - \$50,000 (and/or up to 90 day permit sanction or denial)	\$30,000 - \$80,000 (and/or up to 365 day permit sanction or denial)	\$35,000 - Statutory Maximum (and/or up to permit revocation or denial)

VIOLATION	VIOLATION HISTORY -- PENALTY AMOUNT		
	FIRST	SECOND	THIRD
VIOLATIONS REGARDING SIZE/CONDITION/QUANTITY OF FISH OR LANDING / POSSESSION REQUIREMENTS			
All violations including, but not limited to: retaining, possessing or landing berried or v-notched or undersized lobsters; mutilated lobsters, speared lobster; removing eggs from berried lobsters; landing or possessing undersized fish or shellfish; container tagging; importing, exporting, landing, possessing or transferring undersized fish; landing in excess of an allocation; exceeding a possession or landing limit by 10% or more; and transferring fish at sea.	\$5,000 - \$50,000 (and/or up to 90 day permit sanction or denial)	\$15,000 - \$60,000 (and/or up to 365 day permit sanction or denial)	\$30,000 - Statutory Maximum (and/or up to permit revocation or denial)
VIOLATIONS REGARDING TRANSFER, PURCHASE, TRADE, SALE (AND ATTEMPTS)			
All violations including, but not limited to: purchase, sale, offer for sale, transfer, trade, import or export, barter, any fish or lobster or parts thereof taken or retained illegally. (Technical or minor violations may result in a written warning, fix it ticket or summary settlement where appropriate for first, second and third time offenses.)	\$5,000 - \$50,000 (and/or up to 180 days permit sanction or permit denial)	\$10,000 - \$80,000 (and/or up to 365 permit sanction or permit denial)	\$30,000 - Statutory Maximum (and/or up to permit revocation or denial)

VIOLATION	VIOLATION HISTORY -- PENALTY AMOUNT		
	FIRST	SECOND	THIRD
Weakfish and Horseshoe Crab Fisheries violations including, but not limited to: purchase, sale, offer for sale, transfer, trade, import or export, barter, any fish or lobster or parts thereof taken or retained illegally. (Technical or minor violations may result in a written warning, fix it ticket or summary settlement where appropriate for first, second and third time offenses.)	\$2,500-\$15,000	\$5,000 - \$25,000	\$15,000-Statutory Maximum

Stephen

From: unjust enforcement [unjustenforcement@gmail.com]
Sent: Wednesday, July 22, 2009 1:55 PM
To: rgaines@gloucesterimes.com
Cc: fishlaw@aol.com
Subject: NOAA GSDA Enforcement

Follow Up Flag: Follow Up
Flag Status: Flagged

Mr. Gaines,

I am writing you to convey information and opinion on the controversy surrounding NOAA Enforcement and the case against the Gloucester Seafood Display Auction (GSDA). I apologize in advance for wishing to remain anonymous, but I work for NMFS here at the NERO, so it's probably in my best interest. I believe NMFS overall does a great job with a difficult mission, and I don't like seeing the whole NERO tainted by the actions of a few.

I have close contacts in enforcement, and I think I might have some insights that may interest you. Firstly, what can't be stressed enough is that every single "violation" the GSDA is being charged with is self-reported. The GSDA is required to submit weekly reports of all their purchases, and was (is still) reporting accurately. This is clearly not the action of someone whose intent it is to violate any law. Even the self-reported overages that enforcement is charging them for are minor, in some cases 1 or 2 fish, things even a state game warden probably would not write a ticket for.

Enforcement is most likely going to try to pass it off on General Counsel, but remember General Counsel only gets what enforcement gives them. They are General Counsel for Enforcement, not the other way around. General Counsel did not make the decision to have 20 agents raid the GSDA with a warrant, all for nothing. Remember, every "violation" was self-reported-no warrant necessary (waste). A grand production like this almost requires a big fine, if only to justify the grand production itself.

So, why would enforcement blow this up into something it is not? I believe the answer lies in personal ambition. In 2006, enforcement joined us in paybanding or pay for performance. But in enforcement's world, the more "complex" the case, the grander the production, or the illusion that something is big and significant, is what gets you a higher payband score. Hence the incentive to make a simple issue a big "complex case".

This pay for performance incentive was then accelerated when a couple years ago enforcement began offering GS-13 equivalent promotions to agents who produced "complex" cases that met certain elements. I know they had to submit examples of this work to get promoted, and I'm told the two agents who worked the GSDA investigation, Pat Flynn and Mike Henry, actually got promoted based at least partly, if not primarily, on this case. If you look into it, I suspect you'll find that the way they proceeded against the GSDA dovetails nicely with the elements of a "complex case" necessary for promotion. If you put yourself in their shoes you might ask "How can we take these simple self-reported technical violations and turn it into something that will benefit us? The answer is to blow it up, do a big search warrant raid production, charge them with a lot of small minor self reported overages, turn it into something it is not. I'm no investigator, but how do self reported violations constitute "complex" in their world?

I've heard that Flynn and Henry are saying they did not even want to work the case, that they never thought it was worth it, but their management made them do it. I don't believe this. Look who gained financially. It's sad to think it comes down to that, but I believe it did here. People tell me Flynn and Henry, who are responsible for Gloucester, hardly ever went there. If they did, they could have dealt with any of these reporting issues early, got compliance, and moved on. But again, why do that? Why not let the small technical violations build up over time and then spin something big out of it to their benefit? Besides this, we give enforcement access to all reported dealer reports of landing as we get them from dealer, so why were the agents responsible monitoring these landings all along? Is that not there job? I wish everyone all the success in the world, and maybe they are good employees, but to get promoted over this fiasco seems absurd. Their supervisors are ultimately responsible.

Anyway, there are a lot of good people in NMFS, including enforcement, who do the job honestly, and I just wanted to set the record straight as I see it.

