Testimony of

THE HONORABLE TODD J. ZINSER
INSPECTOR GENERAL

U.S. DEPARTMENT OF COMMERCE

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

Chairman Rockefeller, Ranking Member Hutchison, Subcommittee Chairman Cantwell, Subcommittee Ranking Member Snowe, and Members of the Committee:

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). We examined their overall conduct of enforcement actions; how they prioritize actions and set

[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.

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.

- Considering reestablishment of an ombudsman position to serve as an interface with the 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; in the Northeast Region, this contributed to aggregate fine assessments that are inconsistent with those in the other regions. Specifically, as shown in the following table, GCEL data for closed cases for the 5-year period from July 1, 2004 through June 30, 2009, illustrate 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

four 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). This 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

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 unauditable 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 Magnuson-Stevens Fishery Conservation and Management Act[3] (65 percent of cases). The

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

[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.

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.

4. NMFS, in consultation with NOAA's Office of Communications, will direct resources to improve communications on enforcement issues, particularly in the Northeast.

[4] See 16 U.S.C. § 1859.

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:

1. *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 is on the management issues we identified. As noted below, we will follow up and examine individual cases about which we received complaints and will

determine whether additional action by our office or NOAA is necessary or recommended. 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.

2. *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 NOAA 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.

3. *GCEL Progress.* While GCEL has reported development and planned implementation of a number of specific actions and measures for programmatic enhancement that are responsive to our findings and recommendations, we will carry out follow-up reviews to assess their progress.

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).