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

NOV 22 2010

MEMORANDUM FOR: Todd J. Zinser
Inspector General

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

SUBJECT: Office of Inspector General Review of NOAA Fisheries Enforcement Programs and Operations (September 23, 2010)

This memorandum replies to Report No. OIG-19887-2, September 2010, issued by your office on September 23, 2010 (September Report or Report). You have indicated this is the final report by your office issued in response to the request I made in June 2009 for review of NOAA's enforcement programs. Thank you for the opportunity to move NOAA's enforcement work forward as an effective, transparent, and fair program. I will continue to be actively engaged on this issue and am fully committed to ensuring this result.

You note that the purpose of the September Report is to provide the results of your examination of 27 specific complaints raised by fisherman and others to your office during your review of NOAA's enforcement program. These 27 complaints are listed in Appendix A to the Report. You also note that almost all the complaints come from the Northeast Region and were submitted to your office through December 2009. Of the 27 complaints, you recommended 19 as appropriate for further review.

Based on information your office provided on the 19 complaints subsequent to your Report, you noted that they relate to matters opened between 1998 and 2009; one complaint involves a regulatory determination that is not an enforcement matter; the remaining 18 complaints were identified as having been submitted by 14 individuals or entities. We note that during this same time period, NOAA Office of Law Enforcement (OLE) investigated 3000 to 4000 incidents per year (over 42,000 during this twelve year period) and referred on approximately 500 cases per year to the NOAA Office of General Counsel for Enforcement and Litigation (GCEL) (approximately 6000 during this twelve year period).

As you note in the September Report, subsequent to the complaints and since you began review of NOAA's enforcement programs, I have directed significant changes in these programs. You outline some of these changes at pp. 2-3 of the September Report.

The September Report includes a number of Findings, as well as Recommendations. While this memorandum does not address the Findings, I note that the Findings are limited almost exclusively to the Northeast Region, and you note that they are not reflective of NOAA's work in other regions. As with my prior responses, it is important to note that this Response to the September Report (Response) is not designed to evaluate whether NOAA agrees with the findings in the September Report or whether NOAA finds them accurate, fair, or representative. I am looking forward and addressing the Recommendations only.

OIG Recommendation #1: "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."

Action Planned or Taken: Secretary Locke and I, ourselves or through the agencies we direct, have taken several steps in response to this Recommendation, which I understand to be focused on the matters that are the subject of the Report.

First, by memorandum of September 23, 2010 (attached as Appendix 1), Secretary Locke appointed a Special Master and charged him with reviewing the 19 complaints identified in the Report and making recommendations to the Secretary as to whether any penalties should be modified or remitted. In making these recommendations, the Secretary directed the Special Master to:

> "identify those instances in which clear and convincing evidence establishes that NOAA enforcement personnel engaged in conduct that overstepped the bounds of propriety and fairness expected of them,[1] and had a material impact on the outcome of the case. Examples of such conduct may include:
>
> (a) Abuse of process, including vindictive prosecution or other prosecution in bad faith, and unreasonable delay that prejudices the defense of the case;
> (b) Abusive conduct that amounts to coercion, intimidation, or outrageous behavior; and
> (c) Presenting false or misleading evidence or other conduct that impacts the truth of the case presented."

[1] This language is taken from the seminal definition of prosecutorial misconduct in *Berger v. United States*, 295 U.S. 78 (1935).

The Secretary further stated that:

> "the Special Master may consider the seriousness of the conduct engaged in by any NOAA personnel, the impact of that conduct on the outcome of the case, the amount of the penalty assessed, any relief previously afforded for the penalty assessment or opportunities to seek relief, the factors enumerated in Section 308(a) of the Magnuson-Stevens Act and regulations thereunder as well as any other factors he deems appropriate for determining the amount of a penalty under the Act."

The September Report also identified but did not discuss an additional 104 complaints brought to the attention of your office. With respect to these additional complaints, the Secretary directed the Special Master:

> "to consider whether any of the 104 complaints . . . warrant further review. These would include:
>
> (a) Cases otherwise appropriate for review under [the] criteria [used for review of the 19 complaints] in which the complainant declined to waive confidentiality in order to participate in the IG's investigation but now is prepared to do so;
> (b) Cases in which GCEL attorneys charged excessive penalties in a manner that unfairly forced settlement; or
> (c) Cases handled by a GCEL attorney in which conduct of the kind specifically enumerated in the IG's September 2010 Report prejudiced the outcome of the case."

We understand that the Special Master has received files related to complaints identified in the Report and is beginning his review of them, and that the Special Master will be submitting a progress report to the Secretary shortly.

Second, NOAA has made extensive changes, including some noted in the September Report, to its policies (e.g., higher level review of charging and settlement decisions, revised draft penalty policy currently undergoing public comment, available at http://www.nmfs.noaa.gov/ole/draft_penalty_policy.pdf); regulations (amending 15 C.F.R. 904.204(m) to place the burden of justifying a particular civil penalty or permit sanction on NOAA rather than the respondent in cases before administrative law judges); and procedures (developing and implementing a process to establish national and regional enforcement priorities; providing enforcement charging information to the public; developing a communications plan to provide greater outreach to fishermen, fishing communities, and other fisheries stakeholders; developing a compliance assistance program to assist fishers in understanding the regulations, ensuring their gear is in compliance or providing additional information regarding regulations). We also held an Enforcement Summit on August 3, 2010, to seek ideas from a range of stakeholders on improving NOAA's enforcement program.

NOAA has also made personnel changes in leadership positions involved in matters discussed in the Report. In April 2010, NOAA Fisheries Assistant Administrator Eric Schwaab appointed Alan Risenhoover as Acting Director for OLE. In October 2010, the former OLE Director Dale Jones was assigned to the position of fisheries program specialist; and NOAA posted a job announcement for a new OLE Director and is conducting a nationwide search for a new strong leader under the guidance of Vince O'Shea, Executive Director of the Atlantic States Marine Fisheries Commission and former U.S. Coast Guard Captain in charge of fisheries law enforcement. Also in October 2010, NOAA named Tim Donovan as the Acting Special Agent in Charge for OLE's Northeast office, the position formerly held by Andrew Cohen. Charles Juliand, a lawyer in the GCEL Northeast office, has been reassigned away from enforcement duties to the office of General Counsel for Natural Resources.

All of these steps, combined with the actions outlined in earlier responses, some of which are noted in the September Report, will help ensure a strong, effective, and fair national enforcement program to protect the important resources for which NOAA is the public's trustee.

OIG Recommendation #2: "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"; and

OIG Recommendation #3: "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."

Action Planned or Taken: NOAA has given serious consideration to establishing an ombudsman position in NOAA. As we noted in our Response to the January 21, 2010, report (Response of March 18, 2010), the earlier Ombudsman program in the Department was problematic. Moreover, the Small Business Administration (SBA) already has a National Ombudsman to whom small businesses, including fisherman, can bring their concerns about excessive or unfair federal regulatory action. Since June 2008, NOAA's charging documents have included a notice regarding the respondent's ability to file a complaint with the SBA National Ombudsman,[2] and NOAA plans to include a similar

[2] The statement included in charging documents reads as follows: "In accordance with the provisions of the Small Business Regulatory Enforcement Fairness Act, the Small Business Administration has established a National Small Business and Agriculture Regulatory Ombudsman to receive comments from small businesses about excessive or unfair federal regulatory enforcement actions. If a small business wishes to comment on the enforcement actions of NOAA, it may do so via the internet at www.sba.gov/ombudsman, email at ombudsman@sba.gov, mail (Small Business Administration, Office of the National Ombudsman, 409 Third St. SW, Washington, D.C. 20416), or by calling 1-888-REG-FAIR. PLEASE NOTE: The right to file comments with the Ombudsman is independent of the rights afforded every respondent, including the right to contest the assessment of a civil monetary penalty or permit sanction. If

notice in materials prepared for purposes of compliance assistance, in addition to the current notice on the OLE website. Notably, in its recent annual reports to Congress (for FY2008 (submitted) and FY2009 (draft, to be finalized soon)), the National Ombudsman for the Small Business Administration has given NOAA straight A's on matters of regulatory fairness and responsiveness, including in matters regarding compliance assistance. Thus, rather than appointing another ombudsman, we are taking a more comprehensive approach.

We are currently developing a compliance assistance program to enhance our enforcement program. Specifically, OLE has established a Compliance Liaison position in the Northeast to improve compliance assistance to the fishing industry and other stakeholders, and has selected Mr. Don Mason from NOAA National Marine Fisheries Service (NMFS) Northeast Regional Office to serve in this role. Mr. Mason is a lifelong resident of Cape Ann, Massachusetts, and 25-year employee with the NMFS, monitoring industry trends and conditions on the Gloucester waterfront. As Compliance Liaison, Mr. Mason will listen to the industry and work directly with them to solve problems – whether those problems involve understanding the regulations, ensuring their gear is in compliance, or providing additional information regarding regulations. Mr. Mason is not an enforcement officer and all work will be done in a collaborative fashion. As Liaison, Mr. Mason has expert knowledge of the regulations, will draw upon the expertise of program staff, and be closely aligned with Regional outreach staff to ensure consisteney and efficiency of messaging and products. As Liaison, Mr. Mason will be another point of contact for industry and will respond to fishermen's questions about regulations and how to be compliant. OLE will review the effectiveness of this pilot program in the Northeast, and based on its effectiveness, OLE will consider expanding it nationwide.

In addition, we have put in place an e-hotline to report unfair or overzealous enforcement actions or other breaches of conduct by NOAA enforcement agents or attorneys. This Enforcement Complaint e-Hotline allows stakeholders to report any issues to NOAA management through a specific email address (**OLE.ComplaintHotline@noaa.gov**) that goes directly to NOAA Headquarters. See http://www.noaanews.noaa.gov/stories2010/20100927_hotline.html. Any complaints received are reviewed at NOAA Headquarters and, as necessary, investigated further.

These steps will assist NOAA in addressing many of the issues you raised in the September Report. With respect to simplifying fisheries management regulations, NOAA appreciates the problems that complex regulations may cause. Under the Magnuson-Stevens Act, however, regulations are developed through a complex process that starts with Fishery Management Plans and draft regulations from the Fishery Management Councils; this is the process followed by the New England Fishery Management Council. If a Council opts for complex plans and regulations, NOAA has no authority under the Magnuson-Stevens Act to simplify the regulatory program – its authority is limited to reviewing the regulations for compliance with the Act and other

---

you wish to exercise an[illegible] in accordance with the procedures described in 15 C.F.R. [illegible] it may provide to the Ombudsman."

applicable laws. At the same time, NOAA continues to work within the Council process to address these issues, including participation by NOAA enforcement personnel (and in the Northeast, the Compliance Liaison) at Council meetings to provide input to the Council on the clarity and enforceability of fisheries regulations.

Finally, NOAA continues to take issue with the IG's suggestion that the penalty assessment and defense process can put members of the fishing industry out of business without recourse. As you are aware, the process of noticing violations and assessing penalties provides extensive due process (notice of the charges and the evidence supporting those charges, opportunity for a hearing before an Administrative Law Judge to contest the charges, further review by the Administrator, as well as judicial review in the federal courts of the Administrative Law Judge's or Administrator's conclusions). As discussed in prior responses and elsewhere in this Response, NOAA has made changes to make this system more transparent, accountable, and accessible.

OIG Recommendation #4: "That NOAA review its regulations and internal guidance concerning warrantless inspections and provide detailed direction to OLE agents."

Action Planned or Taken: NOAA is reviewing its Enforcement Operations Manual (Section 6) regarding search procedures, and is developing amendments to those procedures to provide more detailed direction to OLE agents. NOAA plans to issue amendments to Section 6 of the Manual by March 31, 2011.

OIG Recommendation #5: "That GCEL guidance explicitly identify first-time violations as a mandatory mitigating factor."

Action Planned or Taken: As previously noted, NOAA is seeking public comment on a draft penalty policy, which we expect to finalize in early 2011. Rather than treat "first-time violations" as a mandatory mitigating factor without regard to the circumstances of a particular case, the draft policy instead provides that a charging decision in a particular case should take into account the alleged violator's degree of culpability based on an assessment of the alleged violator's intent in committing the violation; this results in lower penalties for first-time violations that are mistakes as contrasted with those that are intentional. Further, the draft penalty policy provides that recidivism is an aggravating factor warranting a higher penalty. It is essential that those operating in a regulated system think they may be enforced against so they comply with the rules. Any system that effectively provides for "one free pass" so reduces that deterrence as to threaten the resource. Moreover, the oceans are vast, and the federal enforcement presence on the water and the docks is relatively limited; thus, the fact that the case may represent the first time an entity is charged does not mean that the entity has not previously violated the law, and in fact, the opposite can be the case as violators themselves sometimes admit.

NOAA has also conferred with a number of high-level and experienced enforcers, including those who have had substantial responsibility for running enforcement programs. Uniformly they also reject an approach of treating "first-time violations" as a mandatory mitigating factor without regard to the circumstances of a particular case. Attached as Appendices 2 and 3 are letters from Catherine R. McCabe, Principal Deputy Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S.

Environmental Protection Agency, and Dr. Shimshack (Tulane University). We expect one additional letter shortly. Thus, this would not be consistent with best practices in enforcement, and we are not going to implement this recommendation.

* * *

We will keep you informed as we move forward regarding the deadlines we have committed to in this Response.

Appendices to Memorandum from Under Secretary Lubchenco
Re: OIG Review of NOAA's Fisheries Enforcement Program (Sept. 23, 2010)

Number	Document	Date
1	Secretarial Decision Memorandum	Sept. 23, 2010
2	Letter from Catherine R. McCabe, Principal Deputy Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, to Lois J. Schiffer, NOAA General Counsel	Nov. 18, 2010
3	Memorandum from Jay Shimshack, Ph.D., Department of Economics, Tulane University, to Lois J. Schiffer, NOAA General Counsel	Nov. 15, 2010

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

September 23, 2010

SECRETARIAL DECISION MEMORANDUM

By this memorandum, I am putting in place a process to consider exercising my authority to modify or remit penalties assessed in specific cases identified by the Department of Commerce Inspector General (IG) in its thorough investigation of complaints regarding the National Oceanographic & Atmospheric Administration (NOAA) Office of Law Enforcement (OLE) and Office of General Counsel for Enforcement and Litigation (GCEL).

The most recent IG report (the September 2010 Report) identified certain cases it found would benefit from "an independent process for equitable relief or resolution of past enforcement cases meeting appropriate eligibility criteria." I am appointing a Special Master to review certain complaints received by the IG and make recommendations as to whether I should modify or remit any of the penalties. I am also directing NOAA leadership to take action to address other issues the IG identified that do not lend themselves to individual case-by-case remedies.

New leadership at OLE and GCEL has already acted to increase transparency and accountability in their respective offices and to reinforce the high standards of professional and ethical conduct adhered to by most law enforcement professionals who work there. I undertake this action to help our new leadership wipe the slate clean of past practices identified by the Inspector General that are incompatible with these high standards and with the standards I expect of law enforcement officers.

The IG Investigation.

The Inspector General's investigation into the policies and practices of OLE and GCEL began in June 2009 at the request of Dr. Jane Lubchenco, the Under Secretary of Commerce for Oceans and Atmosphere and NOAA Administrator. As

part of this investigation, the IG reached out to people from all over the country by announcing its investigation and posting a notice on the Office of Inspector General website with a link to a dedicated email address; the IG also sent investigators to visit various fishing communities, where the fact of the investigation attracted notice in local press.

NOAA's Office of Law Enforcement investigates more than 5,000 incidents per year, and refers roughly 400 cases per year to GCEL for enforcement action. Although the IG's investigation found that complaints about NOAA's enforcement practices are "not widespread," it received 131 different complaints from fishermen, dealers, and various other representatives about action they believed represented unfair treatment or overzealous enforcement by OLE or GCEL employees. In his January 2010 report, the IG presented examples of 11 of these complaints and stated it was "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 [the IG] or by NOAA." The great majority of these complaints arose from NOAA's Northeast Region.

The September 2010 Report presents the results of this further investigation into the 11 examples and additional complaints it identified. The report discusses 27 complaints that represent the most serious issues and concerns raised, in which the IG identified instances of (1) "overzealous or abusive conduct" stemming from broad and powerful enforcement authorities; (2) enforcement process that are "arbitrary, untimely and lack transparency;" and (3) "unduly complicated, unclear, and confusing fishing regulations." With respect to 19 of these complaints, the IG recommends some further action by NOAA. In some of these instances, suitable action could consist of review to assess whether additional training, personnel action, or other administrative measures are warranted, but the report identifies certain complaints as suitable for review of the outcome of the enforcement action.

The Appropriateness of Secretarial Action.

All of the complaints identified for review in the September 2010 Report arise from action taken under the Magnuson-Stevens Fishery Conservation and Management Act (Act). Under Section 308(c) of this Act, I have the authority to "compromise, modify or remit, with or without conditions, any civil penalty which is subject to imposition or which has been imposed under this section." The plain language of this statute allows modification or remission of the amount of any civil penalty imposed under the Act at any time, including after the penalty is imposed, on my own initiative.

I do not undertake exercise of this authority lightly. Enforcement is a vital part of NOAA's fisheries management program. Indeed, the IG's January 2010 Report noted that numerous interviewees "supported enforcement, provided that it is fair, equitable, and not onerous" and "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."

Furthermore, finality is an essential tenet of the US legal system. Once the legal process has run its course, the opportunity to re-open cases is rarely available and is reserved for serious miscarriages of justice. The complainants identified by the IG had legal remedies available to them at the time, including the opportunity to request a hearing before an administrative law judge and, if they were dissatisfied with the decision at that level, to seek further review by the NOAA Administrator or a federal court. A significant number of the complainants were represented by counsel, who could be expected to provide a shield against any overzealous law enforcement officer or attorney.

To establish a new direction moving forward, Under Secretary Jane Lubchenco and I have appointed new leadership to oversee NOAA law enforcement. Eric Schwaab as Assistant Administrator for Fisheries and Lois Schiffer as General Counsel of NOAA have already revised the reporting structure to ensure that all charges brought and all cases resolved by officers and lawyers in the field are approved by agency management and are consistent with NOAA policies. They are establishing new criteria for both assessing penalties and settling cases that will strengthen accountability of officers and lawyers and increase transparency for affected stakeholders. They are developing approaches consistent with their resources to provide prompt case review. Ms. Schiffer recently named a new Assistant General Counsel for Enforcement and Litigation, Benjamin Friedman, a veteran Department of Justice prosecutor who will strengthen the enforcement leadership team.

This new leadership and focus will reinforce transparency, consistency, and responsiveness in NOAA's enforcement programs. Numerous speakers at NOAA's National Enforcement Summit in August 2010, expressed NOAA's and DOC's intention to promote transparency and the rule of law in the fisheries management program so as to improve community understanding of fisheries regulation and overall compliance with regulations to protect and rebuild fish stocks. This forward-looking approach is critical to ensuring a fair and effective enforcement program.

Despite these important considerations and steps forward, I have concluded it is necessary to take action to review certain cases identified by the IG in order to

make clear that conduct by law enforcement officers and attorneys that oversteps the bounds of propriety and fairness expected of them is not part of NOAA's law enforcement program. The perception that enforcement is arbitrary and abusive undermines the acceptance of NOAA's enforcement of fisheries laws and the recognition of effective enforcement as a valuable tool for promoting sustainable fisheries.

Appointment of Special Master.

Therefore I am appointing the Honorable Charles B. Swartwood, III as a Special Master to review and evaluate the cases identified by the IG in his September 2010 Report as warranting further review of the enforcement act and to recommend appropriate action to me. I delegate Judge Swartwood the authority granted to me by Section 308(c) of the Magnuson-Stevens Action to review cases brought under that Act, but retain the ultimate authority and discretion to make determinations based on the Special Master's recommendations regarding whether any penalties should be modified or remitted.

Judge Swartwood served amicably as a United States Magistrate Judge for the District of Massachusetts for twelve years and currently serves as Chairman of the Massachusetts State Ethics Commission. He was appointed, as a trial lawyer, by the Massachusetts Supreme Court to investigate and report on allegations of judicial misconduct. In appointing him to the Ethics Commission, Massachusetts Governor Deval Patrick said, "Judge Swartwood is widely respected for his understanding of the law and his common sense approach to resolving legal matters" and noted that he has "a wealth of experience and a strong sense of fairness." Judge Swartwood will bring the same qualities to this review.

In determining which matters should be referred to me, the Special Master is directed to identify those instances in which clear and convincing evidence establishes that NOAA enforcement personnel engaged in conduct that overstepped the bounds of propriety and fairness expected of them,[1] and had a material impact on the outcome of the case. Examples of such conduct may include:

(a) Abuse of process, including vindictive prosecution or other prosecution in bad faith, and unreasonable delay that prejudices the defense of the case;
(b) Abusive conduct that amounts to coercion, intimidation, or outrageous behavior; and

[1] This language is taken from the seminal definition of prosecutorial misconduct in *Berger v. United States*, 295 U.S. 78 (1935).

(c) Presenting false or misleading evidence or other conduct that impacts the truth of the case presented.

In making a recommendation for modification or remission of any penalty, the Special Master may consider the seriousness of the conduct engaged in by any NOAA personnel, the impact of that conduct on the outcome of the case, the amount of the penalty assessed, any relief previously afforded for the penalty assessment or opportunities to seek relief, the factors enumerated in Section 308(a) of the Magnuson-Stevens Act and regulations thereunder as well as any other factors he deems appropriate for determining the amount of a penalty under the Act.

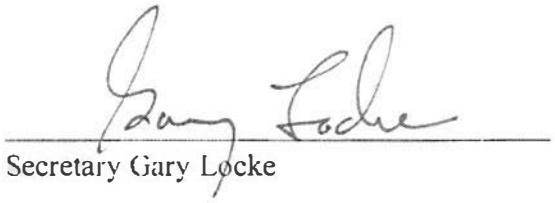
This review will focus on the cases that the IG's September 2010 Report indicated would benefit from further review of the enforcement action. In addition, to insure that this review encompasses as many cases as possible that may have been affected by conduct outside the bounds of propriety and fairness, Judge Swartwood is directed to consider whether any of the other 104 complaints brought to the attention of the IG that were not discussed in the September 2010 Report warrant further review. These would include:

(a) Cases otherwise appropriate for review under these criteria in which the complainant declined to waive confidentiality in order to participate in the IG's investigation but now is prepared to do so;
(b) Cases in which GCEL attorneys charged excessive penalties in a manner that unfairly forced settlement; or
(c) Cases handled by a GCEL attorney in which conduct of the kind specifically enumerated in the IG's September 2010 Report prejudiced the outcome of the case.

For the cases the Special Master identifies as being appropriate for further investigation, he shall review the cases files maintained by NOAA and the Office of Inspector General and conduct such other interviews and investigation as he sees fit. NOAA personnel are directed to be available to meet with him (or members of his staff) to discuss the complaints he is investigating upon reasonable notice. The Special Master may hire staff to support him and all reasonable expenses associated with the review and investigations will be funded from the Asset Forfeiture Fund, subject to the approval of the General Counsel of the Department of Commerce.

The Special Master will provide a report to me regarding his progress 60 days after his appointment and every 45 days thereafter until the review is concluded by four months from the time of his appointment. His final report shall fully detail the process used to review each case and summarize his findings regarding each case.

His recommendation for relief in any case should outline the basis for the particular recommendation as well as any amount by which he recommends the penalty be modified or remitted.



Secretary Gary Locke

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 18 2010

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Lois Schiffer
General Counsel
National Oceanic and Atmospheric Administration
1401 Constitution Ave. NW, HCHB 5814A
Washington DC 20230

Re: NOAA OIG Report on NOAA Fisheries Enforcement

Dear Ms. Schiffer:

This is in response to your request for our views on a recommendation included in the NOAA OIG September 2010 Final Report entitled "Review of NOAA Fisheries Enforcement Programs and Operations." The specific recommendation (p. 11) is "that GCEL guidance explicitly identify first-time violations as a mandatory mitigating factor." There is also a discussion (p. 9) that includes the following language: "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."

EPA's civil penalty policies treat first-time violators differently. The general framework for civil penalties can be found at http://www.epa.gov/compliance/resources/policies/civil/penalty/penasm-civpen-mem.pdf.

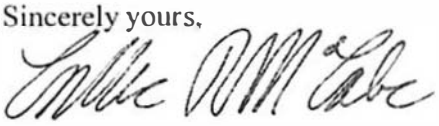
As a general matter, EPA determines civil penalties, for settlement purposes, based on two components: gravity of the violation, and economic benefit accruing to the violator as a result of the violation. One of the factors used in adjusting the penalty is "History of Noncompliance." This factor can be used only to **increase** the penalty to reflect prior violations (p. 21), since that is an indication that the party was not deterred by a prior enforcement response. EPA's policies do not include a mandatory mitigation for a first-time offense. However, our policy provides that penalties can be adjusted up or down depending on the "Degree of Willfulness and/or Negligence."

In my view, making a first-time offense a mandatory mitigation factor would be unwise. A first-time offense could still be very serious and result in significant environmental harm, or even involve criminal conduct. Having the discretion, as our policy provides, to mitigate a penalty based on a relative lack of culpability would, in my view, provide sufficient discretion to recognize first-time offenses in appropriate circumstances.

Moreover, giving a "first bite at the apple" would undermine the general deterrence purpose of enforcement. EPA tries to maximize the effect of enforcement actions by communicating the results of an individual enforcement action to the regulated community at large, with the hopes that other parties will be deterred from violating environmental requirements. A mandatory mitigation for first-time violators would seem to create an incentive for regulated parties to take their chances and wait to get caught before taking steps to comply with applicable requirements.

Please let me know if you would like any further information on EPA's civil penalty policies. Thank you.

Sincerely yours,



Catherine R. McCabe
Principal Deputy Assistant Administrator
Office of Enforcement and Compliance Assurance

MEMORANDUM FOR: Lois J. Schiffer, General Counsel
National Oceanic and Atmospheric Administration (NOAA)
U.S. Department of Commerce

DATE: November 15, 2010

FROM: Jay Shimshack, Ph.D.
Department of Economics, Tulane University

SUBJECT: **Office of Inspector General: Final Report on the Review of NOAA Fisheries Enforcement Programs and Operations**

On September 23, 2010, the US Department of Commerce's Office of Inspector General (OIG) published a report outlining findings and recommendations to address alleged unfair enforcement by NOAA's Office of Law Enforcement and Office of General Counsel for Enforcement Litigation. I have conducted academic and policy research on enforcement and compliance for over a decade, so I read the report carefully. This brief memorandum lays out my reactions. My comments are based on my subjective professional assessment of the state of scientific knowledge related to enforcement in environmental and natural resource contexts.

It is likely that the Office of Inspector General (OIG) recommendation of mandatory mitigating factors for all first-time violations is inconsistent with the state of knowledge on *fair* enforcement policy. The key point is straightforward. If all first-time violations are associated with mandatory mitigating factors, regulated entities have limited incentives to comply with statutory obligations until they have been caught violating at least once. Mitigating factors for all first-time violations do not promote a level playing field for honest, hard-working members of the industry who intend to always comply. These provisions put the most responsible members of the regulated community at a significant competitive disadvantage.

It is likely that the OIG recommendation of mandatory mitigating factors for all first-time violators is inconsistent with the state of knowledge on *effective* enforcement policy. Evidence suggests that infrequent violations may be especially easy and inexpensive to prevent. Credible enforcement for first-time violations deters many violations that can be inexpensively avoided by more attention to understanding regulations, employee training, and precautionary actions. These easy-to-avert violations have important implications for environmental and natural resource quality.

It is likely that the OIG recommendation of mandatory mitigating factors for all first-time violators is inconsistent with the state of knowledge on *cost effective* enforcement policy. Credible threats for repeat offenders take more public resources to sustain than credible threats for infrequent violators. The intuition is that the regulator is more likely to have to actually deliver on threats for frequent violators. The implication is that the compliance "bang per buck" may be especially great when used to deter infrequent or first-time violations. Note that repeat offenders and recidivists have demonstrated that they may be especially insensitive to enforcement actions.[1]

The OIG recommendation of mandatory mitigating factors for all first-time violators is inconsistent with the *realities of compliance monitoring*. NOAA's regulated environment, as well as the regulated environment in all natural resource contexts, is characterized by significantly incomplete monitoring. The NOAA-regulated Exclusive Economic Zone is 1.5 times the size of the continental United States. As a

[1] A 2010 unpublished manuscript by Shimshack and Ward entitled "Repeat Offenders, Enforcement, and Environmental Compliance" formalizes and empirically verifies the hypotheses presented in this discussion.

consequence, many violations may appear as first-time violations when they actually represent patterns of behavior.

Presumably, the primary argument for mandatory mitigating factors for first-time violations is that some members of the regulated community may not fully understand their compliance obligations under the law prior to detection. A better alternative to this information or complexity problem is enhanced compliance assistance. The scholarly literature linking compliance assistance interventions with environmental and resource outcomes is small and incomplete, but the evidence to date suggests that assistance services improve compliance.[2] Considerable evidence links compliance assistance with improved taxation compliance.[3] An additional alternative is better publicity of enforcement actions and corresponding violations. Publicity calls attention to specific activities that are clearly forbidden under the law within an industry.

In sum, a stylized fact of enforcement in environmental and natural resource contexts is that sanctions get results. The state of science suggests that a default mitigating factor for first-time violations may substantially weaken this outcome. Further, the state of science suggests that OIG recommendations may increase public costs per resource benefit achieved. Coupling penalties with increased compliance assistance and increased publicity of sanctions will likely reduce fishers' information burdens more fairly, more effectively, and more cost effectively.

[2] See Metzenbaum, Shelley, "Compliance and Deterrence Research Project: Measuring Compliance Assistance Outcomes." *State-of-Science and Practice White Paper Prepared for the EPA's Office of Enforcement and Compliance Assurance*, Dec 2007.

[3] See Alm, Jim, "Measuring, explaining, and controlling tax evasion: Lessons from theory, experiments, and field studies." *Tulane University Working Paper*. 2010.

Supplemental Appendices to Memorandum from Under Secretary Lubchenco Re: OIG Review of NOAA's Fisheries Enforcement Program (Sept. 23, 2010) (Submitted Nov. 29, 2010)

Number	Document	Date
4	Letter from Michael W. Cotter, United States Attorney, District of Montana & Chair of Attorney General's Advisory Committee/ Environmental Issues Working Group, U.S. Department of Justice, to Lois J. Schiffer, NOAA General Counsel	Nov. 24, 2010
5	Letter from Eric Schaeffer, Director, Environmental Integrity Project, to Lois J. Schiffer, NOAA General Counsel	Nov. 21, 2010

U.S. Department of Justice

United States Attorney
District of Montana

Michael W. Cotter
United States Attorney

P.O. Box 1478
Billings, MT 59103

Phone: (406) 247-4639
(406) 457-5271

November 24, 2010

Dr. Jane Lubchenco
Under Secretary of Commerce
for Oceans and Atmosphere
Administrator, National Oceanic and Atmospheric Administration
United States Department of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Dear Dr. Lubchenco:

Thank you very much for taking the time to meet with a delegation of United States Attorneys regarding the NOAA fisheries enforcement program. The Department of Justice shares your commitment to good stewardship of our wildlife and natural resources. We also share your commitment to an effective enforcement program that treats fishermen fairly, while at the same time holding violators accountable – both to protect our resources and to level the playing field so that violators do not profit at the expense of law-abiding fishermen.

We especially appreciate the opportunity to share our insights about the importance of the criminal program to effective enforcement. We believe that a full appreciation of any challenges in the NOAA fisheries enforcement program – and its effectiveness – requires context which has been lacking from much of the public discourse we have seen. We hope to help restore context with the observations below.

- To begin with, a close read of the Inspector General's reports makes clear that the issues that prompted the interest in reform are regional in nature, centered in New England – and there is no evidence in the reports of a nationwide enforcement problem. Indeed, of the 27 complaints addressed in detail in the IG's September 2010 report, 26 involved the New England fishery. The regional nature of the challenges was also apparent at the NOAA enforcement summit, which included representatives of the Department of Justice: fishing industry representatives from other regions did not appear to share the concerns voiced by some in New England.

- The Inspector General's reports also make clear that any challenges appear in only a tiny fraction of the overall work of the fisheries enforcement program. The Inspector General

identified nine confirmed complaints and an additional 19 complaints appropriate for further review. These complaints spanned a 12 year time period. During this time, NOAA fisheries enforcement investigated tens of thousands of cases and undertook thousands of enforcement actions – issuing about 3700 Notices of Violation since January 1, 2000. In other words, the exhaustive work of the Inspector General, who solicited input from the interested regulated industry – most of whom are extremely sophisticated and many of whom are represented by counsel – identified confirmed complaints in less than 1/4 of one percent of the cases investigated by NOAA. We applaud NOAA's swift and broad efforts to make changes to address the challenges reflected in the complaints and other findings of the Inspector General, but also feel that it is important to underscore the context and extent of the challenges as identified by the Inspector General.

• None of the evidence of enforcement issues cited by the Inspector General relates to criminal enforcement. We know of no evidence to suggest that any of the challenges identified exist in the criminal enforcement program. For example, one of the most sweeping concerns is the broad discretion afforded NOAA attorneys in imposing penalties. In the criminal setting, federal district judges impose the penalties, guided by statutory factors, the Sentencing Guidelines, and legal precedent.

• While there was no evidence presented suggesting problems with criminal enforcement, the January 2010 report recommended that NOAA consider whether it should "continue to approach fisheries enforcement from a criminal-investigative standpoint," or look for "another approach." The report further suggested possible workforce changes to de-emphasize criminal enforcement. As we discussed at length, we agree with you that criminal enforcement plays a key role in fulfilling NOAA's mission, and in ensuring the effectiveness of the civil enforcement. We are concerned that the conflating of the civil and criminal programs may result from a failure to appreciate the distinct role NOAA Special Agents play in federal criminal enforcement. NOAA Special Agents are highly trained *criminal* federal law enforcement officers who conduct long-term and often extremely complex criminal investigations. These agents prepare cases for *federal criminal indictment* – in prosecutions which often send incorrigible criminals to prison for lengthy sentences. The uniformed officers in the fisheries program play a vitally important role in enforcement, but it is a very different role from that played by Special Agents. Any recommendation or observation as to staffing or caseload among agents and uniformed officers should be based on a careful understanding of the distinct role these two types of officers play. And we respectfully disagree with any suggestion that challenges in the civil enforcement program, predominantly in one region of the country, necessitate an overhaul of a tremendously successful nationwide criminal enforcement program.[1]

[1] Neither the United States Attorney community nor the prosecutors at the Environmental Crimes Section were made aware of the IG investigation; nor were we consulted

• We also think some of the specific criticism of penalty practices lacked context. For example, we simply do not agree that a system which rewards early payment of penalty by reduction in fine inherently implicates due process rights. We believe this is properly understood as a simple decision by a party to resolve a dispute early in order to avoid the risk and cost of a hearing – which happens commonly in civil enforcement and private civil litigation. Likewise, federal criminal law does precisely the same thing: courts in the United States have for decades provided reduced sentences to defendants who accept responsibility and plead guilty before trial. In the federal criminal cases, defendants who plead guilty forfeit a great deal more than a hearing before an ALJ – they forfeit their 5th Amendment right to remain silent, their 6th amendment right to trial by jury, their rights to subpoena witnesses, cross examine witnesses against them, to an appeal, and to a presumption of innocence, to name just a few. And certainly more is at stake in the federal criminal context – where a defendant's decision to plead guilty can (and usually does) result in imprisonment. Courts have long approved reduced sentences for defendants who forfeit these rights in order to reward acceptance of responsibility and save the limited government and judicial resources. *See, e.g., Brady v. United States*, 397 U.S. 742, 752 (1970) (recognizing conserving government and judicial resources as a basis for reduced sentence). The United States Sentencing Commission has codified this arrangement, providing defendants who plead guilty in advance of trial a 3 level reduction in their sentencing guidelines. U.S.S.G. § 3E1.1. The Sentencing Guidelines also, quite appropriately, reward defendants who cooperate and provide information about other criminals. U.S.S.G. § 5K1.1. We believe that an understanding of this backdrop would have helped inform the criticism of penalty practices intended to reward early and pre-hearing disposition of enforcement actions.

• Any discussion of changes in the Asset Forfeiture Fund should be informed by examination of such programs in other enforcement settings. The Department of Justice has a very successful asset forfeiture program which seizes and successfully manages assets worth approximately one billion dollars each year. These programs are common in law enforcement, and help leverage limited resources to make sure we can identify, charge and prosecute criminals. NOAA Asset Forfeiture Funds have in the past been used to great success as "buy money" in undercover investigations, for agent travel on investigations, and to purchase essential investigative equipment. Adequate controls for handling of seized money are essential – but imposition of adequate controls can and should be undertaken without undercutting proper use of seized assets in furtherance of civil and criminal investigations.

by the Inspector General in preparation of the report; we thus did not have an opportunity to offer context on these criminal and penalty issues, where we believe our experience might have been most helpful.

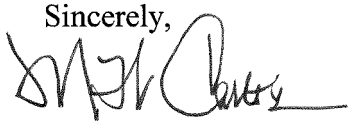
While we readily recognize the limited role of criminal prosecutions in the overall enforcement program, it remains an essential tool for achieving compliance. For example, it is our experience that a small number of prosecutions targeting historic areas of regulatory noncompliance generally result in widespread compliance throughout the affected industry. This form of deterrent has proven effective in a broad range of program priorities – from false labeling of seafood products to illegal coral importation, just to name a few. Several recent prosecutions in our districts and nationwide led to the convictions of companies and individuals substituting species to defraud consumers and gain a competitive advantage. The success of these prosecutions, thanks in large part to the investigative efforts of NOAA criminal agents, was applauded by law-abiding companies who rely on aggressive enforcement efforts to establish and maintain competitive markets.

NOAA criminal investigators are also active and critical participants in environmental crimes task forces and working groups throughout our districts. Task forces and working groups play an essential role in detecting and addressing environmental offenses. There are limited federal law enforcement resources available to respond to alleged violations and develop proactive strategies to gain compliance. The collaborative efforts of task force members, including state and local law enforcement, allow us to effectively leverage these limited resources to accomplish everyone's goals. We believe NOAA should recognize, encourage, and build on these efforts.

Finally, it is our collective experience that NOAA criminal investigators have fostered excellent working relationships with their state and tribal counterparts. United by a common purpose of protecting fisheries and other marine resources, these investigators have worked together to more efficiently conduct investigations and assess the appropriate forum for enforcement. The ongoing analysis of NOAA's enforcement work force should recognize the continuing need to support and further these relationships.

Thank you once again for taking time out of your day to meet with the Justice Department delegation. We appreciate your focus, resolve and commitment to excellent enforcement efforts. NOAA has been a valued partner in our shared efforts to protect our nation's treasured marine resources. We hope our observations are helpful, and very much look forward to working with you in the future.

Sincerely,



MICHAEL W. COTTER
United States Attorney

Chair, AGAC Environmental Issues
Working Group

1 Thomas Circle, Suite 900
Washington, DC 20005
main: 202-296-8800
fax: 202-296-8822
www.environmentalintegrity.org

November 21, 2010

The Hon. Lois Schiffer, Esq.
General Counsel
National Oceanic and Atmospheric Administration
HCHB5814A
1401 Constitution Avenue, NW,
Washington, DC, 20230

Dear Ms. Schiffer:

I am responding to your request to review recommendations from the Office of Inspector General (OIG) for the Department of Commerce regarding enforcement of U.S. commercial fisheries laws. As you know, I have no personal experience with commercial fishing programs, nor do I have knowledge of the specific enforcement cases reviewed by the OIG in its September, 2010 report (OIG-19887-2). My perspective comes from the eight years I spent in the US Environmental Protection Agency's enforcement program, including five years as Director of the Office of Civil Enforcement (1997 to 2002). I currently serve as Director of the nonprofit Environmental Integrity Project, which advocates for more effective enforcement of our environmental laws.

The issues addressed in the OIG's report are familiar, as they raise questions fundamental to any agency's enforcement program, i.e., how to treat the regulated community fairly, and ensure that penalties take into account mitigating circumstances while reflecting the seriousness of the violation. As noted in the OIG's report, NOAA has already made significant changes to these programs. Such actions should make enforcement actions more transparent and consistent, and curb potential abuses without strangling the government's agents in red tape that would make it impossible to enforce the law.

Writing regulations so that they are as clear as possible, and communicating these requirements to commercial fishermen in plain English will also be helpful. At EPA, we published a series of "Enforcement Alerts," designed to warn the regulated community of common types of violations, and met frequently with trade associations to share data and review our enforcement priorities. Recognizing the value of OIG's review, I would like to respectfully raise three potential issues as you consider the specific recommendations in the report.

1) While enforcement of the law must be fair and even-handed, defendants are rarely happy to be caught up in an enforcement action. While the legitimate concerns of defendants and their lawyers should be addressed, NOAA also needs to preserve its ability to take actions that eliminate the economic

advantage of noncompliance, deter would-be violators from making the wrong choice, and protect the interest of law-abiding fishermen who would otherwise be undercut by unscrupulous competitors.

These enforcement goals for commercial fisheries were explicitly addressed in a 2009 report from the University of Maryland and the Environmental Law Institute, available at http://dkingweb.cbl.umces.edu/fisheriesenforcement.html. Dr. Dennis King of the University of Maryland helpfully summarizes the report's findings in an August 2010 review, pointing out the the UMD/ELI review found that, "...more enforcement and more certain and meaningful penalties are needed to adequately deter illegal fishing," and adding:

> "Complaints of overly aggressive enforcement and excessive penalties contained in the OIG Report are receiving a great deal of media and political attention. Unless these relatively few specific cases are viewed in the context of the more general results in the UM/ELI Report they could be misinterpreted and misused and lead fishery enforcement reform in the wrong direction."[1]

In response to a UMD/ELI survey question, fishermen who raised enforcement concerns in the New England were more much more likely to complain about the *lack* of enforcement than the kind of issues flagged in the OIG study.[2]

2) While conceding that, "some first-time offenses would warrant maximum assessed penalties," the IG nevertheless recommends that NOAA treat all first-time violations as a, "mandatory mitigating factor." (p. 9) I would recommend that the agency not treat first time violations as a mandatory mitigating factor, but instead issue guidance directing enforcement staff to balance the first-time nature of an offense against other factors, which may include the severity of the violation or the degree of culpability. Otherwise, the agency risks signaling to all offenders that they can count on a free pass for any misconduct the first time around, no matter how serious the consequences. That would not only undermine deterrence, but also be unfair to those fishermen who are trying to comply out of respect for laws that protect everyone's share of a limited resource.

If it is not already required, staff should be asked to complete a litigation report that explains how the various factors outlined in agency policy were weighed in assessing a penalty. Those factors should include, as the UMD/ELI report recommends, consideration of higher penalties for chronic violators.

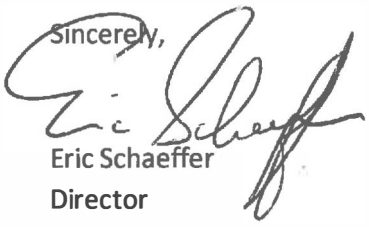
3) The OIG report recommends establishment of an independent office, "...empowered to advocate or advise the regulated community on...defense and settlement advocacy." (p. 5). It seems likely that a program advising defendants that its own agency was simultaneously prosecuting would create impossible conflicts, substantially increase the cost of enforcement by entangling actions in internal

[1] Dennis King, Ph.D., Enforcement and Compliance in U.S. Commercial Fisheries: Results from Two Recent Studies, University of Maryland (August, 2010) at 2.
[2] *Id.*, at 12.

disputes, delay the resolution of cases, and result in the kind of confusion and uncertainty about the law that would undermine compliance. Such an office would also be redundant, as Congress has already established an ombudsman to hear small business complaints about enforcement that is housed in the Small Business Administration: http://www.epa.gov/sbrefa/\

Thank you for considering my views, and I am confident you will find a way to act on the many useful recommendations in the OIG report while strengthening enforcement of laws that protect our commercial fisheries.

Sincerely,



Eric Schaeffer
Director