

U.S. DEPARTMENT OF COMMERCE
Office of Inspector General

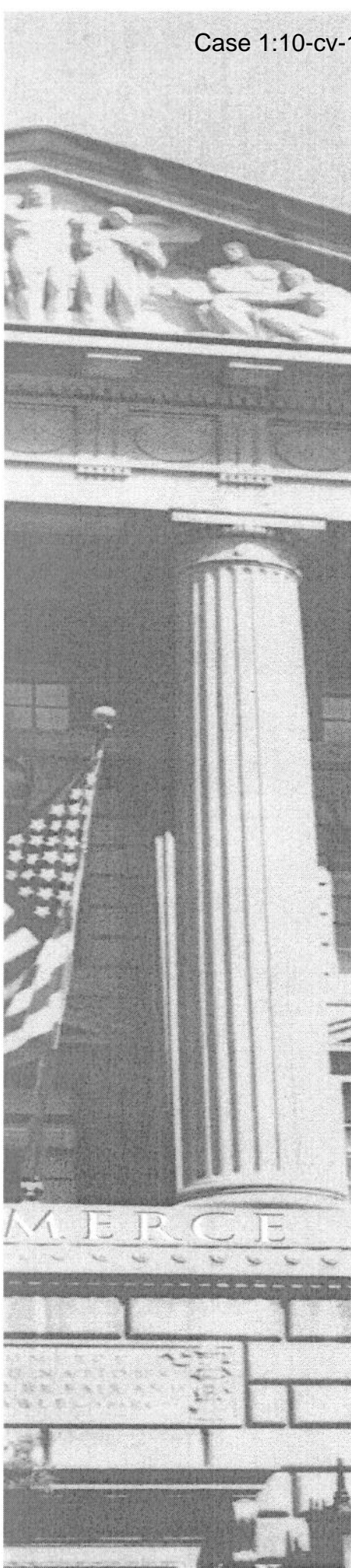


***National Oceanic and
Atmospheric Administration***

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

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

Office of Investigations

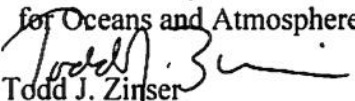




UNITED STATES DEPARTMENT OF COMMERCE
The Inspector General
Washington, D.C. 20230

September 23, 2010

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

FROM: 
Todd J. Zirser

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					
		Classification			
Complaint Category		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