



*U.S. DEPARTMENT OF COMMERCE
Office of Inspector General*



*National Oceanic and
Atmospheric Administration*

*Review of NOAA Fisheries
Enforcement Programs and
Operations*

Final Report No. OIG-19887

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Office of Investigations

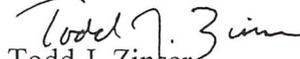




January 21, 2010

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

FROM:


Todd J. Zinser

SUBJECT: Review of NOAA Fisheries Enforcement Programs and Operations

This responds to your memorandum of June 2, 2009, requesting that we review the policies and practices of the Office for Law Enforcement (OLE) within the National Marine Fisheries Service (NMFS), along with the National Oceanic and Atmospheric Administration's (NOAA) Office of General Counsel for Enforcement and Litigation (GCEL). Your memorandum reiterated concerns raised by Members of Congress and elected state officials about reports of heavy-handed and unfair enforcement, particularly in NOAA's Northeast Region.¹ This report presents our results and recommendations.

In response to your request, we carried out a review from June through December 2009. Our review focused on evaluating (1) how OLE and GCEL conduct enforcement operations within a regulatory environment; (2) the process used by OLE and GCEL to establish priorities with respect to enforcement actions and penalty assessments, and whether such actions and penalties are within established legal parameters; and (3) the resources applied by NOAA to the enforcement function, including management and the use of funds obtained through imposed penalties.

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

¹ By letter dated May 1, 2009, the Massachusetts congressional delegation requested that you investigate alleged excessive penalties and retaliatory actions by OLE in NMFS' Northeast Region. We also spoke with Massachusetts state officials and received correspondence from members of North Carolina's congressional delegation and Representative Ileana Ros-Lehtinen of Florida, who expressed similar concerns.



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.

Our review also experienced two additional limitations. First, inadequate management information systems were a significant detriment. As we further explain below, if NOAA is to be successful in bringing a greater level of management attention to its enforcement program, it will need substantially improved data systems. This is one of our overarching findings.

Second, we were also constrained in our ability to address concerns raised about the asset forfeiture fund, as NOAA refers to it. Although one of our objectives was to examine this fund, we found that despite a balance of \$8.4 million as of December 31, 2009, OLE officials are not aware of the fund's having ever been audited. We found that 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. We are commissioning a forensic review of the fund as a follow up to this review.

We spoke with over 225 individuals in various parts of the country, including the Northeast, North Carolina, Florida, the west coast, and Alaska. Persons with whom we spoke included fishermen, boat captains, industry association representatives, conservation officials, Fishery Management Council members, and NOAA personnel from OLE, GCEL, and other organizations. Our discussions consisted of formal interviews, small group listening sessions, telephone conversations, and follow-up contacts. Additionally, we established a dedicated e-mail address for interested parties to use to provide potentially relevant information. We also reviewed numerous OLE and GCEL enforcement records and related documents and pertinent statutes and regulations, and examined OLE's and GCEL's case management information systems.

Finally, we reviewed Department of Justice policy and guidelines regarding certain enforcement techniques, and analyzed comparable federal regulatory enforcement agencies, namely the Environmental Protection Agency (EPA), the Department of the Interior's Fish and Wildlife Service, and the Department of Commerce's Bureau of Industry and Security. Our review team consisted of Office of Inspector General staff from across several disciplines and areas of expertise, including program evaluation, criminal investigation, forensic audit, and risk analysis.

We appreciate the cooperation extended to our team by you and the NOAA staff, and your resolve to address this longstanding issue. We have highlighted the reforms that NOAA already has planned in response to the briefings on our findings that we delivered. We will complete our follow-up work as expeditiously as possible and provide a similar report at that time.

RESULTS IN BRIEF

Through OLE and GCEL, NOAA fulfills a vital, complex, and difficult enforcement mandate, which includes regulatory and criminal enforcement authorities to promote compliance and deter violations within the commercial fishing industry. NOAA is entrusted with broad statutory enforcement powers. As a result, 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.

NOAA's law enforcement operations consist of relatively small elements (OLE and GCEL) within a large, science-based agency. As such, those offices have not garnered a great deal of attention from senior management, which is generally more focused on the science aspects of NOAA's mission. Notwithstanding their size, however, NOAA's enforcement operations 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.

In short, we found systemic, nationwide issues adversely affecting NOAA's ability to effectively carry out its mission of regulating the fishing industry. These issues have contributed significantly to a highly-charged regulatory climate and dysfunctional relationship between NOAA and the fishing industry—particularly in the Northeast Region. If not addressed by NOAA's senior leadership, these issues have the potential to further strain the tenuous relationship that exists in the Northeast Region, and to become problematic in NOAA's other regions. We note that the NMFS Assistant Administrator position is presently occupied by an acting official, and that the new NOAA General Counsel appointee was just announced. These key leadership positions are critical to NOAA's ability to effectively oversee its enforcement program. Significantly, our findings reflect that:

1. **NOAA senior leadership and headquarters elements need to exercise substantially greater management and oversight of the agency's regional enforcement operations.** These include setting priorities, implementing effective management information systems, and utilizing data to inform management decisions and enforcement activities. Given the complexities of NOAA's mission and organization, the industry, and the current enforcement climate, its establishment of enforcement priorities 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 focused enforcement.
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.** We validated that GCEL's process for determining civil penalty assessments is characterized by significant discretion on the part of individual enforcement attorneys, with minimal guidance on how to exercise that discretion. As such, we find it difficult to argue with those who view the process as arbitrary and in need of reform.

One reform NOAA should consider is instituting a process that includes higher-level review of civil penalty assessment determinations by GCEL attorneys in advance—for example, by a panel established within NOAA headquarters. We also identified a need for NOAA to undertake revisions to applicable procedural regulations and penalty schedules in order to provide greater consistency and clarity, and reduce confusion among affected industry parties.

To its credit, in response to the results of our review, GCEL has recently undertaken a number of initiatives to promote transparency, help ensure fairness, and open lines of communication with the regulated community. These efforts are detailed in a December 1, 2009, memorandum from the Assistant General Counsel for GCEL to NOAA's Deputy General Counsel. GCEL's initiatives include (1) revising procedural regulations and penalty schedules; (2) developing an internal operating procedures manual; and (3) implementing a new case-tracking database, linking to OLE's case management system.

GCEL's planned actions are responsive to our findings and recommendations, and are a good start to building transparency in its enforcement processes and improving NOAA's relationship with the industry. However, more must be done, and NOAA's oversight of these and other actions will be critical to achieving the desired outcome.

- 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.** Based on OLE's data, its caseload from January 1, 2007 through June 30, 2009, was about 98 percent noncriminal. NOAA specifically addressed and made decisions about OLE's workforce composition 10 years ago, increasing its already predominantly criminal investigator workforce (then 75 percent) to today's 90 percent. This workforce structure is not the only option available to NOAA; for example, we looked at how some other regulatory enforcement agencies are staffed and our report includes comparative information. In 1998, the then-Assistant Administrator for NMFS desired a different mix, consisting of a greater proportion of uniformed enforcement officers to carry out essential regulatory inspection functions. This did not occur; in fact, today, of OLE's enforcement workforce of 164 personnel, only 15 are uniformed officers—none of whom are in the Northeast Region. There are also 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's 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 Act² (65 percent of cases). Because it is staffed largely with criminal investigators, OLE's orientation is to conduct criminal investigations. However, the criminal provisions of the Act are narrowly-focused and nearly all misdemeanors. 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

² The Act is codified, as amended, at 16 U.S.C. § 1801 et seq.

observers and officers authorized to enforce the Act.³ According to OLE, violations of the Act typically do not result in criminal charges. Most violations (such as exceeding catch limits) result in civil penalties alone. NOAA requested expansion of the Act's criminal provisions in conjunction with the 2006 reauthorization process, but such provisions were not adopted.

Our findings underscore a larger challenge for NOAA, one involving complicated issues that have existed and become magnified over decades without being properly addressed. This has become particularly apparent in the Northeast Region. We see this challenge as two-fold: First, as expressed through industry concerns, the fishing laws and regulations are highly complex, making compliance by those in the industry difficult even with the best of intentions. Second, whether NOAA's workforce and management structure is appropriate to carry out its equally complicated mission of enforcing the regulations with transparent, fair, and well-managed processes. While we recognize that OLE has limited resources to cover an increasingly complex and vast jurisdiction, this underscores the critical importance of ensuring that constrained resources are used to support the most effective enforcement approach.

Follow-up Efforts

Based on our results, the following three areas require—and will receive—additional review by our office:

- Fishermen and other industry sources expressed concern to us that NOAA's fines are excessive, constituting a form of bounty, because NOAA 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.⁴ We determined that NOAA has an asset forfeiture fund comprising such proceeds, the balance of which NOAA reported as \$8.4 million as of December 31, 2009. However, the account under which they are maintained has weak internal controls, and we could not readily determine how NOAA has utilized these funds 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, or as part of the Department-wide financial audit. As a result, we are commissioning a forensic review of the fund as a follow-up, and will issue our findings upon its completion.
- 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.

³ See 16 U.S.C. § 1859.

⁴ 16 U.S.C. § 1861(e)(1)(C).

- During our review we received specific complaints from dozens of fishermen, including alleged abuses of authority by NOAA enforcement personnel, disparate treatment, and excessive fines. We are in the process of examining these complaints and the corresponding enforcement case files to determine whether any additional action is necessary or recommended, either by our office or by NOAA.

ENFORCEMENT CLIMATE

Our review was carried out against a backdrop of highly complex and intertwined circumstances, events, and conditions—particularly in the Northeast Region—which provide important context for our findings. Of note, you recognized issues with the current enforcement climate during your February 2009 confirmation hearing before Congress. In response to a senator’s question about how to repair the polarized relationship between the fishing industry and regulators, you responded, “We need more trust in data, in process, and in diverse points of view.” Our report underscores your response.

Industry Concerns

Most of the complaints we received from fishing industry parties, particularly in NOAA’s Northeast Region, fell into the three categories listed below. By far the most common complaint was that fishing regulations are too complicated. We also note that numerous individuals with whom we spoke supported enforcement, provided that it is fair, equitable, and not onerous. Moreover, they expressed strong support for enforcement against what they believe is a minority of unscrupulous operators who intentionally violate the law and place the industry at risk by compromising the viability of the nation’s fisheries.

As indicated, we did not review individual cases, in order to focus first on the overall management of NOAA’s enforcement program and operations. In addition, several of the complaints pertain to ongoing enforcement action, and it would be inappropriate for our office to attempt a review of such ongoing cases. Therefore, the examples cited represent one side of the story—many of which appear more appropriate for resolution by a fisheries ombudsman than an Inspector General investigation.

According to complainants, fishing regulations are unduly complicated, unclear, and confusing. Complainants contend that:

- Broad fishing regulations have become increasingly complex and onerous.
- Regulations impose an excessive administrative burden on regulated parties.
- Regulations change with little or no advance notice and increase in complexity.
- Federal regulations in some instances conflict with state regulations.

Complaint Examples

- In one complaint, a vessel set sail for 10 hours en route to its fishing location. The boat’s generator then broke down, however, requiring that it return to port without ever having

set a line to fish. NOAA charged the owner $\frac{3}{4}$ of a day against a permitted total number of fishing days because, according to its interpretation of the regulations, sailing to and from a location constitutes being “engaged in fishing.” OLE informed the owner that this circumstance was simply a risk of doing business.

- According to a North Carolina fisherman, his Vessel Monitoring System (VMS) stopped functioning. He sent it to a vendor for repair, but it was never returned, despite efforts to retrieve it. He called NMFS to explain his issue and asked if he could fish without the VMS. The NMFS official with whom he spoke stated that it was okay to continue fishing without the unit. However, he later received a Notice of Violation Assessment (NOVA—a proposed civil fine) from an OLE agent for 18 counts of fishing without the VMS over a 6-month period, at \$10,000 per count. He settled with NOAA for a 6-month permit sanction, during which he had no income.
- A fisherman in North Carolina was assessed a \$35,000 NOVA because his Vessel Trip Reports (VTR) did not match his fish dealer reports. VTRs are good-faith estimates by a fisherman and are filled out by weighing fish on scales at sea, often when the vessel is rolling in the ocean, before entering the port and offloading the fish. This fisherman told us that it is extremely difficult to determine exact weights of the fish caught while at sea. Dealer reports, by their very nature, are more precise, since dealers accurately count and weigh fish prior to auction or sale. This case was settled for \$14,000, but the fisherman felt he did nothing wrong.

According to complainants, NOAA’s regulatory enforcement processes are arbitrary and lack transparency. Complainants contend that:

- Penalties are disproportionate to the gravity of the offense(s) charged. It is unclear how GCEL attorneys determine the assessments for fines and penalties. The administrative enforcement process, including cases adjudicated through the administrative law judge (ALJ) system and with appeals filed to the NOAA Administrator, is biased in favor of NOAA. (In 2007 and 2008, the *Baltimore Sun* published a series of articles impugning the fairness of the Coast Guard’s ALJ system used by NOAA to hear respondent appeals. These articles appear to have contributed to the industry’s perception of NOAA enforcement.)
- NOAA’s system encourages respondents to settle cases, regardless of culpability, because of the high costs associated with contesting the charges and/or taking the case before an ALJ. Citations for violations are often not timely, making it difficult for respondents to defend themselves.
- GCEL attorneys possess and exercise too much authority and discretion in assessing penalties, prosecuting cases, and negotiating settlements.
- OLE special agents and GCEL attorneys do not take into consideration unintentional errors and mistakes. There is a perception of disparate enforcement treatment, resulting in inconsistent penalties for similarly situated respondents.

- GCEL attorneys threaten respondents with higher penalties if they refuse to settle a case.

Complaint Examples

- A fisherman in the Northeast complained that he was issued a civil penalty assessment 3 years after his alleged violation of the daily limit for codfish. He stated that during the intervening 3 years, he forgot many of the details of the incident and thus was unable to adequately defend himself against the charge.
- Fishermen in Gloucester said that they were cited and heavily fined for noncompliance with a paperwork requirement for a Yellowtail Flounder Letter of Authorization, while those in New Bedford, Massachusetts, were not cited, even though OLE discovered the same noncompliance.
- One fisherman in the Northwest was fined \$75,000 and his entire catch seized for fishing in a closed area. However, he maintained that the data showing he was inside the closed area actually confirmed that he could not have been fishing there because the course and speed of his vessel were inconsistent with the act of fishing. He acknowledged being in the closed area, but maintained that he was merely passing through. He eventually settled the case for \$25,000.
- Another fisherman explained that while out at sea he was advised of a paperwork error in labeling a monthly vessel trip report that is required to be filed with NMFS (labeling it one specific month, rather than another); this rendered his permit invalid. Once the error was brought to his attention by NMFS, he returned to port, properly signed and filed a new report, and was issued a new permit. He further confirmed with the NMFS employee who issued the permit, and with an OLE agent, that he could resume fishing. Nonetheless, he was subsequently notified by GCEL that by resuming fishing, he had committed a permit violation.
- Two fishermen complained that NOAA fined them \$270,000, with a 1-year shutdown of their business. They say that their vessels were properly permitted and fishing legally, but they made honest administrative errors, and this was the first time that NOAA had cited them for any offense. They appealed to an ALJ, who in December 2009 reduced the fine to \$54,000 and suspended all but one month of the business shutdown. The ALJ noted that "the evidence does not suggest [the fishermen] purposely ignored fishery laws to gain an advantage in the fishery." The fishermen have reportedly further appealed the ALJ's reduced fine amount to the Under Secretary.

According to complainants, NOAA’s broad and powerful enforcement authorities have led to a fisheries enforcement posture that is overly aggressive and intrusive. Complainants contend that:

- OLE special agents employ overly aggressive and inappropriate techniques for regulatory enforcement, causing fishermen to feel as though they are being treated like criminals for noncriminal issues.
- The perception exists that NOAA is intentionally putting small fishermen out of business in favor of corporate fishing entities.
- OLE agents and GCEL attorneys have a motive to fine fishermen because proceeds from fines and penalties go into an account that funds OLE and GCEL operations.
- Within the past year, media attention—especially in the Northeast Region—has increasingly focused on NOAA enforcement issues. This includes NOAA’s multiple enforcement actions against the Gloucester (Massachusetts) Seafood Display Auction.⁵ In addition, during our review, two organized public protest rallies took place in Gloucester, which were covered by the media, with reports of several hundred participants at each. This appears to have contributed to an already contentious relationship between NOAA and the industry.

Complaint Examples

- Multiple fishermen told us that OLE criminal investigators would cite them for violations and then use the citations as leverage to build a case against another individual or entity. One fisherman was cited for a fish overage and was then promised by an OLE agent that he could “make the overage disappear” if the fisherman agreed to cooperate on another case.
- One fishing industry official indicated that during what he believed was a regulatory inspection of his place of business, OLE criminal investigators searched the desk and files in his office. When he asked about their legal authority and his rights, the agents said they had forgotten a “letter” that explained their authorities. The agents subsequently obtained a copy of the letter from GCEL and provided it to him.
- When one fisherman indicated that he wanted an attorney present during an interview with an OLE criminal investigator, the agent responded that it would just make it harder for him.

⁵ In March 2009, NOAA issued a NOVA to the auction for \$355,200 and a 120-day suspension. In April 2009, the NOAA Administrator upheld an ALJ decision related to a 2004 NOVA against the auction. As a result of the appeal decision, NOAA issued a 10-day suspension to the auction in June 2009 for violating the terms of a 2003 settlement agreement. Final judicial disposition of this matter remains pending.

NOAA Perspective

Both OLE and GCEL officials acknowledge that many fishing regulations are complex, confusing, and difficult to enforce, particularly in the Northeast Region. This is due in part to the way in which the region's Fishery Management Council (FMC) promulgates the region's fishery management plans, which ultimately become regulations. More specifically, they maintain that such issues are the result of the New England FMC's inclusion of numerous regulatory exemptions designed to accommodate varying interests of the region's diverse fishing industry. Additionally, according to GCEL attorneys, while they have an opportunity to review and comment on FMC fishery management plans prior to their becoming regulations, for the purpose of improving compliance and enforceability, their proposals have not often been accepted or acted upon.

GCEL attorneys adamantly deny that they engage in selective or vindictive prosecution, and maintain that they strive to be consistent and treat similarly situated respondents in a similar fashion. They advised that specific civil penalty amounts, when viewed in isolation, might appear excessive, but penalties must serve as a deterrent to future violations and reflect the violation's harm to natural resources. According to one GCEL attorney, each case is like a "snowflake"—they are all different. He contends that there is very little comparability among cases, and that the prosecution of each case must be assessed based on its own individual merits and circumstances. According to both OLE and GCEL officials, the vast majority of fishermen and other regulated parties in the Northeast comply with fisheries regulations; they assert, however, that a small and extreme minority exists who regularly violate regulations and are the most vocal with their complaints.

Prior OIG Audit and Evaluation Coverage

Over the past 12 years, our office has produced five reports addressing various aspects of NOAA fisheries enforcement issues.⁶ Some of the more relevant results from our previous reports include the following:

In a September 1998 report, we discussed OLE's lack of policy direction and mission focus from NMFS' leadership, recommending that NMFS develop specific enforcement priorities and goals for OLE. (This is a finding repeated in this report—12 years later). At the time, NOAA did not concur with our conclusion that providing more specific policy guidance on enforcement priorities and strategies would aid OLE in defining its organizational structure and allocating resources.

⁶ *Investigation of Work and Scientific Methods of the National Marine Fisheries Service's Northeast Fisheries Science Center* (Letter to Senators Snowe, Collins, Kennedy, and Kerry; Memorandum to NOAA, February 2009); *NOAA's Management of the Joint Enforcement Agreement Program Needs to Be Strengthened* (Report No. IPE-19050-1, September 2008); *NMFS Should Take a Number of Actions to Strengthen Fisheries Enforcement* (Inspection Report No. IPE-15154, March 2003); *National Marine Sanctuary Program Protects Certain Resources, But Further Actions Could Increase Protection* (Inspection Report No. IPE-185911, February 2008); and *NMFS Office of Law Enforcement Needs Management Improvements* (Audit Report No. STL-9835-8-0001, September 1998).

Regarding OLE's workforce composition, the report referenced the desire of the then-Assistant Administrator for NMFS to have OLE's staffing of uniformed enforcement officers be increased to 50 percent, to provide greater enforcement visibility, with the remaining half being special agents/criminal investigators. (At the time, it was 25 percent and 75 percent, respectively). Today, OLE's enforcement staff consists of approximately 10 percent uniformed officers and 90 percent criminal investigators.

From our February 2009 report: a history of poor communication and mistrust in the Northeast Region colored how individuals have viewed NOAA's management of fisheries, and NOAA had made only limited progress toward improving the transparency of its fishery management process there since 2004. In particular, we found (1) the relationship between the Northeast fishing industry and NMFS to be characterized by a lack of confidence and trust; (2) ineffective communication and misunderstandings between NMFS and the industry that eroded trust; and (3) poor handling by NOAA of a 2008 Freedom of Information Act (FOIA) request, which contributed to its reputation in the Northeast Region as an agency unconcerned with transparency. In response to our recommendations in the February 2009 report, NOAA took action to examine why statutory deadlines were not met for the particular FOIA request, and has taken preliminary steps to pursue ecosystem approaches to fisheries management. NOAA has not yet acted, however, to fully satisfy the intent of our recommendations to enhance the participation of the Northeast industry in the fisheries management process and clarify its policy on a controversial multi-species exemption.

Evolution of the Magnuson-Stevens Act

The Magnuson-Stevens Act was signed into law in 1976, providing NOAA with broad enforcement authority, including random boarding and searches of any fishing vessel subject to the Act.⁷ In addition, NOAA can conduct unannounced inspections of places of business—without obtaining warrants—to access data or information to which it is entitled under the Act.⁸ Refusal to provide immediate access to a vessel or place of business is a violation in itself, and may result in civil penalties or permit sanctions.⁹ Additionally, NOAA special agents have arrest authority for violations of the Act. The Act also empowers NOAA to seize certain fishing-related assets (such as fish catches and vessels) that are involved in violations of the Act. NOAA may retain and use the funds received from these asset forfeitures, and from the civil penalties it imposes and collects.

In 1996 the Magnuson-Stevens Act was reauthorized and added new habitat provisions, requiring, for the first time, that each fishery management plan identify essential fish habitats and minimize the adverse effects of fishing in such habitats.¹⁰ This significantly affected many sectors of the fishing industry because it prescribed more stringent gear restrictions and reduced open fishing areas.

⁷ 16 U.S.C. § 1861(b)(1)(A)(ii)

⁸ 16 U.S.C. § 1861(b)(1)(A)(vi)

⁹ 16 U.S.C. § 1857(1)(D)

¹⁰ See the Sustainable Fisheries Act, Pub. L. No. 104-297 (1996).

Subsequent reauthorization of the Act in 2006¹¹ required overfished stocks to be rebuilt within 10 years,¹² and also mandated—for the first time—annual catch limits and accountability measures to end overfishing. These changes have resulted in NOAA’s tightening regulation and enforcement of an industry with significant elements already struggling, particularly in the Northeast.

NOAA has been encouraging the Fishery Management Councils to use “catch shares”¹³—a fishery management tool that NOAA believes can help end overfishing, and rebuild and sustain fisheries and fishing communities. However, one such catch share program—sector management—which is scheduled to begin this year—has caused substantial concern within the Northeast commercial fishing industry; fishermen fear that it will drive small boat owners out of the industry.

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 priorities, implementing effective management information systems, and utilizing data to inform management decisions and enforcement activities.**

As noted, NOAA’s law enforcement operations consist of relatively small elements (OLE and GCEL) within a large, science-based agency. As such, those offices have not garnered a great deal of attention from senior management, which is generally more focused on the science aspects of NOAA’s mission. Notwithstanding their size, NOAA’s enforcement operations have great potential to have an impact on the fishing industry, the livelihood of individual fishermen, and the public’s confidence in NOAA and the Department of Commerce.

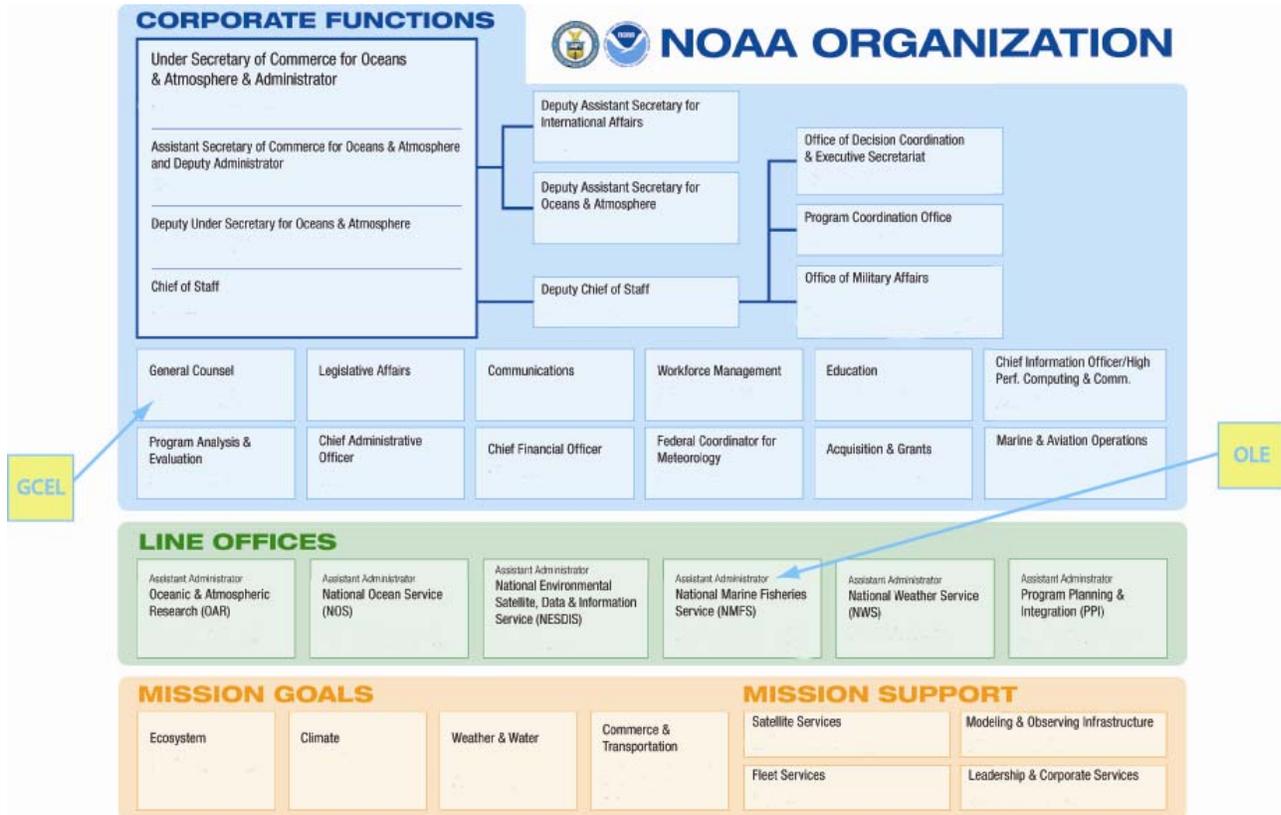
Organizationally, OLE and GCEL reside several levels down within NOAA’s overall structure and, as such, are not specifically identified as program (“line”) offices in NOAA’s public organization chart (see Figure 1). Rather, the Chief of OLE reports to NMFS’ Deputy Assistant Administrator for Operations, who, in turn, reports to the Assistant Administrator for Fisheries. The Assistant General Counsel for GCEL reports to a NOAA Deputy General Counsel, who reports to NOAA’s General Counsel. (See Appendix for detailed background information on OLE’s and GCEL’s structures, budgets, and processes.)

¹¹ See the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479 (2007).

¹² NOAA’s 2009 data indicated that 15 of 19 groundfish stocks in the Northeast Region were overfished or subject to overfishing.

¹³ “Catch share” is a general term for several fishery management strategies that allocate a specific portion of the total allowable fishery catch to individuals, cooperatives, communities, or other entities. Each recipient of a catch share is directly accountable to stop fishing when its specific quota is reached.

Figure 1. NOAA Organization Chart



Source: NOAA

Based on numerous interviews and examination of enforcement records, we conclude that a lack of management attention, direction, and oversight has led to regional enforcement elements operating autonomously; in the Northeast Region, this has contributed to aggregate fine assessments that are inconsistent with those in the other five regions. This regional disparity fosters an appearance that fine assessments in the Northeast Region are arbitrary. Specifically, GCEL data for closed cases for the 5-year period from July 2004 through June 2009 illustrates that in the Northeast Region, 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. Further, 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). (See Table 1.)

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

Region	NOVA 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, and NOAA’s Civil Administrative Penalty Schedule and accompanying internal guidelines. GCEL noted that initial assessment determinations take into account such factors as prior violations, particular facts of the case, aggravating and mitigating circumstances, and value or scarcity of the involved resource. However, reflecting a lack of appropriate management and oversight of GCEL is that 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.

We note that information contained in Table 1 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. Further, according to GCEL officials, due to system inefficiencies and data integrity issues, management must supplement system-generated data with data compiled manually for certain reports that they prepare. This illustrates NOAA’s problem with its data systems. It is not possible to effectively manage a national enforcement program such as NOAA’s without reliable and efficient management information systems and meaningful data.

When we asked OLE and GCEL senior management whether they use enforcement-related data from their management information systems to inform decision-making, they indicated that they do, but only to a limited extent due to system inadequacies. For example, neither OLE nor GCEL is able to generate data from their management information systems on recidivism rates, which is important for assessing deterrence and therefore program effectiveness. Such limited use of data, combined with unreliable data in OLE’s and GCEL’s management information systems, reflects a lack of appropriate attention by NMFS and NOAA leadership to provide effective oversight of the agency’s enforcement program. It seems to us that with an asset forfeiture fund with a balance of

\$8.4 million, NOAA had more than sufficient resources to develop and implement the data systems necessary to keep track of the performance of its enforcement group.

Further, we found that NOAA leadership has had minimal involvement in setting enforcement priorities, linking enforcement to its fishery management goals, or evaluating enforcement program effectiveness. Heretofore, the office of the NOAA Under Secretary has had limited involvement with some aspects of the enforcement mission, such as allocating resources through the budget process and reviewing appeals of assessed fines. However, senior NOAA headquarters officials (including the Assistant Administrator for Fisheries) acknowledged having not provided formal input to the regions regarding enforcement priorities and operations, except with respect to international fishing violations.

Similarly, regionally-established enforcement priorities, even if documented, have not typically been disseminated to headquarters or other regions. We also found that NOAA leadership's plans identifying the most pressing fishery and conservation issues do not include enforcement priorities or strategies. For instance, while NOAA's August 2009 Annual Guidance Memorandum states that enforcement of management measures is a challenge to ensuring the sustainability of healthy fisheries, no enforcement priorities are mentioned. Given the complexities of NOAA's mission and organization, the industry, and the current enforcement climate, its setting of enforcement priorities should involve integration and coordination with the headquarters fisheries management and science center elements, including the Assistant Administrator for NMFS—to whom OLE reports.

2. NOAA needs to strengthen policy guidance, procedures, and internal controls in its enforcement operations to make the civil penalty assessment process more transparent and appear less arbitrary and unfair. NOAA also needs to undertake revisions to applicable procedural regulations and penalty schedules in order to provide greater consistency, clarity, and reduce confusion with affected industry parties.

Significantly, GCEL does not have an internal operations manual. GCEL attorneys explained that proposed fines are determined by NOAA's Civil Administrative Penalty Schedule and accompanying informal guidelines. However, the penalty schedule and informal guidelines afford GCEL attorneys broad discretion. This, combined with GCEL's absence of formal procedures for sufficiently documenting its decisions regarding penalty assessments and settlement amounts, has resulted in a process for determining civil penalty assessments that appears arbitrary. As such, GCEL's explanations for how penalty assessments are determined cannot be audited and thus are not verifiable. In other words, such decisions are left to the sole discretion of the individual enforcement attorney, who has broad discretion, and there is no established process for higher-level review.

Additionally, we found NOAA's data for fines 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, we found that 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 this review, GCEL has recently undertaken a number of initiatives to promote transparency, ensure fairness, and open lines of communication with the regulated community. These efforts are detailed in a December 1, 2009, memorandum from the Assistant General Counsel for GCEL to NOAA's Deputy General Counsel.

GCEL's stated objectives include (1) revision to procedural regulations and penalty schedules; (2) development of an internal operating procedures manual; (3) implementation of a new case tracking database linking to OLE's case management system; (4) increasing communication and direct interaction with the Fishery Management Councils (FMC), including in the near term with the New England FMC; (5) providing explanatory notes to enforcement case files; (6) tracking priorities; and (7) providing public access to charging information. While these intended actions are responsive to our findings and recommendations, we will carry out a follow-up review to assess the agency's progress.

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 means to accomplish its primarily regulatory mission (i.e., based on OLE's data, its caseload from January 1, 2007 through June 30, 2009, was about 98 percent non-criminal.)

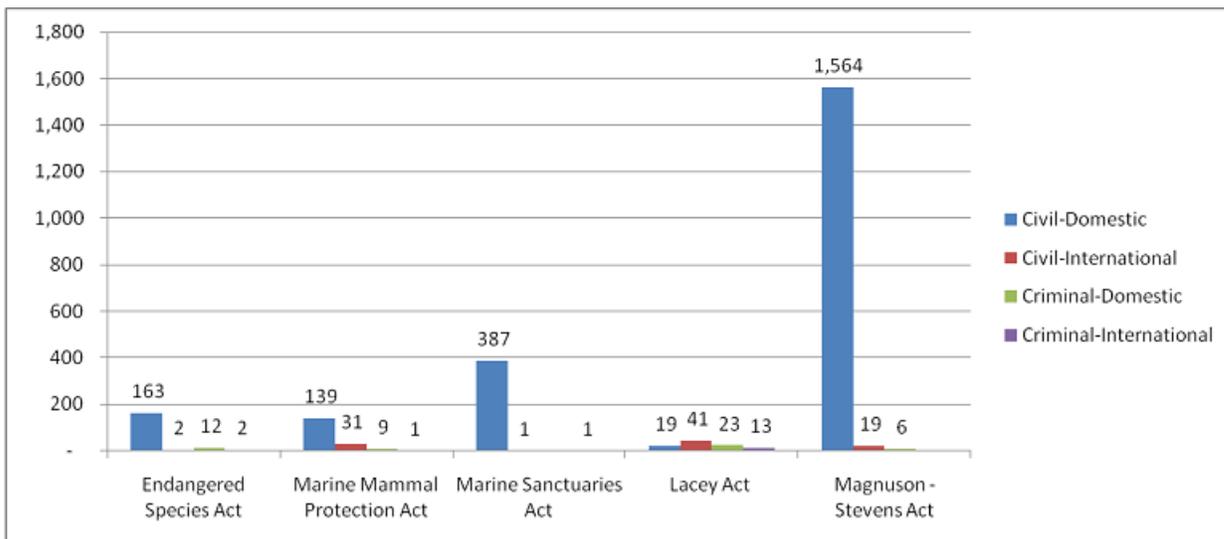
NOAA specifically addressed and made decisions about OLE's workforce composition about 10 years ago, increasing its already predominantly criminal investigator workforce (75 percent) to today's makeup (90 percent). This workforce structure is not the only option available to NOAA; for example, we looked at how some other regulatory enforcement agencies are staffed, and comparative information is provided below.

At the time of NOAA's decisions 10 years ago, the then-Assistant Administrator for NMFS desired a different mix, consisting of a greater proportion of uniformed enforcement officers to carry out essential regulatory inspection functions; in particular, that the proportion of uniformed fishery officers be increased to 50 percent to provide greater enforcement visibility, with the remaining 50 percent special agents/criminal investigators (at the time, it was 25 percent and 75 percent, respectively.) This did not occur, and based on subsequent workforce composition decisions, OLE's enforcement staff today consists of approximately 10 percent uniformed officers and 90 percent criminal investigators. There are indications in the record that this workforce composition was also driven by considerations of the better pay and benefits that apply to federal criminal investigators, rather than by strict mission requirements.

As of August 31, 2009, OLE's enforcement staff consisted of 149 criminal investigators (special agents, 1811 series) and 15 uniformed enforcement officers (1801 series)—12 of whom are located in Alaska, with none in the entire Northeast Region. Significantly, according to OLE data for the past three years (2007–09), approximately 98 percent of its enforcement caseload has been regulatory/civil—with only about 2 percent criminal cases. (See Figure 2.) 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 enforcement.

Figure 2. OLE Caseload by Statute (January 1, 2007–June 30, 2009)^a



^a This reflects the total number of cases involving potential violations of the laws listed. (Note: For listing purposes, individual cases involving more than one statute potentially violated are counted in the number of cases for *each* applicable statute.)

Source: NOAA

OLE’s mission is primarily the enforcement of laws that protect and regulate the nation’s living maritime resources and their natural habitats. OLE’s 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 (65 percent of its cases). Because it is largely staffed with criminal investigators, OLE’s orientation is to conduct criminal investigations. However, the criminal provisions of the Magnuson-Stevens Act are narrowly focused and nearly all are misdemeanors, which, according to OLE, typically do not result in criminal charges. Most violations, such as exceeding catch limits, result in civil penalties alone.

According to OLE criminal investigators, they view themselves as just that—criminal investigators whose primary job is to conduct criminal investigations. This is a view driven by OLE management. As such, and as articulated by OLE’s Chief, they view any fisheries enforcement case as potentially criminal. As a result, OLE considers it appropriate to operate from a criminal-investigative standpoint and apply techniques typically used in criminal investigations to regulatory enforcement matters, as they deem necessary.

We agree that it is possible that in any given case, a regulatory inspection could yield evidence of a crime. This is common across government regulatory agencies. However, it seems to us that it

should be clear to the regulated community whether information OLE collects is for the purpose of a regulatory proceeding or a criminal proceeding. It is one thing for a regulatory inspector to come across evidence of a crime during the normal course of a regulatory inspection; it is entirely different if it even appears that evidence of a crime is being collected under the guise of a regulatory inspection. As further addressed below, this is why other enforcement agencies, including those we surveyed for purposes of comparison, separate the two functions.

The Magnuson-Stevens Act's criminal provisions predominantly involve (a) violations concerning interference with regulatory activities, including threats to officers/observers, or submission of false information; and (b) violations by foreign-flagged vessels for fishing in U.S. waters. Other than the foreign-flagged vessel provisions, the Act prescribes no criminal penalties for actual fishing violations committed by the domestic industry (such as exceeding catch limits, gear violations, or fishing in excluded zones.)¹⁴ NOAA requested expansion of the Act's criminal enforcement provisions in conjunction with the 2006 reauthorization process, but such provisions were not adopted. In particular, NOAA requested criminal fines and imprisonment for egregious violations for illegal harvesting. Although OLE also has authority to enforce some criminal provisions in other statutes (for example, the Endangered Species Act and the Lacey Act), the fact remains that its caseload from January 1, 2007 through June 30, 2009, was only about 2 percent criminal.

One effect of OLE's current workforce composition, according to individuals from the industry and OLE with whom we spoke, is that its criminal investigators do not spend significant time on the docks, with dealers, or in fish houses, relying instead largely on officers from Joint Enforcement Agreement¹⁵ agencies, thereby reducing OLE's overall visibility and routine interaction with the regulated industry. This can contribute to misunderstanding and increased tension within the current enforcement climate.

The blurring of OLE's regulatory and criminal functions can be seen in its use of certain law enforcement tools. For example, OLE's criminal investigators execute administrative inspection warrants, which are for the purpose of gathering evidence in civil enforcement matters. While OLE does not execute these warrants very often (nine between 2004 and 2009, per OLE data), there are important distinctions between this type of warrant and criminal search warrants, which OLE criminal investigators also execute and which are used to gather evidence in criminal investigations. The manner in which OLE operates does not make clear the important distinction between regulatory and criminal functions when executing either type of warrant. In reviewing OLE's policy guidance, we found no distinction; in fact, the guidance for both is the same. We contrast this with EPA, which advised us that its criminal investigators do not execute administrative inspection warrants and are not even permitted to assist inspectors with the execution of those warrants, in order to keep regulatory and criminal functions separate.

¹⁴ See generally 16 U.S.C. § 1859.

¹⁵ Joint Enforcement Agreements (JEA) provide NOAA with a mechanism for transferring federal dollars to the states and territories to fund federal fishery enforcement activities. JEA dollars typically fund dockside monitoring and inspection, at-sea patrols, and equipment, vessels, outreach, and education for partner agencies.

Additionally, OLE uses consensual monitoring (non-telephone) for criminal and noncriminal cases, with the majority being used in criminal cases (53 out of 62, between July 2004 and July 2009, per OLE data). This law enforcement technique involves the audio recording of private conversations, using cooperating witnesses under the supervision of law enforcement, or undercover agents. The three comparable agencies with whom we spoke (EPA, the Fish and Wildlife Service, and Commerce's Bureau of Industry and Security) advised that they do not employ this technique in noncriminal cases; in fact, one of these agencies specifically advised that it considers the technique overly intrusive for noncriminal matters.

OLE contends that because the statutes it primarily enforces contain not only civil but also criminal provisions, any enforcement matter is potentially criminal, thus warranting the use of criminal investigators for both functions in the interest of maintaining maximum flexibility with respect to operational need. The desire to maintain maximum flexibility is understandable, especially for an agency such as OLE that has limited resources to cover an increasingly complex and vast jurisdiction. However, other options exist for achieving flexibility, and this rationale for OLE's enforcement approach tends to explain why fishermen with whom we spoke feel that they are being treated like criminals. Irrespective of OLE's rationale, only about 2 percent of its caseload has been criminal-investigative, yet over 90 percent of its enforcement personnel are criminal investigators—a clear imbalance. Ultimately, the overall effect of OLE's workforce composition and enforcement approach is that the commercial fishing industry—particularly in the Northeast Region, where there are no uniformed enforcement officers—has difficulty distinguishing OLE's regulatory function from its criminal function.

RECOMMENDATIONS

We recommend that NOAA take the following actions:

1. Ensure that NOAA leadership regularly addresses and provides input to enforcement priorities and strategies with regional management, including formal reporting protocols. Given the complexities of NOAA's mission and organization, the industry, and the current enforcement climate, its setting of enforcement priorities should involve integration and coordination with the headquarters fisheries management and science center elements, including the Assistant Administrator for NMFS—to whom OLE reports. Further, NOAA should consider reestablishing the position of ombudsman to serve as an interface with the regulated industry; such a position was created in May 1999, but has remained vacant for several years and it is unclear within NOAA whether the position still exists.
2. Determine whether NOAA should continue to approach fisheries enforcement from a criminal-investigative standpoint, and, if another approach is determined to be more appropriate, align OLE's workforce composition accordingly. In particular, NOAA should determine whether the agency has an appropriate balance and alignment of uniformed enforcement officers/inspectors and criminal investigators, based on mission need.
3. To promote greater transparency, consistency, and oversight in NOAA's enforcement processes and operations, (a) ensure that GCEL develops, implements, and follows an internal operating procedures manual that includes comprehensive processes, methods, and

justification for determining civil penalty assessments and fine settlement amounts;
(b) institute a mechanism for higher-level review of civil penalty assessment determinations by GCEL attorneys in advance (e.g., by panel established within NOAA headquarters); and
(c) ensure that OLE's National Enforcement Operations Manual is current, including providing sufficient policy guidance on regulatory and criminal authorities and procedures.

4. Ensure follow-through on the GCEL initiatives outlined in its December 1, 2009, memorandum, intended to foster greater industry understanding of and compliance with complex fishing regulations. These include (a) reviewing and making appropriate revisions to applicable procedural regulations, civil penalty schedules, and associated guidance; and (b) developing an internal operating procedures manual.
5. Ensure that GCEL and OLE develop, implement, and effectively utilize reliable, integrated case management information systems.

Please apprise us within 60 days of your response to the results of this review, including any actions taken or planned with respect to our recommendations. We appreciate the cooperation extended by you and your staff during our review. If you have any questions, or if we can be of further assistance, please do not hesitate to call me at (202) 482-4661.

BACKGROUND INFORMATION ON NOAA’S ENFORCEMENT PROGRAMS AND OPERATIONS

Regulation of Fisheries. The Magnuson-Stevens Fishery Conservation and Management Act, the primary federal fisheries statute, created eight regional fishery management councils to advise NMFS on fishery management issues.¹⁶ Overseen by the Secretary of Commerce, the councils develop the fishery management plans and attendant regulatory recommendations to manage and conserve fish stocks in their geographical regions, subject to the approval of NMFS. Once approved, the regulations are implemented by NMFS and enforced by OLE, the U.S. Coast Guard, and state enforcement agencies through the Joint Enforcement Agreement (JEA) program with OLE.

There are two broad types of fishery regulations: input controls and output controls. Input controls limit the extent of effort commercial fishermen expend on their fishing activities by mandating how, when, and where fishing may occur, thereby indirectly controlling the amount of fish caught. These can include restrictions on the number of licenses, the size and engine capacity of boats, the number of days at sea that each vessel may fish, year-round and seasonal area closures, and restrictions on gear type, such as the length and mesh size of nets. By contrast, output controls directly limit the amount of fish that can be taken from the seas by, for example, establishing a total allowable catch for a species or limiting the amount of fish caught during each trip.

Office for Law Enforcement. NMFS/OLE enforces laws that protect and regulate the nation’s living marine resources and their natural habitats. Most of its enforcement work is civil and administrative in nature, focusing on the protection of the nation’s fisheries and compliance with these regulations; however, OLE has authority to enforce over 37 statutes, as well as numerous treaties related to the conservation and protection of marine resources (see Figure 3).

Figure 3. Primary Laws Enforced by NMFS’ Office for Law Enforcement

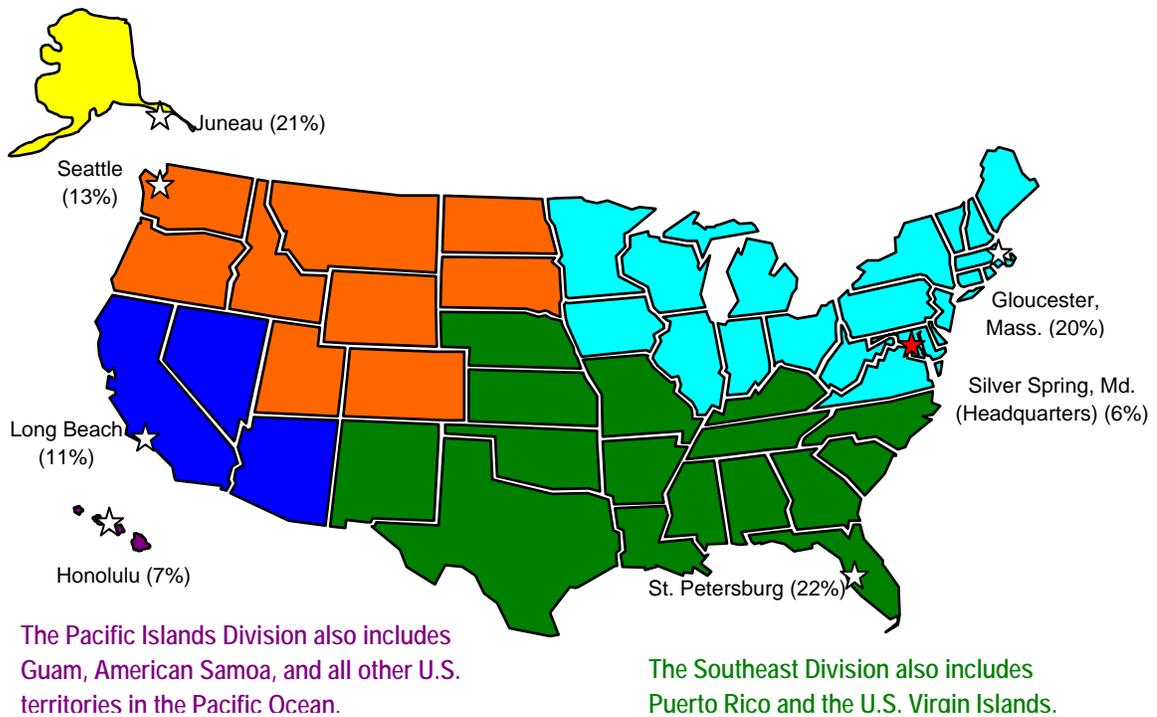
- Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1801 et seq.)
- Endangered Species Act (16 U.S.C. § 1531 et seq.)
- Marine Mammal Protection Act (16 U.S.C. § 1361 et seq.)
- Lacey Act (16 U.S.C. § 3371 et seq.)
- National Marine Sanctuaries Act (16 U.S.C. § 1431 et seq.)

Source: NOAA

¹⁶ These are for New England, Mid-Atlantic, South Atlantic, Gulf of Mexico, North Pacific, Pacific, Western Pacific, and the Caribbean.

OLE’s budget for FY 2009 was \$56,405,000 (an increase of \$3,085,000 over FY 2008.) As of August 31, 2009, OLE staff consisted of 235 personnel: 149 criminal investigators (special agents, 1811 series); 15 enforcement officers (1801 series); and 71 technical and support personnel and program analysts. In addition to OLE headquarters in Silver Spring, Maryland, it has six divisions (regions) consisting of a total of 53 field offices. Figure 4 presents a breakout (by percentage) of OLE special agents and officers assigned to the divisional offices.

Figure 4. Divisional Distribution of OLE Personnel



Source: OIG based on NOAA data

General Counsel for Enforcement and Litigation: NOAA/GCEL also plays a key role in fishery enforcement. GCEL processes civil penalty cases, permit sanctions, and administrative forfeitures. As of August 31, 2009, GCEL's full-time staff of 20 consisted of two managers, 14 line attorneys, two support positions, and two contract positions. NOAA’s Civil Administration Penalty Schedule is a compilation of internal guidelines used by NOAA enforcement attorneys in assessing penalties for violations of statutes and regulations that NOAA enforces. GCEL attorneys currently use their 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.

NOAA's Investigative and Administrative Processes. After OLE conducts an investigation involving allegations of fishery violations, it can take several enforcement actions, including (1) determining that no action is warranted; (2) issuing a "Fix-It Notice"¹⁷ verbal warning, written warning, or summary settlement; (3) referring the case to GCEL for potential administrative, civil action; or (4) referring the case to the U.S. Attorney's Office for potential criminal prosecution.

GCEL may consider a variety of options with cases referred to it by OLE, including declining administrative action; downgrading or upgrading an initial enforcement action; issuing a written warning; issuing a summary settlement; issuing a NOVA and/or issuing a Notice of Permit Sanction (NOPS—an action against a regulated party's permit to fish).¹⁸ GCEL may also settle cases using compromises or a combination of any of the foregoing remedies.

The respondent has 30 days from receipt of a NOVA in which to respond. During this time the respondent may: (1) accept the penalty or compromise penalty, if any, by taking the actions specified in the NOVA; (2) seek to have the NOVA amended, modified, or rescinded; (3) request a hearing; (4) request an extension of time to respond; or (5) take no action, in which case the NOVA becomes final. The respondent, within the 30-day period specified, may request an extension of time to respond.

If the respondent prefers a hearing, the request is placed on the docket by the Office of the U.S. Coast Guard's Chief Administrative Law Judge, whose office is contracted by NOAA to adjudicate administrative cases on its behalf. For any hearing held in response to a request, the Administrative Law Judge (ALJ) will render an initial decision. Any party to the hearing may seek the NOAA Administrator's review of the ALJ's initial decision within 30 days after the date the decision is served. Review by the Administrator of an initial decision is discretionary and is not a matter of right. If a party files a timely petition for discretionary review, or action to review is taken by the Administrator upon his or her own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator.

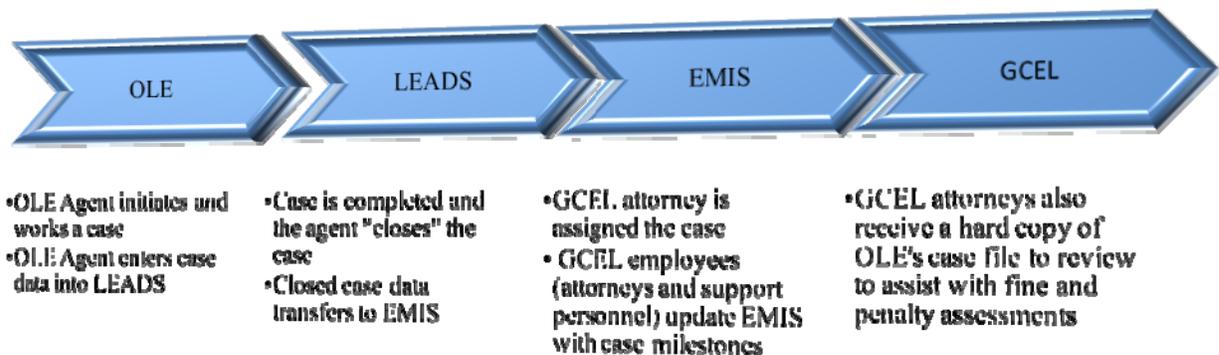
Petitions for discretionary review must comply with several requirements regarding format and content. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge. If the Administrator declines to exercise discretionary review, such order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final decision of NOAA. The Administrator need not give reasons for declining review. The Administrator will render a written decision on the issues under review. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision. Appeals to the decision of the Administrator can then be filed with U.S. District Court.

¹⁷ The purpose of a "Fix-It Notice" is to call attention to a minor violation in a formal venue, but forego any potential court costs and monetary penalties in lieu of correcting the violation identified. The violation should be corrected on scene or shortly thereafter.

¹⁸ See generally 15 C.F.R. Part 904 (setting forth the procedures governing NOAA's administrative proceedings).

Enforcement Case Management. OLE and GCEL use separate case management systems to manage and monitor their enforcement and litigation activities. OLE uses the Law Enforcement Accessible Database System (LEADS) as its case tracking system. This system interfaces with GCEL’s Enforcement Management Information System (EMIS). When an OLE special agent closes a case within LEADS, EMIS is updated with the case information and it becomes an open case in EMIS.¹⁹ GCEL personnel, including attorneys and support staff, are then responsible for tracking and updating the case data, including case resolution, fines, settlements, and/or forfeitures for those cases that OLE has referred to GCEL. Cases not referred to GCEL are still populated into EMIS, but not accessible by GCEL personnel. Updating cases within EMIS is up to the discretion and responsibility of the assigned attorney handling each individual case.

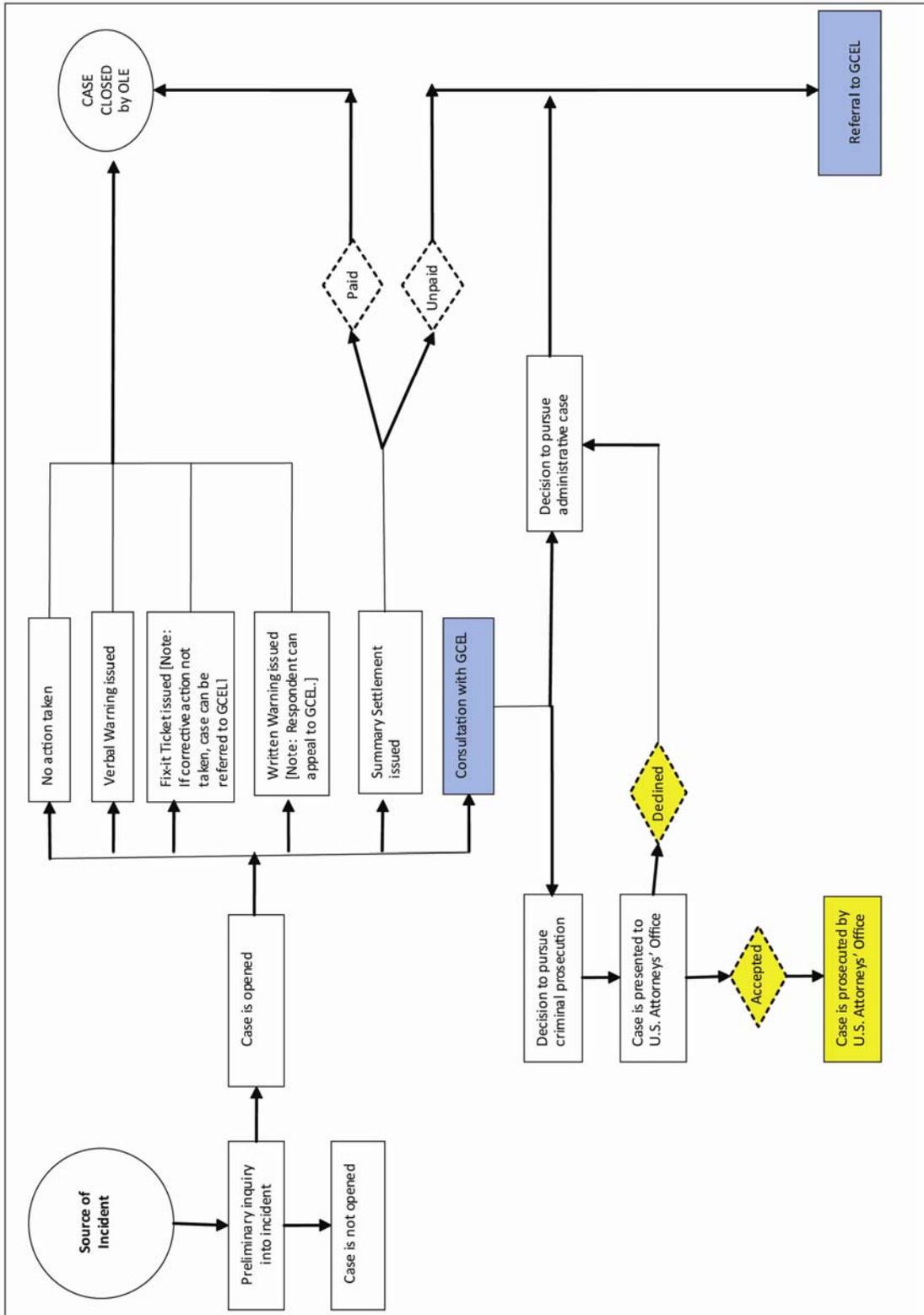
Figure 5. NOAA Enforcement Process and Case Management Systems



Source: OIG

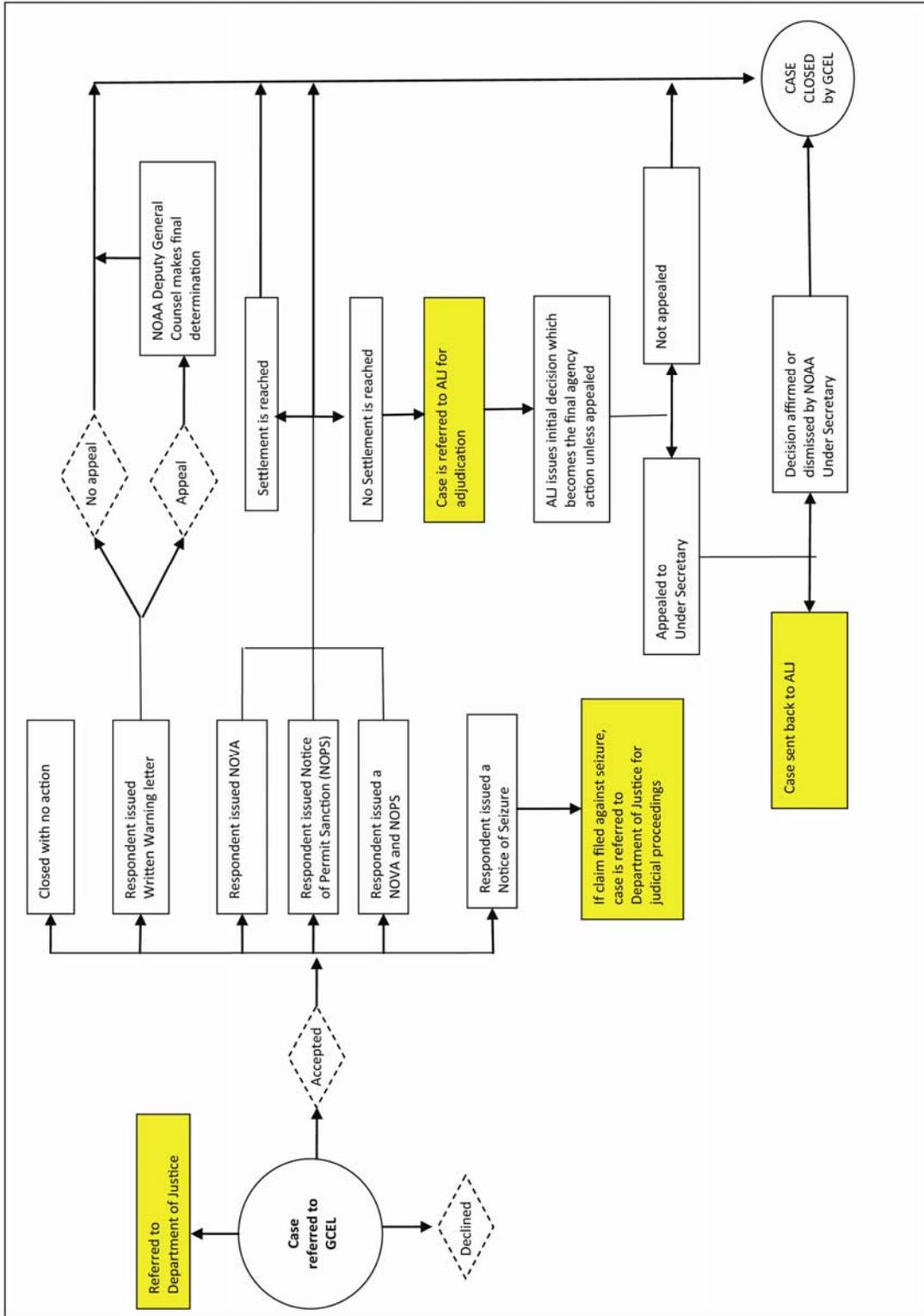
¹⁹ According to OLE, it considers a case “closed” when there is some sort of resolution of the case, by OLE’s definition of resolution; for example, a summary settlement is paid, a case is referred to GCEL, or it is referred to the Department of Justice. GCEL opens a case once it is referred to it by OLE.

Figure 6. OLE Investigative Process



Source: OIG based on NOAA data

Figure 7. GCEL Administrative Process



Source: OIG based on NOAA data