

**SETTING THE BAR FOR
ACCOUNTABILITY: IMPROVING
NOAA FISHERIES LAW
ENFORCEMENT PROGRAMS
AND OPERATIONS**

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON INSULAR AFFAIRS,
OCEANS AND WILDLIFE

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

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**OVERSIGHT HEARING ON “SETTING THE BAR
FOR ACCOUNTABILITY: IMPROVING NOAA
FISHERIES LAW ENFORCEMENT PROGRAMS
AND OPERATIONS.”**

**Wednesday, March 3, 2010
U.S. House of Representatives
Subcommittee on Insular Affairs, Oceans and Wildlife
Committee on Natural Resources
Washington, D.C.**

The Subcommittee met, pursuant to call, at 2:37 p.m. in Room 1324, Longworth House Office Building, Hon. Madeleine Z. Bordallo [Chairwoman of the Subcommittee] presiding.

Present: Representatives Bordallo, Christensen, Shea-Porter, Young, and Cassidy.

Ms. BORDALLO. Good afternoon everyone. The Oversight Hearing by the Subcommittee on Insular Affairs, Oceans and Wildlife will come to order. Today we will hear testimony on “Setting the Bar for Accountability: Improving NOAA Fisheries Law Enforcement Programs and Operations.”

**STATEMENT OF HON. MADELEINE Z. BORDALLO, A DELEGATE
IN CONGRESS FROM THE TERRITORY OF GUAM**

Ms. BORDALLO. Today’s hearing is the direct result of a serious report issued in January of this year by the Department of Commerce, Office of Inspector General, regarding the activities and policies of the National Oceanic and Atmospheric Administration’s fisheries law enforcement operations and programs.

This is not the first report we have received from the IG regarding these matters, but I sincerely hope that this Administration will take the steps necessary to ensure that it is the last. Regrettably, in many regions of the country, the dysfunctional relationship between NOAA and the fishing industry has reached a breaking point. If not remedied, this will have long-lasting, detrimental effects—not only on our fishing communities, but on the very resources the agency is charged with managing and protecting.

In June of 2009, at the urging of several Members of Congress, NOAA Administrator Lubchenco asked the IG to review the operations of the NOAA Office of Law Enforcement within the National Marine Fisheries Service and the Office of General Counsel for Enforcement and Litigation. The review identified systemic nationwide issues in a highly charged regulatory climate contributing to the dysfunctional relationship between NOAA and the fishing industry.

Such issues include a nine-to-one ratio of criminal to civil investigators on staff, despite the fact that more than 90 percent of their caseload is non-criminal, regulatory violations, a record of non-uniform prosecutions, an utterly opaque penalty process, and chronic deficiencies in NOAA’s enforcement data system. The review made several recommendations to improve this situation of

mismanagement and distrust, which I am sure Inspector General Zinser will elaborate on in his testimony.

Two weeks later, NOAA issued a 10-point plan to address these issues that is in the process of being implemented. I commend Administrator Lubchenco for the steps she has taken thus far to address a very serious situation that was largely inherited, and I trust that she is committed to making it right. Still, many questions remain, and it is not yet clear that everyone involved shares her commitment.

Last week, we were informed by the IG's office that the Director of the Office of Law Enforcement, Mr. Dale Jones, authorized the destruction of documents at the NOAA law enforcement headquarters in Silver Spring in November, while his office was already under investigation by the IG. The office-wide document disposal effort was not approved by the IG's office or by Mr. Jones' superiors at NOAA.

While it is certainly possible that the timing of such a house-cleaning could be coincidental, and that no documents of importance were destroyed, how will we ever know? And how is it possible that Mr. Jones, an investigator himself, thought that document shredding was appropriate at the same time that his office was under investigation? On its face, it does not seem possible, and it certainly does not give the appearance of an office that is committed to a fair and open investigation or a resolution of the ongoing distrust that exists within the fishing industry.

The current reality is that while individual investigators may be doing their best job possible, the management of the fisheries law enforcement system is flawed, and there is much more in the way of reform that will be needed. The question is whether the current director of the Office of Law Enforcement has the credibility to initiate those reforms.

So I look forward today to hearing from our witnesses, and I hope that, with input from Congressional colleagues, this hearing will be a step toward a better fisheries enforcement system that serves both our fishing communities and our fisheries. At this time, I recognize the gentleman from Louisiana, Mr. Cassidy, the Ranking Republican Member of the Subcommittee, for any statement that he may have.

[The prepared statement of Chairwoman Bordallo follows:]

**Statement of The Honorable Madeleine Z. Bordallo, Chairwoman,
Subcommittee on Insular Affairs, Oceans and Wildlife**

Today's hearing is the direct result of a very serious report from the Department of Commerce Office of Inspector General (IG) regarding the activities and policies of National Oceanic and Atmospheric Administration's (NOAA) Fisheries law enforcement operations and programs that was issued in January of this year.

This is not the first report we have received from the IG regarding these matters, but I sincerely hope that this Administration will take the steps necessary to ensure that it is the last. Regrettably, in many regions of the country the dysfunctional relationship between NOAA and the fishing industry has reached a breaking point. If not remedied, this will have long-lasting, detrimental effects not only on our fishing communities, but on the very resources the Agency is charged with managing and protecting.

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wide” issues and a “highly charged regulatory climate” contributing to the dysfunctional relationship between NOAA and the fishing industry. Such issues include a 9 to 1 ratio of criminal to civil investigators on staff, despite the fact that more than 90 percent of their caseload is non-criminal, regulatory violations; a record of non-uniform prosecutions; an utterly opaque penalty assignment process; and chronic deficiencies in NOAA’s enforcement data system.

The Review made several recommendations to improve this situation of mismanagement and distrust which I am sure Inspector General Zinser will elaborate on in his testimony. Two weeks later, NOAA issued a ten point plan to address these issues that is in the process of being implemented. I commend Administrator Lubchenco for the steps she has taken thus far to address a serious situation that was largely inherited, and I trust that she is committed to making it right. Still, many questions remain, and it is not yet clear that everyone involved shares her commitment.

Last week, we were informed by the IG’s office that the Director of the Office of Law Enforcement, Dale Jones, authorized the destruction of documents at the NOAA law enforcement headquarters in Silver Spring, in November while his office was already under investigation by the IG. The office-wide document disposal effort was not approved by the IG’s office or by Mr. Jones’ superiors at NOAA.

While it’s certainly possible that timing of such a housecleaning could be coincidental, and that no documents of importance were destroyed, how will we ever know? And how is it possible that Mr. Jones, an investigator himself, thought that document shredding was appropriate at the same time that his office was under investigation? On its face, it does not seem possible, and it certainly does not give the appearance of an office that is committed to a fair and open investigation or a resolution of the ongoing distrust that exists within the fishing industry.

The current reality is that while individual investigators may be doing their best job possible, the management of the fisheries law enforcement system is flawed and there is much more in the way of reform that will be needed. The question is, whether the current Director of the office of law enforcement has the credibility to initiate those reforms.

I look forward to hearing from our witnesses today, and hope that with input from my congressional colleagues, this hearing will be a step toward a better fisheries enforcement system that serves both our fishing communities and our fisheries.

**STATEMENT OF HON. BILL CASSIDY, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF LOUISIANA**

Mr. CASSIDY. Thank you, Madame Chair. This hearing was scheduled to examine disturbing findings about the NOAA fisheries enforcement programs, as reported by the Department of Commerce Inspector General. Clearly, fisheries laws need to be enforced, and those that cheat affect the livelihoods of those who play by the rules. But according to the IG’s report, in at least one region of the country, fisheries enforcement has been considered arbitrary, and enforcement officers have lost the respect of the fishing community.

In order for fisheries management to be effective, rules and regulations need to be clear, and enforcement needs to be consistent and fair. As the report notes, there needs to be a level of trust among fishery managers, law enforcement, and the regulated community—trust that the rules are being enforced fairly and evenly. The report argues that in at least one region the system has broken down. The IG’s report has made a few things clear, including the fact that fisheries rules and regulations are complicated. In addition, the report shows that there needs to be oversight at a higher level within NOAA, and the report clearly states that NOAA needs to listen to fishermen’s concern.

Now speaking to my law enforcement folks back home, they point at when they review the report, that it makes little mention of the role that state law enforcement plays through Cooperative Enforce-

ment Agreements with NOAA. I am interested to know how enforcement by state agencies was taken into account by the IG who performed the investigation and prepared the findings. I would also like to hear the panelists' recommendations for the future enforcement role of the states.

I look forward to hearing the testimony today and hearing what NOAA will do to address the serious issues raised by this report. Thank you.

Ms. BORDALLO. I thank the gentleman from Louisiana, Mr. Cassidy, for his opening remarks. Now I would like to recognize the first panel. It will be three of my colleagues. And right now Mr. Tierney, from the Sixth District of Massachusetts, is here with us. If you would begin, Mr. Tierney.

STATEMENT OF HON. JOHN TIERNEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. TIERNEY. Thank you very much, Madame Chairwoman and Ranking Member Cassidy and the members of the Committee. I appreciate the opportunity to join you today, and I am very happy to join Walter Jones and Barney Frank, my colleagues, to talk about this important subject, important not just to those like the three of us who represent coastal areas, but to anybody who has an interest in areas where fishing takes place and the fishing industry in the neighboring communities, but also just the dietary factor of the importance that seafood plays in all of our healthy eating habits.

We had a hearing yesterday, as you know, in our Subcommittee on Oversight up in Gloucester, Massachusetts, in my district. I want to thank Dr. Lubchenco for coming there. I know that it wasn't her first choice of places to be yesterday, but I do know that she took the trouble to come early, three hours before the meeting took place, and had an opportunity to meet with some of our fishing people and folks in the community. I trust that she got a good earful of what troubles people there, as well as at the hearing where our second panel, in fact, were people from the fishing community as well.

There is a serious problem. Mr. Zinser is to be congratulated for a good job on his Inspector General's report. It is a good start. He has promised to look into some of the particular cases as we go forward because there are many, many individual instances where heavy-handed enforcement, arbitrary decisions, capricious fines, and an attitude by the Federal agents that is almost unbelievable when we as elected officials listen to the way that people are being treated.

Part of that is contributed to by the fact that 98 percent of the offenses and things that are being enforced by the statute are civil in nature, yet 90 percent of the enforcement staff are criminal. Mr. Jones' own background—he is in charge of the Office of Law Enforcement—is, of course, a criminal background. If you heard the instances of the fishing families talking about the way that they are approached, the derogatory language, the disdainful attitude toward them, the repetitive fines—in our area of the Northeast, \$5.5 million in a five-year period. It is two and a half times greater than the next largest region of the six regions, and five times greater or more than the other four regions.

Clearly, something is wrong. The Inspector General points out very evenly, I think, that one problem is that there is really no centralization of this, no overriding policy or set of principles and standards by which fines are assessed. Consequently, it is almost left up to the individual agent to go out there and decide what is going to happen. The database isn't working efficiently. People can't look at past practices and past offenses and determine how that is going to play out on a penalty going forward.

There also seems to be very little consideration for mitigating factors. We heard story after story of people having a minor discrepancy, a paper error, if you might, or having a piece of paper that has been properly documented but not with them at the moment, but at their home; data that they relied on from NOAA to establish their compliance, and NOAA not able to give them that information, but then when they act in what they thought was reliance on proper verbal information from NOAA, only to find out that the information turned out to be inaccurate, and they were penalized.

These are not small penalties. These are penalties enough to cripple somebody and drive them out of business. And if I think there is one overriding point, it is that this particular law, the Magnuson-Stevens Act, is not about pitting conservationists against the fishing industry and fishing families. They are not mutually exclusive. Fishermen are obviously conservationists by their own right. As my colleague Barney Frank says very eloquently, no fisherman in a fishing family for generations wants to be the last member of that family to collect fish. They want it to continue on from family to family, and you can see that from listening to what goes on in these regions.

There has been a history in the Office of Law Enforcement and in the assessment of fines as well of a lack of mission, as the Inspector General says, a lack of oversight, a need for NOAA to gain control over that process again. The wrenching personal stories just lay out how there has been arbitrary decisions made and how we need to get control of that situation again. Regulation is not something that the fishing community rejects. They expect regulation. They understand that it has a purpose. They want it to be fair. They want it to be clear. They want it to be transparent. They want it to be even-handed. That has not at all been the case.

Given that all of this is laid out over a decade or more, most of which Mr. Jones has been the head of the Office of Law Enforcement, my question to him is why he didn't just resign. And my question to Dr. Lubchenco, when she has had a chance to digest all of this and look at the Inspector General's report—and then the particular cases that he is going to look into will be for her—don't we need a rearrangement of that entire department, starting with Mr. Jones working on down?

Mr. Cassidy, you raised the point of the state cooperation with agencies. That has not been the problem in our area. It has not been the state enforcement people that have been the problem. It has been the Federal enforcement people who come in and treat these fishermen like common criminals. They came in, in one instance, and raided a fishing auction without a warrant in the mid-

dle of the night. If our police departments hadn't been there to document it, I guess nobody would have been the wiser on that.

But it has just been an abhorrent way of operating on this, and it has to come to an end. I am very pleased that you are taking an interest in this. I think together we can impress upon Dr. Lubchenco, who as you noted, Madame Chairwoman, is new. This is a wonderful opportunity for her to look at this with fresh eyes. It is good that she asked for an independent review by Mr. Zinser, and we are getting that. We hope to work with her as well on rectifying first the statute, which needs more flexibility.

We definitely need to have it not be so rigid so that people can earn a living where the fish are there. It is not going to be enough to give our fishermen loans or to retrain them for another job when by NOAA's own data, it shows millions and millions of dollars of fish out there and ready to be fished. We have to find a way for people to be able to go out and earn their living. That is what they want to do.

So with your help on that, we look forward to moving in the right direction on this, and thank you again for your time and your attention on this issue.

Ms. BORDALLO. I thank the gentleman from Massachusetts, Mr. Tierney. We are going to be awaiting the other two of our colleagues. But before that, I would like to ask the gentlemen standing in the back, you can take seats around the table here if you wish to. It may be a long hearing.

So we would like to call on the second panel then. Thank you, Representative Tierney. I would now like to recognize our panel of witnesses, the second panel. Our witnesses include The Honorable Todd J. Zinser, the Inspector General, the U.S. Department of Commerce, and Dr. Jane Lubchenco, the Under Secretary for Oceans and Atmosphere and Administrator, National Oceanic and Atmospheric Administration. You can begin.

I just want to remind you that we do have a timing system here of five minutes. The red light will go on. We would appreciate your cooperation with the time limits. Be assured, though, that your full written statement will be entered into the record. Mr. Zinser, you can begin your testimony.

**STATEMENT OF HON. TODD J. ZINSER, INSPECTOR GENERAL,
U.S. DEPARTMENT OF COMMERCE**

Mr. ZINSER. Thank you, Chairwoman Bordallo, Congressman Cassidy, Congressman Young. We appreciate the invitation to testify on our most recent report concerning the fisheries enforcement programs and operations of NOAA. My testimony today will briefly summarize our report.

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

The Under Secretary could have chosen to undertake this review using an internal NOAA team, but instead she chose to ask for our independent review. It was my view then and it is still my view

that the Under Secretary wants to know what the problems are with her enforcement operations and wants to try to fix them. Our review included speaking with over 225 individuals in various parts of the country, including fishermen, boat captains, industry association representatives, conservation officials, fishery management council members, and current and former NOAA personnel. We reviewed enforcement records and examined NOAA's management information systems. We reviewed Department of Justice policy and guidelines and analyzed comparable Federal regulatory enforcement agencies.

Our report details our three principle findings. First, NOAA's senior leadership and headquarters elements need to exercise substantially greater management and oversight of the agency's regional enforcement operations to include setting enforcement priorities. Second, NOAA needs to strengthen policy guidance, procedures, and internal controls in its enforcement operations to address a common industry perception that its civil penalty assessment process is arbitrary and unfair. We found the process used for determining civil penalty assessments include significant discretion on the part of individual enforcement attorneys with minimal guidance on how to exercise that discretion. As such, we found it difficult to argue with the view that the process is arbitrary and in need of reform.

Third, NOAA needs to reassess its enforcement workforce composition, which is presently 90 percent criminal investigators, to determine if this criminal enforcement oriented structure is the most effective for accomplishing its primarily regulatory mission. Based on NOAA's own data for its enforcement results, over the last two and a half years, about 98 percent of their work was non-criminal.

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

Our report presents specific recommendations for NOAA to strengthen its enforcement programs and operations. These include, one, NOAA's leadership regularly addressing and providing input to enforcement priorities and strategies with regional management; two, instituting a robust ombudsman program specifically for fisheries enforcement issues to provide an effective interface with the commercial fishing industry; three, determining whether NOAA has an appropriate balance and alignment of uniformed enforcement officers and criminal investigators based on mission need; four, ensuring that there is an operating procedures manual for enforcement attorneys and that the operations manual for its special agents is current and provides sufficient policy guidance on its authorities and procedures for civil and criminal enforcement activities; five, ensuring follow-through on the process improvement initiatives outlined by the General Counsel for Enforcement and

Litigation in December; six, instituting a mechanism for higher level review of civil penalty assessments; and seven, develop and implement integrated case management information systems for its enforcement mission.

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

That concludes my summary, Madame Chairwoman. I would be happy to answer any questions you or other Members may have. [The prepared statement of Mr. Zinser follows:]

**Statement of The Honorable Todd J. Zinser, Inspector General,
U.S. Department of Commerce**

Chairwoman Bordallo, Ranking Member Brown, and Members of the Subcommittee:

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

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

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

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

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

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

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

SUMMARY OF RESULTS

Our report details our three principal findings:

1. NOAA senior leadership and headquarters elements need to exercise substantially greater management and oversight of the agency's regional enforcement operations, to include setting enforcement priorities based on integration and coordination with headquarters fisheries management and science center elements; implementing effective management information systems; and utilizing data to inform its management decisions and enforcement activities.
2. NOAA needs to strengthen policy guidance, procedures, and internal controls in its enforcement operations to address a common industry perception that its civil penalty assessment process is arbitrary and unfair.
3. NOAA needs to reassess its OLE workforce composition (presently 90 percent criminal investigators), to determine if this criminal enforcement-oriented structure is the most effective for accomplishing its primarily regulatory mission.

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

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

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

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

FINDINGS

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

public's confidence in NOAA and the Department of Commerce. Our three primary findings are as follows:

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

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

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

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

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

^a Figures have been rounded to the nearest dollar.

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

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

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

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

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

2. NOAA needs to strengthen policy guidance, procedures, and internal controls in its enforcement operations to address a common industry

perception that its civil penalty assessment process is arbitrary and unfair.

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

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

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

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

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

OLE's fundamental mission is to assist in the protection of fisheries by enforcing resource protection and fisheries management laws. OLE caseload data for January 1, 2007 through June 30, 2009, illustrate that its mission has principally involved enforcement of the Magnuson-Stevens Fishery Conservation and Management Act³ (65 percent of cases). The criminal provisions of the Act are narrowly-focused and nearly all are misdemeanors. Yet because the office is staffed largely with criminal investigators, OLE's orientation is to conduct criminal investigations. This despite the fact that the only felony provisions involve the use of a dangerous weapon during the commission of an act prohibited by Magnuson-Stevens and the assault of observers and officers authorized to enforce the Act.⁴ According to OLE, violations of the Act typically do not result in criminal charges; most violations (such as exceeding catch limits) result in administrative penalties alone.

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

NOAA ACTIONS IN RESPONSE TO OIG FINDINGS AND RECOMMENDATIONS

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

A. Immediate actions:

1. Subject to compliance with applicable labor relations requirements, NOAA General Counsel shall immediately institute higher level reviews

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

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

⁴See 16 U.S.C. § 1859.

- of proposed charging decisions, including proposed penalties and permit sanctions, and proposed settlements to ensure consistency and predictability.
2. An immediate freeze on the hiring of criminal investigators until NMFS completes an internal work force analysis to address the appropriate mix of enforcement personnel and it is approved by the Under Secretary.
 3. An immediate shift in oversight of the NMFS Civil Monetary Penalties Fund (also known as the Asset Forfeiture Fund) from NMFS to NOAA's Comptroller.
 4. NMFS, in consultation with NOAA's Office of Communications, will direct resources to improve communications on enforcement issues, particularly in the Northeast.
 5. NOAA's General Counsel, NMFS, and NOAA's Director of External Affairs will develop specific objectives and detailed plans for a summit on law enforcement practices to be held no later than June 30, 2010.
- B. Actions to be completed by March 21, 2010:
1. NMFS' Office of Law Enforcement and NOAA'S General Counsel, in cooperation with NOAA's Chief Information Officer, will develop a strategy and schedule to improve management information systems, including recommendations on actions to take advantage of the internet to increase transparency.
 2. The Assistant Administrator for Fisheries, with input from NOAA's leadership, will develop a plan and schedule to implement standardized procedures for setting enforcement priorities.
 3. NOAA's General Counsel for Enforcement and Litigation will develop a plan and schedule to strengthen its operating procedures, prosecution of charged cases, and settlement actions.
 4. The Assistant Administrator for Fisheries, in collaboration with the NOAA Communications Office and General Counsel for Enforcement and Litigation, will develop an outreach strategy to improve engagement with the local fisheries community and the public.
 5. The Assistant Administrator for Fisheries, in consultation with the Director of the Workforce Management Office, will formulate a plan to review the NMFS Office of Law Enforcement's staffing and procedures. This plan will explicitly address both civil and criminal requirements, with specific focus on ensuring that criminal procedures are not applied to civil offenses. Development of the plan should include appropriate independent review.

OFFICE OF INSPECTOR GENERAL FOLLOW-UP

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

1. *NOAA's Retention of Civil Penalties and its Asset Forfeiture Fund.* Fishermen and other industry sources expressed concern to us that NOAA's fines are excessive, constituting a form of bounty, because the agency is able to retain the proceeds from its enforcement cases. This is not an uncommon charge against law enforcement agencies granted authority to seize assets. The most effective way to counter such charges is for the agency to demonstrate in a transparent way how the proceeds of its enforcement actions are used. NOAA has the statutory authority to retain proceeds from the civil penalties it imposes and collects, and pursuant to asset forfeitures (such as the sale of seized fish, vessels, etc.) for Magnuson-Stevens Act violations to pay for expenses directly related to investigations and civil or criminal enforcement proceedings.⁵

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

⁵ 16 U.S.C. § 1861(e)(1)(C).

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

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

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

**Response to questions submitted for the record by Todd J. Zinser,
Inspector General, U.S. Department of Commerce**

Questions from Chairwoman Madeleine Z. Bordallo (D-GU)

1. What are the regional impacts from the lack of oversight by NOAA's senior leadership and headquarters?

As cited in our report, the impact from lack of oversight by NOAA leadership over regional enforcement elements was most apparent in the Northeast Region because of a specific set of conditions and circumstances (economic, cultural, science) in that region. However, the systemic leadership issues highlighted in the report have the potential to spread to other regions as conditions in those regions change. The impact from lack of oversight will vary from region to region based upon a number of factors including the science, priorities, and enforcement management strategies that are unique to each regional office.

The science includes data and information from Sustainable Fisheries, Habitat and Protected Resources which in turn can impact the priorities and initiatives of each region depending upon seasonal issues, the status and health of stocks, economic impact(s), input and recommendations from the FMCs and any other necessary or immediate responses based upon current conditions and circumstances. Fisheries enforcement management officials then consider these factors and, together with their leadership, develop and implement strategies, initiatives, and operational procedures and guidance for each region and nationwide.

2. What kinds of expenditures were made using NOAA's Asset Forfeiture Fund?

Our Forensic Review of the Asset Forfeiture Fund by KPMG is ongoing and we should be able to report out fully on the findings of that review in the near future. At this time we are aware of some general categories of expenditures made by NOAA using the Asset Forfeiture Fund. Those categories include operating expenses for the Office of General Counsel for Litigation and Enforcement, contracts to support enforcement databases, travel for agents and attorneys, and equipment purchases for OLE such as boats and cars.

3. What parts of the recommendation "to strengthen the role of the law enforcement committees and advisory panels" from the OIG March 2003 report were not implemented?

OIG recommended in 2003 that NOAA strengthen the role of the Fishery Management Councils' (FMC) law enforcement committees and advisory panels. At that time, NMFS developed and began to implement guidance to more clearly define the role of these bodies. In several of the regions, these groups began to meet regularly

and gave more focus to enforcement issues, but these efforts were not sustained. OIG has not performed a formal review of the status of law enforcement committees, but through other NMFS work we have learned that in some regions the entities morphed into Law Enforcement/Vessel Monitoring System/Safety committees and panels. In others, the groups currently meet less regularly. Also, while OLE representatives do attend the FMC meetings and provide an enforcement report, in general, OLE's involvement on the committees still needs strengthening.

4. What additional steps does NOAA need to take to make its case management system effective?

OLE and GCEL both need to continue upgrading their systems. They need to ensure that these systems are effectively and efficiently linked to the other to help ensure timely and accurate case updates and information sharing between OLE and GCEL. In fact, along these lines it might be beneficial for NOAA to explore a single system solution.

Additionally, management needs to take an active role in utilization and design of the system reporting functions to help ensure the information entered can be organized and reported in a useable and informative manner. Appropriate data fields need to be incorporated into both systems that will allow for tracking and reporting of items such as permits, permit violations, seizures, and repeat offenders, which the system currently does not capture.

NOAA should also ensure that management uses the information to assist with decision-making and oversight. Finally, NOAA must establish procedures and training programs for using the system to ensure case information is updated in a consistent, timely, and accurate manner.

5. What have you learned so far in follow-up investigations on the individual cases of heavy-handed enforcement on fishermen?

Our investigation regarding these matters is ongoing. Therefore, we are unable to report any findings.

Questions from Republican Members

1. This report primarily focused on the Northeast region although you did hear from fishermen in other regions. Do you plan to do any further investigations into other regions?

We believe the results of our review and the recommendations made in our report address the problems we identified within NOAA enforcement nationwide. As such, we do not plan further investigations in other regions.

2. Are most of the problems of transparency and seemingly arbitrary fines you found within the NOAA law enforcement offices systemic or are they primarily regional in nature?

We believe most of the problems identified concerning a lack of transparency and appearance of arbitrary fines and penalties within NOAA's civil assessment process are systemic. NOAA's General Counsel for Enforcement Litigation lacks an internal operations manual. As a result, GCEL's proposed fines are determined by NOAA's Civil Administrative Penalty Schedule (which ranges from a written warning to \$120,000 penalty for single offences) and accompanying informal guidelines. Penalty assessments are left solely to individual regional enforcement attorneys, who have broad discretion. Based on the available data concerning initial penalty assessments, we found that even though the assessments fell within the penalty schedule, the initial assessments by GCEL attorneys in the Northeast were higher relative to other regions.

3. The Alaska region suffered from a similar problem with the Coast Guard fisheries enforcement years ago, especially when personnel were transferred from areas where drug interdiction was the primary responsibility. Regional Fishery Training Centers were created and fishermen became active participants in the training for Coast Guard personnel sent to Alaska. This created a much better relationship between the regulated community and law enforcement. Would some type of cooperative training center be beneficial to NOAA law enforcement personnel? Should we require that all NOAA law enforcement personnel go through the Coast Guard training?

Yes, we do believe that some type of cooperative arrangement for training and/or educational purposes would be beneficial to both NOAA law enforcement and the fishing industry and that it would have a positive impact on relationships between the two entities.

OLE considers the Coast Guard a strong partner in enforcing marine resource laws and performing fishery management ashore. While cooperative training among federal law enforcement personnel with complementary missions is often beneficial, we are not specifically familiar with the Coast Guard's cooperative training center and cannot opine as to whether all NOAA law enforcement personnel should be required to go through Coast Guard training.

4. Do you believe the items suggested by NOAA will be sufficient to meet your concerns and the recommendations you made in the report?

NOAA's proposed action items appear to meet the intent of our recommendations and we believe they are sufficient to meet our concerns. However, follow-through on those proposed actions is key and my office is committed to tracking and ensuring proper follow-through.

5. Congressman Jones notes that the number of law enforcement personnel has risen while the number of fishermen and the level of quotas have declined. Did the IG look at whether the staffing levels of the NOAA law enforcement program were appropriate to their mission? Did the IG look at whether staffing levels in the Northeast region were appropriate to the mission? Did the IG examine the role of state law enforcement through Joint Enforcement Agreements and how those agreements might affect staffing needs for NOAA law enforcement activities?

While we did not assess whether OLE's staffing levels were appropriate, we did find that its current staffing "make-up" is disproportionate to agency function and operational need, particularly compared with other agencies with similar mission profiles and enforcement responsibilities. As of August 31, 2009, OLE's enforcement staff consisted of 149 criminal investigators and 15 uniformed enforcement officers—12 of whom are located in Alaska, with none located in the entire Northeast region. According to OLE data for the past three years (2007-2009), approximately 98 percent of its enforcement caseload has been regulatory—with only about 2 percent criminal cases. As a result, we recommended that NOAA determine whether the agency has an appropriate balance and alignment of uniformed enforcement officers and criminal investigators, based on mission need.

We did not examine how coastal state marine enforcement agencies through joint enforcement agreements (JEAs) might affect staffing needs for NOAA law enforcement activities. In 2008, we assessed NOAA's efforts to target living marine resource violations through the JEA program. OLE relies on the U.S. Coast Guard and coastal state marine enforcement agencies for help enforcing federal fisheries regulations within the 200 miles of U.S. coastline known as the U.S. Exclusive Economic Zone. At that time, we found the JEA program was hampered by administrative and operational deficiencies that prevent NOAA from maximizing the benefits of these partnerships. We determined that (1) JEA activities needed to be more closely monitored from headquarters and at the divisional level to verify state reported JEA data, (2) the use of summary settlements was limited (only 3 of the 27 JEA partners had this authority) and loosely managed, and (3) GCEL lacked written policies and procedures for making and managing delegations of summary settlement authority.

6. Most of your concerns seem to be in enforcement actions against the commercial fishing sector. Have you received similar complaints or did you see similar concerns in enforcement activities of the recreational or charter fishing sectors?

Most of the complaints related to enforcement that we received were from the commercial fishing sector. We received some enforcement-related complaints from the recreational and charter fishing sectors but very few. We heard—both in the course of this review and in previous work—many complaints about NOAA's overly-confusing and complicated fisheries management regime and its ever-changing, burdensome regulations from the commercial, recreational, and charter fishing sectors.

7. Congress required NOAA Science and Statistical Committees (SSC) to meet concurrent with regional fishery management council meetings so that fishermen could participate. I understand that in at least one region, this is still not being done. In addition, I understand that one particular SSC still refuses to hear testimony from any scientist who has ever accepted money from the fishing industry yet has a full-time employee of an environmental group on the SSC. Is the lack of integration of the fishing industry into the science aspects of the fishery management process something Congress should ask the IG to also look into?

The quality of the fishing industry's integration into the science aspects of NOAA's fishery management process is an important issue. In February 2009, the IG sent a memorandum to NOAA after an OIG review of industry allegations regarding NMFS' Northeast Fisheries Science Center. This review focused on northeast groundfish (multispecies) issues and was initiated at the request of Senators Snowe, Collins, Kennedy and Kerry. We recommended that NMFS should enhance the participation of the northeast groundfish industry in the fisheries management process by (1) incorporating data from scientifically rigorous groundfish industry-based surveys (as it already does with industry-based surveys in the sea scallop and monkfish industries); (2) doing more targeted cooperative research with the groundfish industry; (3) improving communication and education efforts with the groundfish industry, including making the Science Center website more user-friendly and easier to navigate; and (4) highlighting creative efforts of groundfish industry members working towards sustainable, profitable local fisheries. NOAA has not yet provided the OIG with information that demonstrates that it is working to implement this recommendation.

8. You note that the law enforcement data management systems at NOAA were inadequate. Would it surprise you to know that the NOAA General Counsel did not even have a system for tracking lawsuits against their own agency until this Committee asked them to do so?

We are not surprised, given the data system inadequacies we identified, that such issues exist.

Ms. BORDALLO. I thank you, Mr. Zinser, for your testimony, and for your ongoing efforts in this issue. Dr. Lubchenco, you can now begin.

STATEMENT OF DR. JANE LUBCHENCO, UNDER SECRETARY OF OCEANS AND ATMOSPHERE AND ADMINISTRATOR, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE

Dr. LUBCHENCO. Thank you, Chairwoman Bordallo, Ranking Member Cassidy, members of the Committee. I greatly appreciate the opportunity to testify before you today on the Inspector General's report.

Congress has acknowledged the value of our marine and coastal environment through several laws, including the Magnuson-Stevens Fishery Conservation and Management Act. Under this law, NOAA has regulatory obligations to ensure the sustainability of marine resources and their habitat. NOAA, fishermen, and the public share a common goal of preserving and protecting the marine environment and our fisheries for the long-term health of both our fishery resources and fishing-dependent communities.

Proper regulation and enforcement are vital to this effort, and to the economic vitality of our coastal communities. For all of this to work, however, commercial and recreational fishermen must know the rules, and believe that if they follow the rules, others will too. But these rules must be consistently and fairly enforced. NOAA is committed to improving its enforcement program to assure that it is both effective and fair. A lot of hardworking investigators, agents, and lawyers work every day to protect our nation's ocean and fishery resources. But there must be a level playing field, and fishermen have to have confidence in the system.

As Congressman Tierney mentioned, I spent a few hours yesterday morning meeting with fishermen in Gloucester. Doing so is part of my commitment to have an open, productive dialogue with fishermen, to understand their perspectives and hear their ideas

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

A couple of months later, I heard concerns from Members of Congress about NOAA's enforcement program. In response, I requested the Department of Commerce Inspector General conduct a review of these programs. I requested this review because I believe in the importance of NOAA's law enforcement efforts and felt it was time to take a fresh look at how well NOAA's enforcement efforts are supporting our mission to rebuild fisheries and the associated economic opportunities within our coastal and fishing communities.

The IG report released on January 21 identifies a number of very serious issues with NOAA's enforcement program, and it recommends several steps we should take to address the deficiencies. I take this report very seriously, and I am committed to responding in a comprehensive, thoughtful, and timely manner.

In response to the IG report, I have instructed the new NOAA General Counsel, Lois Schiffer, and the new National Marine Fisheries Service Assistant Administrator, Eric Schwaab, to address the IG's recommendations and continue to work to improve our outreach and engagement with the fishing community at large.

While we develop a comprehensive plan to address the report recommendations in the allotted 60-day time frame, we have already taken a number of actions in response to the IG report. My written testimony is more thorough, but let me briefly outline some of the changes that have already taken place, and then talk about some of the longer-term actions we are planning.

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

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

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

Other actions I would like to highlight fall into the category of improved communication and enhanced oversight, which are major themes of the IG report. We are planning a number of actions to improve communication and increase transparency with the regulated community. A top-level management team is developing detailed plans for a summit on law enforcement practices to be held no later than June 30 of this year. The summit will help us formulate long-range policies for properly and fairly executing the agen-

cy's enforcement action and develop forward-thinking approaches to enforcement actions, including approaches to address the regulated community's concern of complex, conflicting, and excessive administrative burdens.

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

The IG's report identified a lack of oversight in several aspects of our enforcement programs. To address this, we are working on several initiatives, including developing standardized procedures for setting enforcement priorities. This will ensure some nationwide consistency while still addressing the regional needs. We are also strengthening the operating procedures for our enforcement activities. This is intended to promote greater transparency and prosecution and settlement actions.

So these steps are intended to begin to respond to the issues identified by the IG. NOAA will build upon these steps to respond to all of the IG's recommendations and to improve our enforcement program. Our marine and coastal resources are of immense value to the nation. Effective, fair, and transparent enforcement is critical to ensuring the long-term sustainability of these resources. I echo the urgency for change and commit to serious, measurable reforms to address the IG's recommendations and enhance our work with the fishing community. Thank you.

[The prepared statement of Dr. Lubchenco follows:]

Statement of Dr. Jane Lubchenco, Under Secretary of Commerce for Oceans and Atmosphere, National Oceanic and Atmospheric Administration, U.S. Department of Commerce

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

BACKGROUND NOAA LAW ENFORCEMENT

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

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

NOAA, fishermen, and the public share a common goal of preserving and protecting the marine environment and our fisheries for the long-term health of both our fishery resources and fishing-dependent communities. NOAA's trust resources are a public resource that should be protected through proper regulation and enforcement for the benefit of Americans, coastal economies and the ocean environment. These responsibilities range from enforcing our fisheries and national marine sanctuaries regulations to addressing violations of the ESA and other statutes. Enforcement actions, including investigations and patrols, use of technology such as

vessel monitoring systems (VMS), and partnerships with other federal agencies and states, are needed to ensure effective management and deter cheating.

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

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

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

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

INSPECTOR GENERAL REPORT

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

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

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

Immediate Actions:

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

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

Short-Term Actions:

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

1. To address the report's observation that NOAA lacks formal procedures for sufficiently documenting decisions regarding penalty assessments and settlements resulting in a process that provides the appearance of arbitrary decision-making (subject to compliance with applicable labor relations requirements), NOAA's General Counsel will institute higher level reviews of penalties, permit sanctions, and settlements to ensure consistency and predictability.
2. To address the perception among the regulated community and the interested public that NOAA's regulatory processes and enforcement actions are arbitrary and lack transparency, the Assistant Administrator for Fisheries, working with our Office of Communications, will improve communications on enforcement issues, particularly in the Northeast. This effort will include actions to enhance understanding of fisheries regulations as well as to ensure transparency of enforcement actions.
3. To develop forward-thinking approaches to enforcement efforts (including approaches to address the regulated communities concern of complex, conflicting, and excessive administrative burdens) and to assist NOAA leadership in formulating long-range policies for properly executing the agency's enforcement actions to protect living marine resources, I have asked NOAA General Counsel, the Assistant Administrator for Fisheries and the Director of External Affairs to develop specific objectives and detailed plans for a summit on law enforcement practices to be held no later than June 30, 2010. This effort will include a list of possible chairs and co-chairs, the identification of possible facilitators, and a communications strategy.

Long-Term Actions:

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

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

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

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

**Response to questions submitted for the record by Dr. Jane Lubchenco,
Under Secretary of Commerce for Oceans and Atmosphere and Adminis-
trator, National Oceanic and Atmospheric Administration**

Questions from Chairwoman Madeleine Z. Bordallo (D-GU)

- 1. Can you explain why the Inspector General's report found that fines assessed in the Northeast were 250 percent to 500 percent higher than in other parts of the country?**

Answer: We have been unable to replicate the comparison provided by the Inspector General in his report, even using the raw data that was provided to the Inspector General.

- 2. Ninety percent of NOAA's law enforcement staff are criminal investigators, even though most infractions are misdemeanors. Does the OLE have a "criminal-enforcement-oriented structure"? Does this structure reflect considerations of better pay and benefits for investigators rather than mission requirements?**

Answer: The Office of Law Enforcement (OLE) currently has 145 special agents and 18 enforcement officers. Though most of the sworn personnel within the agency are 1811 series criminal investigators, the intent of the agency was not to create a "criminal orientation" when they converted to this series nearly eleven years ago, but as a means to assure the recruitment and retention of a well rounded and highly qualified skill set. This was done because of the variety of legislative mandates of the OLE, the vast geographic area covered and the limited number of personnel available to cover these requirements. In part because of this vast geographic area, the existence and proximity of state enforcement partners who are authorized to respond to and assist with the mission requirements of the OLE is invaluable.

OLE relies on state partners to conduct a very significant level of patrol and inspection work. The states support the work of the OLE and the United States Coast Guard. The analogy that is often used for the cooperative enforcement program is that the OLE serves the "detective" role and the state partners are the "cop on the beat". The states conduct a large percentage of the dockside and near shore patrols, the Coast Guard conducts the off shore and deep water patrols, and NOAA does the majority of the investigative work. The annual percentage of the OLE budget for the state cooperative enforcement program is approximately 30 percent of the total Enforcement budget. Over the past three years, the program has generated an annual average of 139,952 person hours per year and includes approximately 1,622 dedicated state marine law enforcement officers.

The premise of using special agents to meet mission requirements within the OLE has been the primary approach of the agency almost since its inception in 1970. Special agents were, until 1999, classified under the 1812 "fish and game" series and were then converted into the 1811 "criminal investigative" series. Under either series the agents have conducted almost entirely the same type of both criminal and civil investigative work with the specific factors of individual cases serving to dictate the venue, civil or criminal, through which the case would be pursued.

In the early 1990s the OLE began supplementing its special agent staff with uniformed enforcement officers to conduct certain patrol and inspection related activities. The primary impetus for this program was the establishment of the Individual Fishing Quota (IFQ) program in Alaska. The program afforded the assurance that vessels would off-load only at certain ports and also required advance notice of landing which ensured the agency could inspect a reasonable percentage of off-loads. Enforcement officers were hired and stationed at or near those ports to conduct IFQ enforcement work. The agency also hired a limited number of uniformed enforcement officers in other regions to conduct patrol and inspection activities. The program was not expanded extensively beyond the IFQ program because in 2001 the state cooperative enforcement program began as an alternative measure to cover some of the patrol and inspection mission requirements.

Enforcement officers were classified within the 1812 "fish and game" series which was eliminated by OPM in 2008. At that time agencies with personnel in the 1812 series were required to reclassify them into the 1811 criminal investigator series or 1801 general law enforcement category. All OLE enforcement officers were reclassified from the 1812 series to the 1801 general law enforcement series.

Recruiting and hiring the highest potential level of skill set possible to meet the complex legal and vast geographic challenges of the OLE has been the intent and objective of the agency. The 1811 criminal investigative series has afforded the OLE that ability for several reasons. The 1811 series is the most widely recognized and utilized series by the many federal law enforcement agencies. The 1811 series therefore provides a large recruiting source for well-trained and experienced agents who

have an interest in moving into the mission area of the OLE. There are somewhat more enhanced benefits provided to OLE employees in the 1811 series, relative to those in the 1801 series. These benefits include, but are not limited to, participation in the law enforcement special retirement program, higher potential pay levels, and coverage under the provisions of the "good Samaritan" act.

3. Over the last decade, what have been the uses of the Asset Forfeiture Fund?

Answer: The provision of the Magnuson-Stevens Fishery Conservation and Management Act that establishes the Asset Forfeiture Fund (Fund) specifies that it may be used for a number of different purposes to include: "... (C) any expenses directly related to investigations and civil or criminal enforcement proceedings, including any necessary expenses for equipment, training, travel, witnesses, and contracting services directly related to such investigations or proceedings".

Thus, the Asset Forfeiture Fund has been utilized:

- (1) By Office of Law Enforcement agents and the General Counsel Enforcement and Litigation attorneys for both domestic and international travel to support numerous enforcement requirements;
- (2) To purchase required equipment including, but not limited to, computers, copiers, vehicles, and firearms;
- (3) To support contract services including, but not limited to, services for the Case Management System, research, litigation and legal assistant activities, financial analysis and collections, expert analysis and some forensics work, expert witness services, freezer facilities for the temporary maintenance of seized product, vessel assessment surveys for seized vessels, and the security and docking of seized vessels;
- (4) To support expenses related to investigative operations such as the purchase of illegal product during undercover operations and payment for rewards;
- (5) For a high percentage of all training provided to newly hired employees to attend the Federal Law Enforcement Training Academy; and
- (6) To pay for various computer upgrades and data information systems for the agency.

Questions from Republican Members

1. The IG report recommends that overall fisheries management would benefit if enforcement were targeted better to meeting the goals of the specific fishery management plans. This seems to be a simple concept. Why has it not been implemented? Why aren't regional law enforcement personnel under the direction of the regional administrators or at least why isn't there better coordination between the regional management goals and the headquarters enforcement personnel?

Answer: While the concept of targeting enforcement action to specific fishery management plans is simple, execution of those plans is greatly complicated by multiple mission requirements supported by the same resources. Enforcement staff address commercial fishing enforcement, sanctuary enforcement, import and trade restrictions, marine mammal protection, and the protection of marine endangered species, in addition to supporting State marine conservation mission requirements when federal laws are violated through commerce. Focused enforcement occurs when possible using fishery management plan specific requirements which are based on priorities established in conjunction with the staff of the Regional Administrators' offices. NOAA Office of Law Enforcement's (OLE) management staff and Office of General Counsel for Enforcement and Litigation (GCEL) regional attorneys work closely with Regional Administrators and their staffs to understand and establish priorities.

OLE staff report to Fisheries Headquarters in recognition of mission requirements (such as Domestic laws supporting treaty obligations, Sanctuary/Monument Enforcement, support for State marine conservation mission requirements, etc.) that exceed Fishery Region responsibilities and authorities.

Setting priorities is an important tool for allocating resources to help assure an effective enforcement program. As priorities are set, we must take into account the overarching goal to assure compliance with all of the laws NOAA has the responsibility for implementing. The Inspector General's report has asked us to assure that there is more involvement at the NOAA management level to assure that priorities are established, confirmed, and met at that level.

NOAA is implementing a more formal approach for OLE and GCEL to validate Regional enforcement priorities and integrate them with national priorities. The process, laid out in Appendix 6 of NOAA's March 18, 2010 official response to the Office of Inspector General's January 21, 2010 report on NOAA Fisheries Enforce-

ment Programs and Operations, will be defined in a plan to be finalized by July 29, 2010. The approach will include a high level (Assistant Administrator for Fisheries and NOAA General Counsel) annual review of the effectiveness of enforcement over the last year to be informed by prior consultation with appropriate stakeholders. The annual review will also establish an approach, criteria, and a timeline for determining regional and national priorities for the coming year. Subsequent steps for the establishment of annual priorities at both regional and national levels will include outreach, assessment of available resources, public comment, consultation with General Counsel, and ultimately approval by the Assistant Administrator for Fisheries.

- 2. The IG report found the NOAA data systems to be unreliable. The report found “weaknesses” in GCEL’s and OLE’s current case management information systems—in particular, data that are missing, entered into the systems inconsistently, or vague. In addition, the report noted that “neither OLE nor GCEL is able to generate data from their management information systems on recidivism rates, which is important for assessing deterrence and therefore program effectiveness.” Why is there no law enforcement data tracking system within either the Office of Law Enforcement or NOAA General Counsel? Wouldn’t such a tracking system help identify repeat and serious offenders?**

Answer: The NOAA Office of Law Enforcement (OLE) and Office of General Counsel for Enforcement and Litigation (GCEL) operated from a shared system known as Enforcement Management Information System (Information System) for many years. Prior to 2004 that system was determined to be antiquated and inadequate for the needs of the OLE. GCEL, however, found the system to be adequate to meet their needs at the time. After several years of planning and acquisition work, OLE updated their system and in 2006 converted to a new system known as Law Enforcement Agencies Data System (LEADS). The new OLE system included a “feed” to the Information System for continuing use by GCEL. Several years later, GCEL found that they were experiencing deficiencies with the Information System and began work to replace it as well. Since that time, the new system within OLE known as LEADS has also come to the point of requiring updates and transition to a “next generation” system. Therefore, the OLE and GCEL are working collaboratively with our vendors to assure the implementation of a new system for GCEL and upgraded system for OLE that will synchronize the appropriate and necessary data exchanges to keep both systems up-to-date and timely.

The existing system does allow us to determine if a specific individual is a recidivist. However, it does not have a separate or individual search function to display actual rates of recidivism. If this function were enhanced, it could be used to target specific trends in certain categories of violations or over extended time frames to more effectively identify problem areas.

As part of our response to the January 2010 Office of the Inspector General Report, we are reviewing our current systems, and will make improvements as needed, to ensure OLE and GCEL have more efficient and effective data management processes.

- 3. According to the IG Report, recommendations on the number and percentage of criminal investigators in NOAA Office of Law Enforcement were made in a similar report in 1998 yet again are repeated in this report. Why did the agency continue to hire a higher and higher percentage of criminal investigators despite the IG recommendation?**

Answer: The 1998 Office of Inspector General (OIG) Report references a “Role and Deployment Study” conducted by the NOAA Office of Law Enforcement. The 1998 OIG report questions that study’s value by suggesting that predetermined constraints prevented the study from considering all available options. The report cites the fact that the list of self imposed constraints set by the Chief of Enforcement (Chief) included a requirement to achieve a 1:1 ratio of special agents to fishery patrol officers. It further states that the Chief imposed the constraints because of budget limitations and direction from the Assistant Administrator for Fisheries, as well as several other factors. The OIG then went on to point out that:

“these constraints prevented the study from evaluating all available options for Enforcement to achieve efficiencies and effectiveness. For example, adopting a 1:1 ratio of special agents to fishery patrol officers will reduce the number of agents and increase the number of officers. One reason given for this constraint was to increase Enforcement visibility. However, by dictating that increased visibility be achieved by reducing special agents ignores the option of increasing visibility through greater use of existing con-

tracts with other enforcement organizations, such as state enforcement organizations.”

The subsequent recommendations provided to the Assistant Administrator and the Chief were to further evaluate the impact of the constraints to determine if they were appropriate and to initiate a staffing and deployment plan for Fiscal Year 1999 that included all 164 full-time equivalent personnel. The 1998 OIG report did not address the use of criminal investigators. It called into question the ratio of special agents to enforcement officers that had been suggested by the former Chief and former Assistant Administrator.

After concluding a 1999 pilot study on the use of the cooperative enforcement program through a partnership with the state of South Carolina, the agency determined that it would be effective to pursue an expansion of the cooperative enforcement program. The Administration and Congress agreed, and funding was appropriated in 2001 to support an expansion of the cooperative enforcement program approach through agreements now known as Joint Enforcement Agreements. That program has been funded every year since 2001 and now includes partnerships with every U.S. coastal state and territory, with the exception of North Carolina. Over the past decade, the Office of Law Enforcement (OLE) has operated with the understanding that the state agencies would supplement the patrol and inspection aspect of its mission through the cooperative enforcement program. Therefore, the OLE continued to hire special agents to focus on conducting investigative work.

Though the use of criminal investigators to staff the special agent positions was not directly addressed in the 1998 report, it is very clearly identified as a subject for review in light of the 2010 report. As part of the NOAA response to the 2010 report, we will conduct a workforce analysis to determine the proper mix of personnel within the OLE, as recommended by the OIG.

On February 5, 2010, at the direction of Dr. Lubchenco, NOAA placed a freeze on the hiring of criminal investigators until the workforce analysis can be concluded. At such time as that analysis is completed we will make further determinations on the appropriate staffing of the OLE.

4. Why don't the General Counsel staff who work on fisheries cases work for the Fisheries AA? Why do all of the NOAA General Counsel staff work for the NOAA Administrator rather than the line offices they service?

Answer: NOAA enforcement attorneys support more than just a single line office. For example, they not only support the National Marine Fisheries Service, but also the Office of National Marine Sanctuaries. All NOAA General Counsel attorneys (including enforcement attorneys) report to the NOAA General Counsel, who reports directly to the NOAA Administrator.

5. How much does NOAA rely on state for law enforcement through Cooperative Enforcement Agreements? Please include in this explanation the percentage of funding, man hours, violations reported, or some other meaningful measure to quantify the role of the states in NOAA fisheries enforcement. How does NOAA's reliance on states vary from state to state or region to region?

Answer: The NOAA Office of Law Enforcement (OLE) relies on the state partners to conduct a very significant level of patrol and inspection work. The states support the work of the OLE and the United States Coast Guard. The analogy that is often used for the cooperative enforcement program is that the OLE serves the “detective” role and the state partners are the “cop on the beat”. The states conduct a large percentage of the dockside and near shore patrols, the Coast Guard conducts the off shore and deep water patrols, and NOAA does the majority of the investigative work. The annual percentage of the OLE budget for the state cooperative enforcement program is approximately 30 percent of the total Enforcement budget. Over the past three years, the program has generated an annual average of 139,952 person hours per year and includes approximately 1,622 dedicated state marine law enforcement officers.

The OLE works throughout all coastal areas of the U.S., and staffs over 50 duty stations with a current staffing of 163 sworn employees consisting of 145 special agents and 18 enforcement officers. In some cases, thousands of miles may separate one OLE agent from another. In part because of this vast geographic area, the existence and proximity of state enforcement partners who are authorized to respond to and assist with the mission requirements of the OLE is invaluable.

NOAA is currently undertaking a workforce analysis of OLE. We will take into consideration the impact and dynamics of both the state partnerships and the role

of the United States Coast Guard when conducting the workforce analysis to determine proper staffing levels for the OLE.

6. How much funding is in the FY2011 budget request for Cooperative Enforcement Agreements with state enforcement agencies? How does this compare to previous years? Should this funding be increased to meet NOAA's enforcement needs?

Answer: The FY 2011 Budget Request for Cooperative Enforcement is \$18.8 million; the FY 2010 Request was \$18.6 million. In FY 2009, the request was approximately \$17.6 million, and the program had been roughly similarly funded for a number of years prior to FY 2009. Though some states seem to be limited in terms of the amount of funding they can use effectively and are therefore not willing to consider providing more Joint Enforcement Agreement work, many states remain open to conducting additional federal enforcement work within the scope of the Joint Enforcement Agreement program.

7. Do you agree that data collection, basic fisheries science, and enforcement are the responsibility of NOAA?

Answer: Yes, based on the mission requirements set by the Department of Commerce and established by our statutory provisions, federally managed fisheries are inherently NOAA responsibilities. However, it is important to acknowledge that partnerships with states, through the cooperative enforcement program, have been an invaluable complement to NOAA's enforcement efforts. Under this program, state enforcement partners conduct a very significant level of patrol and inspection work related to marine enforcement. Additionally, cooperative research projects with fishermen, universities, and other groups have enhanced NOAA's ability to collect data and conduct fisheries science. While inherently NOAA's responsibility, cooperative enforcement with States and Territories and cooperative research remain vital programs through which NOAA addresses these stewardship requirements.

8. Regional NOAA General Counsel personnel and the Coast Guard both participate in regional fishery management councils. Is there a need for other NOAA law enforcement personnel to attend all council meetings?

Answer: In addition to the participation by NOAA General Counsel and the U.S. Coast Guard, NOAA Enforcement personnel also participate in Council meetings and processes. The Special Agents in Charge of each Office of Law Enforcement (OLE) Division attend council meetings and participate in the various law enforcement committees of the fisheries management councils. Their access to and participation in developing regulations varies somewhat between councils. We affirm the need for continuing the practice of OLE personnel attending all council meetings, particularly to participate in all enforcement committee deliberations and to present an enforcement report to the councils at each meeting. What may perhaps be missing is a standardized process for all eight councils to assure that, within certain protocols, consideration of enforcement requirements is given formal review and documented in a manner that assures appropriate vetting within the council process.

9. You have recommended that NOAA set up a law enforcement summit. Do you intend to just hold one national summit or do you plan to hold these in each of the regions? Do you plan on personally attending any of the law enforcement summits?

Answer: We plan to hold a National Enforcement Summit, and I plan to attend. The goals for the Summit and additional outreach surrounding the Summit are to develop forward looking ideas in areas of communication, priority setting, and program implementation, to help us achieve an enforcement program that ensures fair and effective protection of the Nation's natural resources in NOAA's areas of responsibility. Plans for the Summit are well under way. We are working with the U.S. Institute for Environmental Conflict Resolution (U.S. Institute)—a well-respected agency with the skills and experience—to lead all the participants in a useful Summit.

The U.S. Institute's plan for the Summit includes:

- Identifying a Summit facilitator drawing on the National Roster of Dispute Resolution and Consensus Building Practitioners, and providing continuing oversight, coordination, and project management.
- Contacting key persons, organizations, and agencies that have been involved in past fisheries enforcement issues to design a structure for the planning process including key events, milestones, schedule, Summit duration, agenda outline/topics, participants, and communications strategy. The participants of this design planning process will remain engaged as summit design is finalized.

- Working with the participants identified above and other key stakeholders identified during these discussions to finalize Summit plans including objectives, a final agenda, event logistics, a communication strategy, and a final list of participants.
- Facilitating the actual summit.
- Preparing a final report, including participant review and comment, and meeting with NOAA management to review the process and lessons learned, and to discuss follow-up plans for actions identified in the summit.

At this time, there are no plans to hold regional law enforcement summits. However, NOAA has plans to increase its outreach efforts to address concerns with the enforcement of commercial fishing regulations. They include:

- Fisherman's forums held in conjunction with Fishery Management Council meetings,
- Conducting a pilot project to test the value of a Web-Portal and Repository to improve public access to regional regulatory requirements,
- Publication of easy-to-read compliance guides,
- A Frequently Asked Questions web link for enforcement related issues,
- Review of "compliance assistance programs" utilized by other regulatory agencies, and
- Exploration of the value of a Fisheries Enforcement E-mail ListServ to better distribute information to constituents.

10. According to the report, NOAA General Counsel's office suggested that "prosecution of each case must be assessed based on its own individual merits and circumstances." The same person then goes on to state that there is a small and extreme minority who "regularly violate regulations." However, the IG report states that the data management system at NOAA is so inadequate that "neither OLE nor GCEL is able to generate data from their management information systems on recidivism rates, which is important for assessing deterrence and therefore program effectiveness." How would you respond to this apparent disconnect?

Answer: Current data systems within the Office of Law Enforcement and Office of General Counsel for Enforcement and Litigation (GCEL) can be queried to determine if an individual is a repeat offender. Past case dispositions are a matter of record and can accurately and readily be determined. The Inspector General's report recommends an inherent part of our data management system be the capability to conduct more general queries of collective data to conduct analysis and determine trends. Such a capability would be helpful for use in determining enforcement priorities, identifying weaknesses in the regulatory system, and, most importantly, supporting more focused direction of enforcement activities in problem areas.

The matter of establishing a fair and transparent process for assessing fines and making prosecutorial determinations by the Office of General Counsel is being addressed through a number of measures under the direction of Lois Schiffer, NOAA General Counsel and myself. We have recently shifted the decision making in these matters to the headquarters level. Additional new measures to establish schedules, protocols, and other steps to assure consistency and fairness are being considered as well.

11. Your plan for addressing the recommendations of the IG includes better communication with the industry. As you know, there was a rally held the same day as the Subcommittee hearing that included a large number of recreational and charter fishermen who are concerned that their livelihoods are being compromised by fishery closures based on what they consider faulty or incomplete science. While this was not an issue examined by the IG for this report, this seems to be a similar case of NOAA not being able or willing to do its basic duties and/or not communicating well with the regulated community. To make matters worse, the FY2011 budget flat-lines the fisheries stock assessment account which will not help matters. Should we consider having the IG take a look at this issue as well?

Answer: On March 23, the Assistant Administrator for the National Marine Fisheries Service, Eric Schwaab, announced the appointment of Russell Dunn as the NOAA Fisheries National Policy Advisor for Recreational Fisheries and the appointment of the 22 members of the recreational fishing community from around the Nation to a Recreational Fisheries Working Group to provide expertise on saltwater recreational fishing to NOAA's Marine Fisheries Advisory Committee. In addition, on April 16 and 17 we held a National Recreational Fishing Summit.

These actions fulfill a pledge I made to the recreational fishing community to put in place the national advisor to help lead NOAA's efforts to create a stronger and more productive partnership between NOAA and America's saltwater angling community.

With regard to stock assessment funding, while there is no substantial increase in the FY 2011 Budget Request (\$51.0 million in FY 2010 to \$51.7 million in FY 2011) the program has grown from \$31.6 million in FY 2008 to \$51.7 million in FY 2011. In addition, the FY 2011 Budget Request includes \$9 million for the Marine Recreational Information Program, which also has recreational data collection components.

12. NOAA seems to have a systemic problem with relating directly with the fishing community in some regions - New England in particular. Congress had to require the Science and Statistical Committees to meet in conjunction with the Council meetings so that fishermen could actually see how their harvest levels were developed. It wasn't until Congress forced the agency to do cooperative research that we got scientists on fishing boats so they could see what the fishermen were seeing. It wasn't until Congress required Marine Mammal Take Reduction Teams which included fishermen for NOAA to listen to fishermen before they regulated their fishing activities in relation to marine mammals. How do you plan to repair the trust between the agency and the regulated community without further Congressional mandates?

Answer: I am committed to rebuilding trust between NOAA and our regulated fishing communities. I personally have participated in numerous meetings to directly engage our constituents, particularly in New England, but also in other parts of the country. I have also not focused solely on one sector within our constituency. I have met with commercial fishermen, recreational fishermen, environmental groups, scientists and others to discuss the ongoing challenges we are facing in fisheries management. NOAA is also in the process of planning two key meetings. The first is our recreational fishing summit, which was held in April. The Summit focused on engaging our recreational constituents in a constructive dialogue to generate possible solutions to the issues they have identified, such as improvements in data collection. NOAA is also planning a summit to discuss our enforcement activities with our constituents. The National Enforcement Summit will focus the discussion on options NOAA could pursue to improve our enforcement program. As we move forward, my leadership team, in particular Eric Schwaab the Assistant Administrator for Fisheries, and I will continue to engage with the fishing community to strengthen our relationship.

13. You were quoted in a recent press release as saying, "We can't manage effectively without trust." Yet fishermen seem to be more angry at the agency than in recent memory. It probably doesn't help that a number of high profile initiatives which have been started since you took office are viewed as having the outcome of fewer fishermen and fewer fishing opportunities including: the Marine Spatial Planning initiative that will remove areas available for fishing; the Catch Shares initiative that is taking money away from traditional fisheries needs such as cooperative research and stock assessments and moving it toward fisheries management systems that encourage less participation; a proposal for a new National Climate Service which will certainly take interest within the agency away from fisheries management; a budget request that funds one new satellite program rather than provide increases to fisheries management needs, etc. All of these in combination seem to be an anti-fishing agenda for this administration at a time when the jobless rate is at or above 10 percent. Can you tell fishermen why they should trust this management team at NOAA?

Answer: I am committed to rebuilding trust between NOAA and the fishing community and working with them to achieve sustainable fisheries, as required by the Magnuson-Stevens Fishery Conservation and Management Act. I personally have participated in numerous meetings to directly engage our constituents all around the country. Using what I've heard to inform our way forward, my overarching goal is to strengthen our use of an ecosystem approach to management, grounded in sound science, to achieve sustainable fisheries and vibrant coastal communities. Attaining this goal will not be easy. It will require engagement by members of the fishing community, scientists, managers, the environmental community and the public at-large.

Our new initiative on catch shares is intended to increase the use of these programs, where and as appropriate, to support sustainable fisheries and more resilient coastal communities and economies. We recognize that basic scientific information, including cooperative research and stock assessments, are critical to the success of fisheries management, and catch shares is not designed to reduce or jeopardize such critical information needs.

The establishment of a NOAA Climate Service is a key goal for our agency, and is an issue that will have important impacts on our management of fisheries as well as many other economic, environmental and social sectors. The need for reliable, timely and relevant climate information and services is growing daily. As an example, changes in ocean conditions including temperature, currents and chemistry, can lead to shifting food web and fish population distributions. The work of a Climate Service is important for identifying these potential changes and understanding how we might address any needed mitigation or adaptation.

Part of the rationale for taking an ecosystem approach to management is to provide a larger context for understanding how to best balance the different uses of the ocean. Coastal and Marine Spatial Planning (CMSP) is not about drawing lines on a map and restricting fishing. Rather, it is a comprehensive planning process that involves all resource managers, stakeholders and users (including fishermen and fishery management councils) across the broad spectrum of sectors that touch the ocean. It is intended to build upon and significantly improve existing decision-making and planning processes, minimize user and use conflicts, identify compatible uses and activities, and result in a more coherent system of managing the diversity uses. CMSP is intended to improve not only ecosystem health but to also facilitate sustainable economic growth in coastal communities.

It is critical as well that we ensure the continuity of climate, weather, and ocean observations, both in situ and from space. A key effort within this context that I will continue to support strongly is improved satellite management and acquisition. Targeted investments are needed now, as proposed in the FY 2011 budget, to sustain and enhance satellite observations including a major realignment of our polar-orbiting satellite program. This will separate the civilian and military satellite procurements, but retain sharing of common assets such as ground system, and NASA will lead the acquisition for NOAA satellites. We must preserve critical operational weather and climate observations into the future.

An additional goal I have set for NOAA is to improve our communication and engagement efforts. This includes not only better explaining our science, but also strengthening our engagement with constituents on the local, regional and national scale. The two summits we are hosting, one on recreational fishing and one on enforcement, exemplify our commitment to work with fishermen, the environmental community, and the public to discuss ways we can address some of the concerns that have been expressed.

Ms. BORDALLO. I thank you, Dr. Lubchenco. If you would remain seated there, my colleagues have arrived, and I would like to call on my colleague Mr. Jones from North Carolina to please come up and testify. Mr. Frank will be here any moment. You can begin, Mr. Jones.

**STATEMENT OF HON. WALTER B. JONES, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF NORTH CAROLINA**

Mr. JONES. Madame Chairwoman, I want to thank you and the Ranking Member for holding this hearing. I think that it is most appropriate, and I will explain the reason I say thank you and why it is most appropriate.

In January, the Inspector General of the United States Department of Commerce released the findings of its seven-month investigation into NOAA law enforcement, the Federal agency responsible for enforcing U.S. fishery laws. The IG report came in response to requests by the Massachusetts and the North Carolina congressional delegations for an investigation into allegations of overzealous commercial fisheries enforcement by the agency, alle-

gations frankly that I have heard for 15 years, and had tried to get the IG's office to look into this before.

Among other things, the Inspector General's report found, and I quote, "systematic, nationwide issues adversely affecting NOAA's ability to effectively carry out its mission of regulating the fishing industry." These issues have contributed significantly to a highly charged regulatory climate and a dysfunctional relationship between NOAA and the fishing industry.

NOAA's civil penalty assessment process is arbitrary and unfair. NOAA workforce composition is dramatically misaligned to its mission. Only about 2 percent of its caseload has been criminal investigations, yet over 90 percent of its enforcement personnel are criminal investigators. Ninety percent of its enforcement personnel are criminal investigators. I think that is so very important, a clear imbalance. This again is the IG's report. NOAA's Assets Forfeiture Fund, which contains the money from civil penalties it collects from fishermen, has a balance of \$8.4 million, but department officials, and I quote, "are not aware of the fund having ever been audited," and the account under which they are maintained has weak, weak internal controls.

This has led the IG to launch a forensic review of the fund. And just yesterday, at a House Government Reform Committee hearing in Massachusetts, the IG stated that early results of that review show that proceeds from the fund were spent on foreign travel by NOAA leadership. Madame Chairwoman, the IG report confirms what fishermen have known to be true. Federal fisheries law enforcement is out of control and needs a major overhaul. That is one reason why last week an estimated 5,000 fishermen from around this country came to Capitol Hill to rally for relief from an agency that is working against them, not with them.

I would like to make one more point that was not in the IG report, but which needs to be stated. According to NOAA's budget documents, since 1997, the number of NOAA fishery enforcement personnel has grown by over 40 percent. But according to NOAA's latest statistics on the state of the commercial fishing industry, from 1997 until 2006, landings of fish in this country have dropped by 5 percent, and in my home State of North Carolina landings have fallen over 66 percent.

In short, we have more law enforcement officers policing a shrinking industry. Furthermore, when these statistics are viewed in light of this report, it seems that NOAA's out-of-control law enforcement tactics have been at least partly responsible for chasing honest fishermen out of business. In these economic times, when unemployment is 10 percent, and when over 80 percent of seafood consumed here is imported, America cannot afford to put more of its citizens out of work and cede more of our markets to foreign producers like China.

I hope the agency understands how serious this IG report is, given the major problems the IG has identified—including serious discrepancies in enforcement, fines, and penalties. In the interest of fairness and transparency, it seems appropriate to put a hold on active prosecutions of fishermen until the problems with NOAA law enforcement are resolved. The North Carolina delegation has joined Chairman Frank and the Massachusetts Delegation in asking

NOAA to do this. I hope the Chairwoman and the Ranking Member will join us in making sure that the agency honors that request to put a moratorium on these prosecutions.

In the meantime, I look forward to working with the Subcommittee and the agency to quickly reform the policies, procedures, and personnel responsible for these problems. Madame Chairwoman, I would like to thank you again for this opportunity to testify. At this time, I will ask unanimous consent that a statement from the North Carolina Fisheries Association President Sean McKeon be included in the record.

Ms. BORDALLO. No objection. So ordered.

[The statement submitted for the record by Mr. Jones follows:]

**Statement submitted for the record by Sean McKeon, President,
North Carolina Fisheries Association**

Thank you for this opportunity to present these comments related to the recent Inspector General of the U.S. Department of Commerce findings of its 7-month investigation into the programs and operations of the National Oceanic and Atmospheric Administration (NOAA).

My name is Sean McKeon; I am the president of the North Carolina Fisheries Association, a non-profit trade association representing the commercial seafood industry primarily in North Carolina since 1952; our membership consists of fishermen, seafood processors, dealers, and myriad related businesses all affected by the decisions made by National Marine Fisheries and their many departments, particularly its enforcement arm, the subject of the OIG investigation.

As you are aware, the Report states, inter alia, investigators uncovered "...systemic nationwide issues adversely affecting NOAA's ability to effectively carry out its mission of regulating the fishing industry. These issues have contributed significantly to a highly-charged regulatory climate and dysfunctional relationship between NOAA and the fishing industry"—a glaring finding to say the least, and one for which the fishing industry has been seeking relief for decades.

According to its website NOAA's mission is as follows:

"Stewardship of living marine resources through science-based conservation and management and the promotion of healthy ecosystems

NOAA Fisheries is responsible for the management, conservation and protection of living marine resources within the United States Exclusive Economic Zone. NOAA Fisheries also plays a supportive and advisory role in the management of living marine resources in coastal areas under state jurisdiction, provides scientific and policy leadership in the international arena and implements international conservation and management measures as appropriate. Under this mission, the goal is to optimize the benefits of living marine resources to the Nation through sound science and management. This requires a balancing of multiple public needs and interests in the sustainable benefits and use of living marine resources, without compromising the long-term biological integrity of coastal and marine ecosystems. Many factors, both natural and human-related, affect the status of fish stocks, protected species and ecosystems. Although these factors cannot all be controlled, available scientific and management tools enable the agency to have a strong influence on many of them. Maintaining and improving the health and productivity of these species is the heart of our stewardship mission. These activities will maintain and enhance current and future opportunities for the sustainable use of living marine resources as well as the health and biodiversity of their ecosystems."

If in fact, as the Report highlights, current procedures and policies adversely affect the Agency's ability to properly carry out its mission, then both the ecological and economic responsibilities of the Agency are not being satisfied. In the case of the commercial fishing industry the Agency's lack of ability to carry out its mission in these two areas (ecology/economy) is having overwhelming negative and deleterious affects on the industry. Many coastal communities continue to lose valuable infrastructure as a direct result of the Agency's "systemic" failures related to its management of this nation's marine resources.

With respect to penalties assessed fishermen the Report found, NOAA's "civil penalty assessment process is arbitrary and unfair". In many incidents fishermen are threatened with exorbitant fines for seemingly mild infractions only to be told reduced amounts would be accepted if made promptly and without going to Adminis-

trative Law Courts. In other words, the OIG Report found many fishermen settled with the Agency after being told paying a lesser amount was better than going to the ALJ courts where fines could be increased even more than the original amount. To many it has become a form of legalized extortion, scaring people with the threat of unimaginable fines when the real purpose seems to be collecting whatever could be collected from the fishermen or related fish business. To make matters worse the report noted NOAA's Asset Forfeiture Fund—which contains proceeds from civil penalties it collects—has a balance of \$8.4 million as of December 31, 2009, but Department officials “are not aware of the fund's having ever been audited”, and that “the account under which they are maintained has weak internal controls” leading the IG to launch a pending “forensic review of the fund”. This finding alone makes the entire management structure and regime at NMFS suspect and worthy of a more far reaching and prolonged investigation, particularly of its in-house oversight.

For years fishermen have been complaining about “being treated like criminals” when dealing with enforcement by the Agency. Not surprising the Report noted, with a high degree of focus, that NOAA's workforce composition is dramatically misaligned to its mission, “only about 2 percent of its caseload has been criminal-investigative, yet over 90 percent of its enforcement personnel are criminal investigators—a clear imbalance”. It seems in order to get paid more money many in the enforcement department opt to become criminal investigators, this despite the fact that 98% of all Magnuson violations are civil misdemeanors, not criminal violations.

The Report also highlighted one important reality overshadowing the entire federal fisheries management system; that is fishermen have been asking for relief from the overly zealous and hostile environment that they must by law deal with when interacting with NMFS. It is not possible to continue to work on the water and provide the American consumer with the seafood products they demand when the environment is so hostile and “out of control.”

Recently, in response to the OIG Report NOAA Administrator Jane Lubchenco instructed the agency's head attorney and its top fisheries manager to take immediate and long-term actions to improve the agency's enforcement and legal operations and enhance its relationship with the fishing community. She said, “I take this report very seriously and I want a comprehensive approach to addressing both the IG's observations and the perceptions of fishermen. Fish are a public resource that should be protected through proper regulation and enforcement for the benefit of Americans, coastal economies and the marine environment. **We can't manage effectively without trust,**” said Dr. Lubchenco. “Taking these steps will help us resolve the issues identified by the Inspector General and enhance our efforts to work with the fishing industry and public in a more constructive manner.” (Emphasis added)

Despite the reactions of Dr. Lubchenco to the Report, her statements and her actions-item list (A ten point list outlined in a recent statement by Dr. Lubchenco*) to fix the problem fall woefully short of the type action necessary to truly change the modus operandi of the Agency, which, as the Report indicates, is one of mismanagement and open hostility to the United States Commercial Fishing industry.

Congress, not NMFS/NOAA should undertake the necessary steps to address the “systemic nationwide issues” documented in the OIG Report. Individuals who sit at the top of NMFS enforcement management should, at very least, be suspended pending the outcome of these hearings and the concomitant OIG investigation that is ongoing; the forensic audit of the assessment funds, continued investigation into “closed” cases, etc. Congress should also see to it that prosecutions of fishermen and or fishing businesses be suspended until this investigation is complete, and Congress, not NMFS/NOAA should be auditing the progress of steps taken to ensure compliance with recommendations by the OIG.

In short, the OIG Report makes certain that federal fisheries management policy and procedure are disasters and that direct Congressional oversight, far in excess of what is currently in place, ought to be implemented. For too long the perception has been (and that perception has been shown to be a reality by the OIG Report) that NMFS is an antiquated and bloated bureaucracy, out of control and unaccountable to anyone including Congress. Hopefully, these hearings will be the beginning of Congress taking the necessary steps to rein this Agency in and bring relief to our nation's suffering commercial seafood industry.

At this juncture in this nation's history, when so many of our fellow citizens are out of work and looking to government for assistance, it should be a national priority to make sure those who do have jobs and work hard each and every day to provide for their families, can go to work without fear of overzealous enforcement agencies or fear of reprisals when they make their concerns known to Congress and seek remedy.

Thank you for this opportunity to address this committee.

***NMFS list of fixes for OIG recommendations.**

1. Subject to compliance with applicable labor relations requirements, institute higher level reviews of proposed charging decisions, penalties, permit sanctions, and settlements to ensure consistency and predictability and to avoid the appearance of arbitrary decision making.
2. Institute a freeze on hiring criminal investigators until a work force analysis is done and approved by Dr. Lubchenco that will address the appropriate mix of criminal investigators and regulatory inspectors in the enforcement office.
3. Shift oversight of the Civil Monetary Penalties Fund (also known as the Assets Forfeiture Fund), where penalties are accrued, from NOAA's Fisheries Service to NOAA's comptroller.
4. Improve communications on enforcement issues, particularly in the Northeast. This will include actions that enhance understanding of fisheries regulations and transparency of enforcement actions
5. Develop specific objectives and detailed plans for a summit on law enforcement practices to be held no later than June 30. The summit will provide a venue to develop forward thinking approaches and long-range policies for properly executing enforcement actions to protect living marine resources.

NOAA will develop, by March 21, long-term strategies that:

1. Improve data integrity and address inefficiencies of the management information systems used by the enforcement office and the enforcement attorneys, including using the Internet to increase transparency.
2. Implement standardized procedures for setting enforcement priorities that will help ensure consistency among regions while addressing regional needs. Ensure NOAA leadership has input
3. Strengthen enforcement attorney operating procedures, prosecution of charged cases, and settlement actions. This includes revising procedural regulations and penalty schedules for consistency and clarity.
4. Implement an outreach strategy to improve relations with local fisheries communities and improve understanding of fisheries regulations and enforcement activities. This includes increasing rapport between NOAA and fishermen in order to improve communications and informal problem solving.
5. Develop a plan to review law enforcement staffing and procedures with a focus on ensuring that criminal procedures are not applied to civil offenses. Development of the plan should include appropriate independent review.

Mr. JONES. Madame Chairwoman, before I close, if it is proper, I would also like to put this in the record. It is a bumper sticker that is going all around the Third District of North Carolina, the home of commercial fishermen, that says, "National Marine Fishery Service: Destroying Fishermen and their Communities Since 1976."

Ms. BORDALLO. No objection. So ordered.

[NOTE: The bumper sticker submitted for the record has been retained in the Committee's official files.]

Mr. JONES. Thank you, Madame Chairwoman. I yield back.

[The prepared statement of Mr. Jones follows:]

Statement of The Honorable Walter B. Jones, a Representative in Congress from the State of North Carolina

Madame Chairwoman, thank you for holding this hearing on NOAA Fisheries Law Enforcement Programs and Operations. This is an urgent issue, and I am very pleased the Subcommittee is examining it today.

In January the Inspector General of the U.S. Department of Commerce released the findings of its 7-month investigation into NOAA Law Enforcement—the federal agency responsible for enforcing U.S. fisheries laws. That IG report came in response to requests made last year by the Massachusetts and North Carolina congressional delegations for an investigation into allegations of overzealous commercial fisheries enforcement by the agency; allegations frankly that I have heard for 15 years and had tried to get the Inspector General's office to look into before.

Among other things, the Inspector General report found:

- "...systemic nationwide issues adversely affecting NOAA's ability to effectively carry out its mission of regulating the fishing industry. These issues have con-

tributed significantly to a highly-charged regulatory climate and dysfunctional relationship between NOAA and the fishing industry”;

- NOAA’s “civil penalty assessment process is arbitrary and unfair”;
- NOAA’s workforce composition is dramatically misaligned to its mission—“only about 2 percent of its caseload has been criminal-investigative, yet over 90 percent of its enforcement personnel are criminal investigators—a clear imbalance”; and,
- NOAA’s Asset Forfeiture Fund—which contains proceeds from the civil penalties it collects—has a balance of \$8.4 million as of December 31, 2009, but Department officials “are not aware of the fund’s having ever been audited”, and “the account under which they are maintained has weak internal controls” leading the IG to launch a pending “forensic review of the fund”.

Madame Chairwoman, the IG report confirmed what fishermen in North Carolina and across this nation have long known to be true: federal fisheries law enforcement is out of control, terribly mismanaged and needs a major overhaul. That is one of the reasons that last week an estimated 5,000 fishermen from around this country came to Capitol Hill to rally for relief from an agency that in their minds is working against them, not with them.

I would like to make one more point that was not in the IG Report, but which needs to be stated. According to NOAA budget documents, since 1997 the number of fisheries enforcement personnel at the agency has grown by over 40%. But according to NOAA’s latest statistics on the state of the commercial fishing industry, from 1997 to 2006 landings of fish in this country have dropped by 5%, and in my home state of North Carolina, landings have fallen over 66%. In short, we have more law enforcement officers policing a shrinking industry. Furthermore, when these statistics are viewed in light of this report, it seems clear that NOAA’s out of control law enforcement tactics have been at least partly responsible for chasing honest fishermen out of business. In these economic times, when unemployment is 10% and when over 80% of seafood consumed here is imported, America cannot afford to put more of its own citizens out of work, and cede more of our market to foreign producers like China.

I hope the agency understands how serious this report is. Given the major problems the IG has identified, including serious discrepancies in enforcement, fines, and penalties, in the interest of fairness and transparency it seems appropriate to put a hold on active prosecutions of fishermen until the problems with NOAA’s Office for Law Enforcement and Office of General Counsel for Enforcement and Litigation are resolved. The North Carolina delegation has joined Chairman Frank and the Massachusetts delegation in asking NOAA to do this. And I hope the Chairwoman, and the Ranking Member, will join us in making sure the agency honors that request.

In the meantime, I look forward to working with the Subcommittee and the agency to quickly reform the policies, procedures and personnel responsible for these problems.

Ms. BORDALLO. I thank the gentleman from North Carolina, Mr. Jones, for his testimony. Now we have another of my colleagues, the congressman from the Fourth District of Massachusetts, Mr. Barney Frank. You can testify.

**STATEMENT OF HON. BARNEY FRANK, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF MASSACHUSETTS**

Mr. FRANK. Thank you, Madame Chairwoman. I appreciate your accommodating Mr. Jones and myself. We were conducting some votes in the Finance Subcommittee, and I appreciate the Administrator and the Inspector General letting us impinge on their time. The Administrator and the Inspector General were both very generous with their time yesterday and came to a hearing in Massachusetts, the city of Gloucester, the home district of our colleague John Tierney at the hearing of the Government Affairs Committee. We should note that the Administrator was not the administrator when the great bulk of these problems took place, and we are en-

couraged by her looking into them, taking them seriously, and her commitment to go forward.

I do think it is very clear that the approach that has been taken by NMFS over a long period has been unduly adversarial. There are fishermen who have violated the rules. There are a handful who should be seriously prosecuted who were plotting and planning to take actions that were illegal. The overwhelming majority of these violations are violations that come when a very complex set of regulations are imposed on very hardworking people who don't always get to dot every I and cross every T.

Also, as I note, we do have some real identification systems, but the lines that are painted on the highways don't work quite as well on the ocean, and there is a degree of ambiguity there. So treating these fishermen as if they were criminals in every case of a violation or in most cases of a violation is clearly wrong. There has been an excess of that. I think the Inspector General's point is very good one, that if you look at the nature of this task, which is a regulatory task, it is a law enforcement force overly weighted with criminal investigators as opposed to people doing more of the administrative work.

And I will repeat myself, as we do in this business quite some time. I don't want to put people out of work, so I do propose that some of the excess law enforcement that the National Marine and Fisheries Service will be having be sent over to the Securities and Exchange Commission, which appears to be under-enforcing. So maybe we can get a balance and shift some of the people. In other words, let us do less prosecution of fishing and more prosecution of "fishy," which is what we have over there.

So I do hope that we are going to see very serious remedial action. I want to say, when Mr. Jones talked about a moratorium, we are not talking about giving people a free pass. We are not talking about dismissing charges. We are saying given what has happened, it is a good idea to hold off until we can look at this. I spoke yesterday with the Administrator, and there are cases that the Inspector General brought; they are not huge in number. But there are some very disturbing examples that ought to be looked at. And we, the Federal Government, ought to be willing to admit we were wrong in some of these cases and either unduly punished people at all or punished them too harshly.

So I hope we will see this move. Fishermen are not the enemies of fishing. I don't know any fishermen who want to be the last people to do fishing. These are people who fish for a living, but they fish as part of a culture. In the city of New Bedford and the Town of Fairhaven that I represent, it is a very important part, not just of the economy, but of the whole social fabric of that community. These are people who do not want to fish out the oceans. There are some disagreements about how you do it, but they should be seen as cooperative. And it is especially the case that we will never have, given the vastness of the oceans, enough law enforcement people to make people comply with a set of rules that they could be unfairly done.

So it is in everybody's interest to promote a more cooperative spirit. I also believe that we in the Congress take some of the blame. I think the law that we passed in 2006, the renewal of the

Magnuson Act, created some of these problems. I think the law itself was too rigid. And because the rigidity is unsustainable, it has led to too much monkeying around with the rules and regulations. If there was more explicit flexibility, the regulations would not have to be as complex and as hard for everybody to deal with. So I hope this Committee will also be working with many of us. I know there is a large coalition of people who want to see the law amended, and we will make the job of everybody easier.

So I appreciate this chance to testify. I thank the Administrator for the time she has given. I admire the good work done by the Inspector General. I believe working together, we can transform an angry situation into a much more cooperative one, in the mutual interests of the environment, the fishermen, and the economy. I thank you.

Ms. BORDALLO. I thank my colleague, Mr. Frank from Massachusetts, for his advice and his words here this morning. I also would like to thank again my colleague, Mr. Jones and, of course, you are excused. We will continue on with the question period now of panel one. Thank you very much, gentlemen.

My first two questions are for Mr. Zinser. Mr. Zinser, did Director Jones authorize the destruction of documents while the Office of Law Enforcement was under investigation? Yes or no.

Mr. ZINSER. Yes, Chairwoman.

Ms. BORDALLO. Was this action authorized by you or by NOAA?

Mr. ZINSER. It was not authorized by me. And when I informed the NOAA leadership of what we found, they did not say that they authorized it either.

Ms. BORDALLO. As an investigator, do you find it surprising that someone under investigation, who is also trained as an investigator, would think it appropriate to shred the files?

Mr. ZINSER. Yes. I was surprised about it, and I guess what came to my mind, Chairwoman Bordallo, was I wonder what the Office of Law Enforcement would do if a fishing company that they were investigating had done the same thing during the course of their investigation.

Ms. BORDALLO. How did you learn of this event?

Mr. ZINSER. Well, we actually learned about it from an informant who called us. But the shredding had already occurred. We also coincidentally received an anonymous call the very day that it was happening, but it came into our hotline, and by the time that was processed, the shredding had been completed.

Ms. BORDALLO. Once you did learn of it, I assume you spoke with Director Jones about it. What was his explanation?

Mr. ZINSER. I did not speak to Director Jones personally. My staff spoke with him. In the summary of the discussion that I read, Mr. Jones indicated that they had been planning this type of record reduction for over a year, and that the timing was such that they had an opportunity to do it. And he expressed to my staff disbelief that anybody would be suspicious that such a shredding operation occurred. But we requested a list of files that had been destroyed. That was provided, and there were approximately between 170 and 180 files, and all but about 40 of them had been destroyed.

Ms. BORDALLO. I thank you. I have a couple of questions for Dr. Lubchenco. Do you know the last time that office undertook such an effort, shredding documents?

Dr. LUBCHENCO. I do not.

Ms. BORDALLO. How about you, Mr. Zinser?

Mr. ZINSER. No, Chairwoman. That is one of the things we are investigating, is what type of record retention schedule the Office for Law Enforcement follows, and that would be a key question in that.

Ms. BORDALLO. Back to you, Dr. Lubchenco. I am sure you can understand that to some on the outside, the timing of this house-cleaning would appear a little too coincidental and does not give the impression of an office that supports full disclosure of the facts. Is it appropriate to place Director Jones on administrative leave or temporarily replace him in the OLE pending the outcome of the investigation by the Inspector General?

Dr. LUBCHENCO. Madame Chairwoman, I first learned of this shredding incident on Monday of this week. I was quite concerned. I do think that it does not look good. I almost immediately called the Inspector General to consult with him and ask if he thought it was appropriate for us to take any steps to initiate an investigation. He told me that his office was in the process of launching an investigation into this and that they would keep us apprised of those findings, and we will act accordingly once that investigation has come to completion.

Ms. BORDALLO. So then in answer to my question about would it be appropriate to place Director Jones on administrative leave or temporarily replace him, would then your answer to that would be it depends on the investigation? Is that what you are telling us?

Dr. LUBCHENCO. I explicitly asked the Inspector General if he would recommend any immediate personnel action, and he said that he thought it would be appropriate to do the investigation first and then take steps.

Ms. BORDALLO. And, Mr. Zinser, how long do you think this investigation will take?

Mr. ZINSER. I don't think it will take that long. I think there are some key interviews we have to do. We have to look at their rules and procedures. I would imagine it would take within 30 days.

Ms. BORDALLO. So then you will make your findings to—you will discuss this on the temporary replacement or—

Mr. ZINSER. Yes. What we generally do, or what I try to do, is as we do our work, as we do our investigations, and as we do our audits and evaluations, I try to keep the management informed of what we are finding, and I have committed to the Under Secretary that as we proceed, we will inform her of what we are finding.

Ms. BORDALLO. All right. Thank you. I would like now to call on the Ranking Member, Mr. Cassidy, for any questions he may have.

Mr. CASSIDY. Thank you. It seems like, Dr. Lubchenco, you came in at a bad time. It seems like you inherited a mess because it seems like your data systems not only for this are not good, but I am hearing from fishermen that your data systems for monitoring catch shares is not very strong either. But focusing upon this, can you just comment why the IG found this lack of data systems for either the Office of Law Enforcement or the NOAA General Coun-

sel? I mean, was the previous group just totally kind of unaware of the issue?

Dr. LUBCHENCO. Congressman, I can't really speak to what was in place, or the rationale for what was in place before I came on board. I can tell you that it has been recognized for some time within NOAA that our mechanisms to track the flow of information concerning law enforcement cases has not been sufficient, and that for over a year now there has been in place steps to—there have been steps taken to put into place a better management system. It entails doing some new computer programming. I understand that there was an outside firm that was contracted to begin transferring our system over to this new system, and that that is in place.

This is one of the many areas that I have asked my General Counsel and head of NOAA fisheries to pay special attention to and to make sure that we have the right kinds of tracking systems and the right kinds of oversight and checks and balances so that we can be on top of this situation from here on out.

Mr. CASSIDY. Now again talking about the mess you received, I have a note before me that the Office of Law Enforcement made a similar report in 1998 regarding the relative mix of criminal investigators to I guess civil investigators. And 10 years later, it is still a problem. Any comment on why an apparently specific recommendation was not enforced?

Dr. LUBCHENCO. Congressman, I don't know the answer to that. We have committed to looking at what the response was to the 1998 report and trying to understand better what changes were made and why they were not sufficient to address the issues that were raised.

I do think it is relevant to note that NOAA agents and enforcement officers work closely with state law enforcement and state agents in their practices, and it is partnership with the state marine law enforcement officers and the U.S. Coast Guard.

Mr. CASSIDY. Can I follow up with you about that? Because I spoke to folks from my state about that, and they think it is a good system. I gather that they are doing a fair amount of the enforcement in Louisiana. So one of their concerns was that apparently the appropriations started off as 17.5 million whenever the program began several years, and it is still 17.5 million, even though they have been asked to take on more and more of the law enforcement responsibilities, so I gather. Is there any hope to increase this assessment? Because if NOAA is having a problem, maybe the states can pick it up sort of thing.

Dr. LUBCHENCO. Congressman, I don't know the history of those funds, but I will look into that and get back to you.

Mr. CASSIDY. Again, when I was reading the material, Mr. Inspector General, regarding Massachusetts, I wondered if maybe the reason that he didn't find that much civil enforcement was because the state agencies were doing the civil enforcement, and they just kept the more criminal activity for the Federal agencies. I am just trying to be fair, trying to understand the situation in the context of what I learned from my state folks. Any comment on that?

Mr. ZINSER. Yes, sir. First of all, the data systems are problematic, and it is hard to gather sufficient data on the types of cases, the types of violations, assessments. For example, the data systems

will not tell you how many permit sanctions have been issued or, for example, if they seize a catch and wind up auctioning off the catch, that data is not in the system. So the data is a problem.

The data that we looked at did include state enforcement efforts because when the JEA partners find Federal violations, they will write them up and transfer those to the NOAA Office for Law Enforcement. We think the JEA program is a good program. We actually issued a report on it last year. Our recommendations there were that the Office for Law Enforcement needed to work closer with the JEA partners to make sure they knew what the JEA partners were doing, and that the Office for Law Enforcement probably needed to have some system for going out and doing like quality inspections for their JEA partners. But we did do a report on that last year, sir.

Mr. CASSIDY. OK. Can I ask one follow-up question? Are the Joint Enforcement Agreements the same as the Cooperative Enforcement Agreements?

Mr. ZINSER. I believe so, yes, sir.

Mr. CASSIDY. OK. Thank you.

Ms. BORDALLO. I thank the Ranking Member, Mr. Cassidy. Now I would like to call upon my colleague, Mrs. Shea-Porter, from New Hampshire.

Ms. SHEA-PORTER. Thank you. Thank you both for being here. First I would like to associate myself with the comments of Congressman Frank. I come from New Hampshire, and what we have been hearing is very consistent with what the Congressman repeated. I am concerned about the lack of trust.

I really appreciate the fact that you are here, Dr. Lubchenco, and I appreciate all of the work that you are doing right now. But it seems to me that they need an ombudsperson at this point. I know back in the 1990s, there was one for NOAA, and it was not a congressional decision. I believe it was an executive decision to have that position. But it does appear that they need somebody that they could turn to that they felt was an impartial person who could hear the stories, maybe help them stay on top of some of the regulations so that there wouldn't be any of the resulting fines.

So I wonder if you thought that would be a good idea, something that you could support.

Dr. LUBCHENCO. Thank you, Congresswoman. That indeed was one of the suggestions in the Inspector General's report, and it is one of many of the recommendations in the report that we are looking at very, very closely. I have asked my General Counsel and my Director of NOAA Fisheries to take the lead in preparing our response to the Inspector General's recommendations. That is due on March 21. We are looking comprehensively at all of the recommendations in the IG report. That, in fact, is one of them.

Ms. SHEA-PORTER. OK. Thank you. And also, because the level of tension is so high right now, everything that is said or done is suspect, and they don't believe the science either, as you know. Are there any steps that you are taking to help work through that?

Dr. LUBCHENCO. I am greatly concerned by the less-than-good relationship that we have with many fishermen, and agree that because of the economic situation right now, because of the need for closures that are driven by our requirements to fulfill the law, that

there are increasing tensions, if you will. I think that it is very important for us to make extraordinary efforts to be working closely with the fishermen to help explain the rationale for many of our decisions, to work with them as partners to try to identify some of the solutions to many of these challenges, and certainly to have confidence in the data that are being used.

We are looking very carefully at how we might do a better job of that. It has only been highlighted by the Inspector General's report. My Director of Fisheries, Eric Schwaab, will have primary responsibility for helping us craft a strategy to improve our relationships because I think that is—I mean, we should have good relationships. We should be partners. We have the same interests, and I would like to move us to a point where in fact that is the case.

Ms. SHEA-PORTER. I am happy to hear that. I just would like to state for the record that we New Englanders that live along our coastline have saltwater in our veins. I know these men and women. They are a very proud, hardworking group of people. They have been by the sea for many, many years. They deeply care about the environment. They care about the quality and the quantity of the fish. And they really are honest and just trying to earn a living. There is a tension, you are right. But I would ask that we keep them, their families, and our traditions in mind. Thank you very much. I yield back.

Ms. BORDALLO. I thank the gentlewoman from New Hampshire, Mrs. Shea-Porter. I do have a couple more questions for the two of you before we bring on the final panel.

Mr. Zinser, what are the effects of having a nine criminal investigator to a one uniformed officer ratio in the OLE?

Mr. ZINSER. Well, I would say there are probably two things. One is that you have a workforce of criminal investigators, and understandably they want to do criminal investigations. That is what they want to do for their career. And the statute, particularly Magnuson-Stevens, doesn't have a lot of criminal provisions. So you have a criminal workforce who is basically assigned to do regulatory work. I don't think that is proper. I think the criminal investigators ought to be assigned to do felonies and serious criminal investigations.

The other impact is on the community. They should be able to know when NOAA comes and talks to them whether they are under regulatory inspection or under criminal investigation because those two operations are very different and have very different consequences. When a criminal investigator comes and talks to you, you could potentially wind up in jail. When a regulatory inspector comes and talks to you, you are going to get a regulatory infraction. That is the biggest difference in my mind.

Ms. BORDALLO. Do they read them the rights when they are investigating to the people? I mean, that is a question I would have certainly. Like you said, when they talk to them, just one word may make a difference.

Mr. ZINSER. Madame Chairwoman, a couple of the specific cases that we are following up on include allegations that members of the fishing industry have asked OLE agents, can I have an attorney, and the responses have been, it will only make it worse for you.

Ms. BORDALLO. Oh, really?

Mr. ZINSER. That is the kind of thing we are following up on.

Ms. BORDALLO. Thank you. Why do the U.S. Fish and Wildlife Service and the Environmental Protection Agency separate their civil and criminal law enforcement capacities?

Mr. ZINSER. The practice of separating regulatory inspectors from criminal investigators is for the purpose that I just mentioned. The constitutional rights of the citizens are impacted by criminal investigators very seriously, and you can't mix the two types of authority. Under regulatory authority, you must let the inspectors into your workplace because you are subject to their regulations.

Ms. BORDALLO. Yes. I think my question would have been NOAA does not.

Mr. ZINSER. Yes.

Ms. BORDALLO. But U.S. Fish and Wildlife and EPA does.

Mr. ZINSER. Yes. Most Federal enforcement agencies do.

Ms. BORDALLO. I see.

Mr. ZINSER. I believe the reason NOAA does not—and I think the explanation that we were provided is that having agents who have criminal investigative qualifications gives them more flexibility. They can do administrative cases, whereas if they were just administrative investigators, they wouldn't have the qualification to do criminal investigations. So I think the leadership of NOAA thought that having criminal investigators gave them greater flexibility in terms of being able to do both kinds of cases.

Ms. BORDALLO. In your opinion, if NOAA had heeded previous recommendations to enhance the participation of the Northeast industry and the fishery management process, would some current challenges have been addressed?

Mr. ZINSER. Yes. I think that the steps that are being outlined now, if they had been taken earlier, would have helped. I still think that the people on the ground in the Northeast, the NOAA folks stationed there that work there every day, I think their work relies on strong personal relationships with members of the community. I think that aspect of it is going to be very difficult to fix.

Ms. BORDALLO. Thank you. And now, Dr. Lubchenco, I would like to highlight several excerpts from the Inspector General's report, and if you could tell me whether you agree or disagree with the Inspector General's findings, and if not, why not.

"NOAA senior leadership needs to establish enforcement priorities that improve integration and coordination with its headquarters, fisheries management, and science center elements." Do you agree?

Dr. LUBCHENCO. I agree.

Ms. BORDALLO. "The attorneys in NOAA, the General Counsel for Enforcement and Litigation, do not have an internal operations manual, and have broad discretion resulting in a process of determining civil penalty assessments that appear arbitrary because such decisions are at the sole discretion of individuals, and there is no higher level review."

Dr. LUBCHENCO. As far as I know, that is accurate. I know that that is what the Inspector General found. I don't have any information to counter that.

Ms. BORDALLO. Do you agree or disagree there is a need for greater consistency in the penalty schedule?

Dr. LUBCHENCO. I absolutely agree.

Ms. BORDALLO. Are there no formal processes for documenting decisions regarding fine assessments and settlement amounts?

Dr. LUBCHENCO. I think the processes that are currently in place are insufficient, and that is one of the areas I am committed to addressing.

Ms. BORDALLO. Very good. Fishing laws and regulations are highly complex, making compliance difficult even with the best of intentions.

Dr. LUBCHENCO. That is absolutely true.

Ms. BORDALLO. All right. I want to thank you both for appearing today before the Committee. Now we will call on the third panel.

[Pause]

Ms. BORDALLO. The witnesses on this panel include Lieutenant Colonel Bruce Buckson, Deputy Director, Florida Fish and Wildlife Conservation Commission, Division of Law Enforcement; and Mr. James Walsh of Davis Wright Tremaine law offices.

I would like first to welcome Lt. Colonel Buckson and thank him for appearing before the Subcommittee. And as I mentioned for the previous panel, I would note that the red timing light indicates that your time is concluded. But we will include your full statement for the record.

Lieutenant Colonel Buckson, please proceed.

**STATEMENT OF LIEUTENANT COLONEL BRUCE BUCKSON,
DEPUTY DIRECTOR, DIVISION OF LAW ENFORCEMENT,
FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION**

Mr. BUCKSON. Thank you, Madame Chairwoman. I appreciate the opportunity to be able to address the Committee on this very important issue. I feel somewhat like a young man who is running up and down the sidelines of a game, and he is saying, put me in, coach, put me in, coach. And all of a sudden he is put in, and you come to find out that maybe he is not a team member. So I think that maybe some of the audience and the Committee members, it may help if I give a little bit of background on myself and also our agency, and clear up the appearance that maybe we aren't team members, but we are actively involved in fisheries enforcement, both state and Federal.

As I said, I am honored to be a part of this quest for excellence, and I hope my input about state perspective will be valuable to the Committee. Just a short introduction. As you said, I am Lieutenant Colonel Bruce Buckson with the Florida Fish and Wildlife Conservation Commission. And in the rest of the testimony, I will probably refer to that as FWC. It is a mouthful as the full name of the agency.

I am a Deputy Director of the Division of Law Enforcement, and I am in my 28th year of my career with the agency and predecessor agency. I served as a law enforcement representative on marine fisheries commissions and fisheries management councils for approximately 12 years. Although I still interact with the law enforcement committees and advisory panels, the Florida seat on these boards is officially held by one of my section leaders.

I have also served as the FWC law enforcement liaison to our Federal partners in the NOAA OLE Southeast region. In addition,

I currently sit on the NOAA OLE Joint Enforcement Agreement Advisory Committee. And I will refer to that as JEA in the future.

I think my few moments here with this Committee would be best spent if I focus on the relationship with fisheries enforcement in the state and Federal partnership and the value of that, and a little bit of a description on what that means. The State of Florida has been a partner with NOAA OLE through a Cooperative Enforcement Agreement, a CEA, since May of 1984. That is the oldest agreement that I have a copy of, though there has been some mention that there was a previous agreement. So well over a quarter of a century we have been involved as partners for fisheries enforcement at the Federal level.

This agreement, as well as those that followed, has been based on the premise that enforcement of all fisheries laws is in the best interest of not only the nation, but also the state. And further, it is based on the premise that there are state enforcement personnel that are fully trained and equipped and currently being used to enforce state fisheries regulations that could be great assets to the enforcement of Federal fisheries regulations.

Currently, the FWC, the Division of Law Enforcement, has 721 law enforcement positions. These are fully trained and equipped law enforcement professionals who patrol the woods and waters of the State of Florida. Over 500 of these law enforcement positions are frontline enforcement officers or investigators. Through our Cooperative Enforcement Agreement, the CEA, with NOAA OLE, each of these officers are provided training and authority to enforce select conservation regulations identified in the Cooperative Enforcement Agreement.

Late in the 1990s, we entered into contracts with NOAA OLE, which was the first step in providing actual funding for fisheries enforcement at the Federal level. These contracts were somewhere in the range of probably 1996, -7 or -8, somewhere in that range. I don't have the specific date. And this was one of the first times that we had an official way to get funding, Federal funding, for Federal fisheries enforcement.

This was also the predecessor to what is called the Joint Enforcement Agreement, the JEA. The JEA is the funding mechanism, a vehicle to get funding to the states to do Federal fisheries enforcement, based on the foundation of a Cooperative Enforcement Agreement. A Cooperative Enforcement Agreement actually provides the authorization, the deputization, whatever term you want to use, to the states. The JEA is what gives some funding to the state partners.

Through the CEA and the JEAs, the FWC—there are a lot of acronyms there. I feel much like a Federal employee now. Through the Cooperative Enforcement Agreement and the Joint Enforcement Agreement, our agency has been able to provide the use of approximately 500 patrol personnel for Federal fisheries regulations that may otherwise be outside of the fiscal realm of the NOAA OLE. These personnel for the most part are uniformed patrol officers. While these officers are not solely dedicated to enforcing Federal fisheries regulations, they have the ability and authority to address Federal violations when observed and, of course, when they are on targeted Federal fishery patrol hours. This is

clearly in the best interest of the conservation at the state and the Federal levels.

One key point that I would like to make is a description of how we view the JEA, the agreement with the NOAA OLE. The state relationship with NOAA OLE is somewhat similar to what we might view as a local police department having a uniformed patrol officer in a detective squad. The patrol officers are the visible first responders to accidents, crimes, and calls for service. The detective squad handles in-depth investigations, covert operations that are normally less visible to the public.

Conceptually, in the JEA or CEA, the state officers provide that patrol function, and the OLE provides the detective function. Obviously, there are necessary deviations from this concept with regard to specific cases, and quite often the egregious violations impacting state resources become joint investigations, where both agencies participate. However, the JEA concept strongly encourages the less egregious fisheries violations to be handled as state violations whenever possible.

This patrol investigation or detective concept seems to be extremely effective with the Joint Enforcement Agreements with the states and territories that are participating. The downside, as it was noted in the IG report, may be that NOAA OLE agents are somewhat less visible, even though the enforcement objective is being met. It is also important to note that NOAA OLE agents have skills and expertise that go beyond the state jurisdictional boundaries, and sometimes even beyond the training and experience of some of our state officers.

This has proven quite critical in addressing violations that have significantly impacted Florida's fishing industry and resources. It is exemplified by a NOAA OLE case involved a see-through dealer in the Florida Panhandle who over a period of time mislabeled hundreds of thousands of pounds of Vietnamese catfish as grouper. Grouper is a locally caught Florida fish, and very popular in fish markets and restaurants. This mislabeling was done to avoid paying tariffs on imported fish, but significantly impacted Florida fishers by undercutting the price of locally caught grouper.

This mislabeling issue gained widespread media attention and prompted investigative reporting. Reporters obtained samples of grouper from many restaurants and had the samples analyzed, only to find they were not, in fact, grouper. This impacted Florida fishermen, wholesale dealers, retail dealers, restaurants and consumers. I believe this case helped restore consumer confidence in the industry.

In trying to bring this to a close—and I apologize for going over the time limit—I think it is key that the successes to be able to be noted by the JEA and the Joint Enforcement Agreement and the relationship that we have with the NOAA OLE, it is a key to our success with resource protection. Thank you very much for the opportunity to be able to testify.

[The prepared statement of Mr. Buckson follows:]

Statement of Lieutenant Colonel Bruce Buckson, Deputy Director, Division of Law Enforcement, Florida Fish and Wildlife Conservation Commission, Tallahassee, Florida

Chairwoman Madeline Z. Bordallo,

Thank you for the invitation to provide comments to the Subcommittee regarding the recommendations in the recent report from the Office of Inspector General (OIG) of the U.S. Department of Commerce regarding NOAA Fisheries Enforcement Programs and Operations (Final Report No. OIG-19887). I have provided a summary of my related personal experience in fish and wildlife law enforcement at the state level, specifically Florida, in a separate document.

It is most appropriate to set the foundation of the testimony I am able to provide the Subcommittee through a brief introduction and historical background of Florida's relationship with NOAA Office for Law Enforcement (OLE). I will address the OIG's three primary concerns in reverse order.

I am Lieutenant Colonel Bruce Buckson, Deputy Director of the Division of Law Enforcement (DLE), for the Florida Fish & Wildlife Conservation Commission (FWC). I am in my 28th year of my career with FWC DLE. I served as Florida's law enforcement representative on Marine Fisheries Commissions and Fishery Management Councils for approximately 12 years. Though I still interact with the law enforcement committees and advisory panels, the Florida seat on these boards is officially held by one of my Section Leaders. I have also served as the FWC law enforcement liaison to our federal partners in the NOAA OLE Southeast Region. In addition, I currently sit on the NOAA OLE Joint Enforcement Agreement (JEA) Advisory Committee.

NOAA needs to reassess its OLE workforce composition to determine if this criminal-enforcement-oriented structure is the most effective for accomplishing its primary regulatory mission—

The State of Florida has partnered with NOAA OLE through a Cooperative Enforcement Agreement (CEA) since May of 1984, nearly 26 years. (Though it is believed there were agreements before this date, this is the oldest document available.) This agreement, as well as those that followed, are based on the premise that enforcement of fishery laws is in the best interest of the state and nation. Further, there are state enforcement personnel and equipment currently being used to enforce state fisheries regulations and these assets could be used to assist with ensuring compliance with federal fishery regulations as well.

This overview serves well as a launching point to provide some views on the NOAA OLE workforce composition as it relates to criminal investigators and uniformed officers. The FWC DLE mission is to protect Florida's natural resources and people through proactive and responsive law enforcement services. The FWC DLE mission is supportive of the Agency overall mission of "Managing fish and wildlife resources for their long-term wellbeing and the benefit of the people". Our law enforcement motto is "Patrol, Protect, Preserve".

The FWC DLE currently has 721 sworn law enforcement positions. These are all fully trained and equipped law enforcement professionals who patrol the woods and waters of the State of Florida and adjacent federal waters. Over 500 of the these law enforcement positions are frontline enforcement officers or investigators. This number does not include supervisors, pilots and specialty investigators. Through our CEA with NOAA OLE each of these officers are provided training and authority to enforce select federal conservation regulations identified in the CEA.

Since 2001 FWC has also had a Joint Enforcement Agreement (JEA) with NOAA OLE. The JEA builds on the foundation of the CEA's authorization and serves as a mechanism to provide NOAA OLE state partners with some funding for federal fishery enforcement efforts. There are approximately 26 states and territories participating in the JEA program. The JEA also provides an operations plan that is cooperatively created with each state's conservation enforcement agency and NOAA OLE.

Through the JEA, the FWC provides over 500 patrol personnel for federal fishery regulations that may otherwise be outside of current fiscal constraints of NOAA OLE. The majority of these personnel are uniformed patrol officers. Though these officers are not solely dedicated to enforcing federal fishery regulations, they have the ability and authority to address federal violations when observed and during targeted federal fishery patrol hours. This is clearly in the best interest of conservation at the state and federal levels.

The state relationship with NOAA OLE is analogous to a local Police Department's uniformed Patrol Officers and Detective squad. The Patrol Officers are the visible first responders to accidents, crimes and calls for service. The Detective Squad handles in depth investigations, covert operations and are normally less visible to the public. Conceptually in a CEA / JEA with NOAA OLE, the state officers provide the Patrol function and NOAA OLE provides the Detective function. Obviously there are necessary deviations from this concept with regard to specific cases. Quite often egregious violations impacting state resources become joint investiga-

tions. However, the JEA concept strongly encourages the less egregious fishery violations be handled as a state violation when possible.

This Patrol (State LE) and Investigation (NOAA OLE) concept is extremely effective and efficient. The downside may be that NOAA OLE agents are somewhat less visible, even though the enforcement objective is being met.

The NOAA OLE agents have a skill set and expertise to go beyond the state jurisdictional boundaries and sometimes beyond the training and experience of the state officers. This has proven critical in addressing violations that have significantly impacted Florida's fishing industry and resources. This is exemplified by a NOAA OLE case involving a seafood dealer in the Florida Panhandle who mislabeled hundreds of thousands of pounds of Vietnamese catfish as grouper. Grouper is locally caught and a popular Florida fish for markets and restaurants. The mislabeling was done to avoid paying tariffs on the imported fish, but also significantly impacted Florida fishers by undercutting the price of locally caught grouper. The mislabeling issue gained widespread media attention and prompted investigative reporting. Reporters obtained samples of grouper from many restaurants and had the samples analyzed, only to find many of them were in fact not grouper. This impacted the Florida fishers, wholesale fish dealers, retail fish dealers, restaurants and consumers. Though this dealer was not the only participant in mislabeling fish, the case helped turn the tide for local fishers and restaurants. I believe this case helped restore consumer confidence with regard to grouper, as well as other species.

Taking a criminal investigative approach to potential violations carries a higher standard of proof than civil violations. This serves primarily to protect the rights of those being investigated and ensure a quality investigation. As well, there is often a potential that an investigation of what begins as civil could lead to a criminal violation, in which case criminal investigative standards would need to be applied.

To summarize these comments in the context of the recommendation to reassess the OLE workforce there are three points.

1. There has been a clear value in having NOAA OLE investigators pursue some high profile and complex Florida cases.
2. The state conservation law enforcement contingencies are well complimented by the investigators of NOAA OLE. The value of this increased visibility for federal fisheries enforcement may not have been fully considered.
3. Possibly most important is the fact that there is a significant patrol function being accomplished by JEA partners.

Though some of these issues are acknowledged in the OIG report, it is critical to consider all potential impacts of a drastic change in NOAA OLE workforce composition and must be based on current circumstances.

My comments to this point have been directed toward the third recommendation, the reassessment of NOAA OLE workforce and specifically from a state law enforcement partner perspective with the benefit of two and half decades of experience.

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

The second OIG recommendation is apparently being addressed through GCEL initiatives to promote transparency, help ensure fairness and open lines of communication with the regulated community. Relative to this recommendation, FWC has recently had discussions with GCEL regarding a more broad use of the summary settlement process for less significant federal cases made by state officers.

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

The final portion of my comments will be less specific and an attempt to provide useful input on what I am viewing as a "quest for excellence". My role as a state agency partner and not a specific subject of the OIG report makes taking this view easier than it might be for my federal partners. The comments are simply observations of challenges facing conservation agencies. As well, I don't have the information to contest the accuracy of the OIG report, nor do I believe that is why I was invited to attend this hearing. The most important objective is to rebuild the public's trust with regard to the mission of protecting the living marine resources and their habitats.

From my observations there often seems to be a separation between law enforcement and the conservation managers and scientists within a conservation agency. This may be due to perceived differences in the mission of each group. Because of this it seems that law enforcement personnel in these agencies have often been viewed as "unique" or "outsiders" and sometimes simply a necessary evil within the agencies and by the public. Conservation managers and scientists are most interested in protecting the resources and less interested in how those protections are

implemented. The implementation of regulations is precisely what law enforcement divisions are responsible to accomplish.

Quite often the law enforcement personnel themselves have unintentionally helped create and often perpetuated the assumption that they are different by inhibiting cross divisional interaction. As an example, I remember a time many years ago when the law enforcement offices of a conservation agency at the headquarters building were only accessible to law enforcement personnel. This restriction was implemented by only allowing the elevators to stop on the law enforcement floor with the use of a special key.

Most interesting is that both law enforcement personnel and managers/scientists are headed toward the same goal post, conservation. Add to these somewhat differing viewpoints the impact both have on the stakeholders and there is potential for disharmony. We must also remember that most of the stakeholders are headed toward the same goal post as well.

As a member of the Law Enforcement Committee (LEC) for the Atlantic States Marine Fisheries Commission (ASMFC) in the mid 1990's, there was a continuing struggle for the LEC to become an integral part of the management process. It was clear that law enforcement was critical to the success of each fishery management plan, but input from the LEC in the planning process was not often requested. With the support of the Commission leadership, law enforcement personnel committed to participating in the fishery management boards, reporting the status of the fishery management plans and any enforcement concerns to the full LEC. Ultimately this information was provided to the full Commission. The ASMFC Strategic Plan was revised to include a specific goal to enhance law enforcement participation in the process. Today the law enforcement committee members are clearly a part of these management teams and the process.

I expect there are many other examples of failures and successes in overcoming these pitfalls for multiple jurisdictions. As well, there are programs and specific action items that can assist in resolving the issues, but any successful program begins with understanding it is a "people" issue and may require some movement from comfort zones.

I believe the Florida Fish & Wildlife Conservation Commission is doing a good job at working across Divisional and Sectional lines to further the agency mission. This requires a diligent effort. Recently, Colonel Jim Brown, the Director of the FWC Division of Law Enforcement, began meetings with other Division Directors to calibrate our enforcement priorities with their conservation priorities. I hope we find we are on track, but I expect we will find it necessary to tweak our operational plans. We have also planned to have similar meetings with our stakeholders around the state. This is designed to explain our mission, strategies and authorities while learning the needs and expectations of the stakeholders, ultimately building confidence through a transparent process.

I hope these comments prove helpful in rebuilding the public trust in NOAA's efforts to protect the nations living marine resources.

Response to questions by Lt. Colonel Bruce Buckson

Questions from Chairwoman Madeleine Z. Bordallo (D-GU)

1. Could you expand upon your discussions with General Counsel for Enforcement and Litigation regarding a more broad use of the summary settlement process for less significant federal cases made by state officers?

The Summary Settlement process is analogous to a traffic fine schedule. It sets clear parameters based on specific violations, which are then addressed by a specific penalty amount. These fines can be applied and options explained onsite which tends to be a good enforcement tool for both the Officer and the Recipient of the citation when dealing with recreational violators, lesser violations or violations that do not need further investigation.

FWC currently utilizes the Summary Settlement system while enforcing most violations inside the Florida Keys National Marine Sanctuary (FKNMS). This system has worked very well inside the FKNMS and we have been in negotiations with GCEL to try and employ this enforcement tool in the rest of our federal enforcement area of responsibility.

Questions from Republican Members

1. Are state law enforcement officials allowed, under the Joint Enforcement Agreements, to levy Federal fines or penalties? If so, what kind of guidance are they given on how to set these fines or penalties? If not, how are law enforcement actions taken by state officials under these agreements?

Under the JEA Agreement, we do not levy fines or penalties. That is the responsibility of the Southeast Region Office of General Council for Enforcement and Litigation (GCEL). FWC currently utilizes three different methods of enforcement as it relates to Federal fisheries enforcement.

The first type is: Written Warnings—this provides a method of documentation for all parties involved and generally serves as a correction notice for the recipient. This most often is employed with lesser violations or when the Officer's discretion determines that this is the most appropriate form to generate compliance.

The second type is: State Citation—which is used per the JEA for State Law violations that are detected during the course of Federal Fisheries patrols. We are additionally encouraged to handle most recreational cases with state enforcement practices that can be addressed by either state or federal charges.

The third type: Federal Citation—which is used for federal cases that follow NOAA guidelines for processing. These cases are documented on NOAA approved FWC forms following a NOAA procedural checklist provided by GCEL to ensure all pertinent information is provided in order to proceed with either a follow-up investigation or prosecution. No fine or penalty is levied by the state during interaction with the recipient.

2. How has NOAA funding for Joint Enforcement Agreements changed in the last ten years? Are the funding levels adequate for the responsibilities that NOAA would like you to fulfill?

With the passage of the Magnuson-Stevens Reauthorization Act in 2007, forty-five (45) states, territories, commonwealths and U.S. possessions became eligible to participate in the Cooperative Enforcement Program (CEP). Within the CEP, OLE currently has JEAs with twenty-seven (27) states, territories, and commonwealths. The primary goal of the agreements is to enhance enforcement of Federal laws and regulations. With that said, funding for the JEA Program has roughly stayed the same for the last 9 years remaining around the 14 million dollar mark and is overdue to be reviewed for increase. There are multitudes of criteria that support an increase in funding starting with increased operational cost for personnel and equipment. With increased population come increased demands on the shared living resources which are in need of protection. This creates a need for an increase in patrols, equipment and personnel. Any program that remains relatively level funded for more than a couple years falls behind quickly due to an ever increasing inflation rate as measured by the Consumer Price Index (CPI). In the case of the JEAs, the current funding in 2009 dollars should be around \$21.5M just to remain equal. The 2001 funding, in 2009 dollars, is only worth \$14.5M or has eroded by roughly 17% due to inflation. Please see the attached letters from the Gulf States Marine Fisheries Commission (GSMFC).

The demands that are put forth by the MSA to end overfishing have challenged law enforcement entities to keep up with the Fishery Management Councils attempts to comply with aggressive management deadlines. The implementation of closed and restricted areas (MPAs, HAPCs, Reserves, Preserves, Sanctuaries, Closures, Parks, Experimental Areas, Etc.) has come without any resources to assist with the enforceability of these closures. The "Protection" aspect has to be generated by a cooperative effort of law enforcement and other related staff. This is accomplished through patrol efforts that emphasize education and community oriented policing, in hopes that there will be compliance with these closures. Florida has over 170,000 square nautical miles of closures that range out to 200 nautical miles off the Florida coast. This is prior to implementing the most recent closure off the Atlantic coast of Florida.

At least 1 Federal Reserve, 1 Habitat Area of Particular Concern (HAPC), 4 Marine Protected Areas (MPA) and many other restrictions and closures including an almost entire closure of the east coast waters for snapper and grouper have been created off the Florida coast since the inception of the JEA Program in 2001. This has come with no increase in funding for enforcement.

The South Atlantic MPAs which include the "North Florida, St. Lucie Hump and East Hump", receive no specific funding for Law Enforcement. Law Enforcement was involved in the process of creation of the MPAs for approximately 10 years and stressed the need for additional funding to create support and accountability of

these MPAs. In an effort to level expectations of the Council, managers and stakeholders, the Law Enforcement Advisory Panel (LEAP) rated their ability to enforce the new MPAs. For example, the “North Florida” MPA is approximately 65 miles offshore to the closest edge and FWC currently has no available asset or staff funded in the area to support this mission.

Though I have cited examples specific to Florida waters and adjacent federal waters, some of the regulations similarly impact other South Atlantic coastal states. These are clear indications of a need to increase the JEA funding to address the ever changing demands to protect our shared living resources. As well, recurring funding is critical to the state’s long term commitment to add positions and equipment for federal fisheries enforcement.

3. Does the State of Florida have a data management system to track fisheries law enforcement actions taken at the state level? If so, do you also track actions taken under Federal statutes under the Joint Enforcement Agreement?

Yes, FWC has a data management system that captures all citations and warnings, and can extract the citations and warnings that are written under Federal statutes. This is an in-house system that is easily modified. In the last year it was modified to better capture federal fisheries data.

FWC also created a specific database that captures all JEA related hours, vessels encountered, boat captains, type of patrols, enforcement actions taken, etc.

4. How much coordination is there between the NOAA Office of Law Enforcement and the state law enforcement programs?

There is a substantial amount of coordination between NOAA OLE in the following areas: National Level—JEA meetings, VMS Meetings, Regular Conference Calls, JEA Advisory Committee; Regional Level—Southeast Region Meetings with the impacted states in order to discuss concerns, intelligence, etc. and Regional Leadership meetings between the states and NOAA staff; State Level—Meetings to discuss the continuity between state and federal priorities. NOAA agents assist with overall state level training for recruits and assist regions with training issues who are affected by law changes or need additional training concerns met. NOAA agents are invited to many regional and local meetings.

5. You note that rebuilding trust is the “most important objective” with regard to protecting living marine resources. Have you looked at the items that NOAA has announced in response to the IG report and do you think these will be satisfactory to rebuild trust?

I have reviewed NOAA’s response to the OIG report (10 items—February 3, 2010—Memorandum from Under Secretary Lubchenco to NOAA General Counsel Schiffer). These items are foundational in beginning the process of rebuilding trust.

The memorandum is thoughtful and strategic. It addresses five critical issues addressed in the OIG report and establishes immediate actions to mitigate continued criticism. The final five actions are planning items for long term solutions. There has since been a detailed follow up memorandum from NOAA General Counsel Schiffer to Dr. Lubchenco outlining the schedule of action plans.

The plans outlined recognize the critical need for transparency in all processes. It is also clear that the plans provide for another critical component in regaining trust by providing for interaction within NOAA as well as external stakeholders.

6. You note that the State of Florida calibrates enforcement priorities with the State’s conservation priorities. This seems to be a fairly common-sense thing to do. Do you have any insights into why NOAA does not appear to do this as well?

NOAA is a large and diverse agency and most of my interaction has been with the Office of Law Enforcement (OLE). Therefore, it would be presumptuous and misleading for me to assume I knew all of the inner workings and actions within NOAA. I can provide some general thoughts based on experiences within the Florida Fish & Wildlife Conservation Commission (FWC).

Ordering priorities is a constant challenge and dynamic. This moving target can only be kept on the radar screen through frequent validation from internal and external stakeholders. FWC has attempted to incorporate law enforcement staff and biological staff both at the Head Quarters and regional office levels. This provides opportunity to share and incorporate ideas across organizational lines and develop relationships. FWC incorporates the respective affected divisions to attend meetings, discussions and planning events in order to be part of the decision making process to ensure all aspects of change are entertained and levied in the best overall interest of our respective conservation priorities. This supplements the LE mission and

assists with gaining compliance and creating effective regulations. It is critical to maintain internal connectivity before building external relationships.

It should be noted that the follow up memorandum from NOAA General Counsel Schiffer to Dr. Lubchenco outlines a process to develop priorities.

CLOSING:

Once again, thank you for the opportunity to provide input on this important issue. I hope you find my comments beneficial to the process. Compliance with federal fishery regulations is important to state fisheries and harvesters. The state/federal partnership for enforcement of fishery regulations is an integral component in gaining compliance with these regulations and therefore critical to the fisheries. The fisheries are clearly shared marine resources. As a representative from an active state partner and a member of several committees, which include other state representatives, I can say that the states would like to be a part of the solution and offer any assistance we may be able to provide.

[The letter from the Gulf States Marine Fisheries Commission follows:]

March 29, 2010

The Honorable Gary Locke
United States Secretary of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230

Dear Mr. Secretary:

I am the Executive Director of the Gulf States Marine Fisheries Commission (Commission) and I am writing on behalf of the Commission and our five partner states, to support the continuation of the authorization and appropriations, specifically for the NOAA Cooperative Enforcement Initiative for Joint Enforcement Agreements (JEAs) between NOAA's Office of Law Enforcement (OLE) and the Gulf States.

All five of the Gulf of Mexico state marine agencies participate in the JEA program which serves as the mechanism to provide the region with funding for federal fishery enforcement efforts. The JEAs are one of the most successful partnership programs currently in existence between NMFS and state agencies, providing an 'operations plan' that is cooperatively created with each state's conservation enforcement agency and NOAA OLE. The JEAs have led to significant progress in creating uniform enforcement databases, identifying regional and local fishery enforcement priorities, and extending coordination to other areas, such as investigations.

The Commission has an active Law Enforcement Committee which plays an integral part in addressing our regional objectives. The five Gulf States, NOAA OLE, and the U.S. Coast Guard are represented on the committee, and representatives from NOAA General Counsel and the U.S. Fish and Wildlife Service also contribute on a regular basis. The funds provided for cooperative law enforcement agreements have, and will, improve efforts to protect, conserve, and manage our living marine resources.

The recent report from the Office of Inspector General (OIG) of the U.S. Department of Commerce regarding NOAA Fisheries Enforcement Programs and Operations (Final Report No. OIG-19887) highlights a number of problems and perceived problems internal to NOAA OLE, specifically in the Northeast. That report only provides a brief mention of the importance the JEAs play in the ability for NOAA OLE to conduct its investigations in that region and across the nation.

"One effect of OLE's current workforce composition, according to individuals from the industry and OLE with whom we spoke, is that its criminal investigators do not spend significant time on the docks, with dealers, or in fish houses, relying instead largely on officers from Joint Enforcement Agreement 15 agencies, thereby reducing OLE's overall visibility and routine interaction with the regulated industry. This can contribute to misunderstanding and increased tension within the current enforcement climate."
Final Report No. OIG-19887, Page 18.

Taken on the surface, the OIG report suggests a NOAA OLE bias toward criminal and high dollars infractions over uniformed agent and misdemeanor cases which are being handled by the states. When viewed in the context of the JEAs, there is a logical division of effort between the large federal cases, characterized by the OIG, and the smaller cases handled by the JEA partners. It is clear that the OIG report did not fully integrate the JEA program advantages and contributions within the federal program.

In the recent House of Representatives Committee on Natural Resources oversight hearing on "Setting the Bar for Accountability: Improving NOAA Fisheries Law Enforcement Programs and Operations", Lieutenant Colonel Bruce Buckson (Deputy Director of the Division of Law Enforcement for the Florida Fish & Wildlife Conservation Commission) testified to the value of the JEAs in federal enforcement. He suggested that:

"the state relationship with NOAA OLE is analogous to a local Police Department's uniformed Patrol Officers and Detective squad. The Patrol Officers are the visible first responders to accidents, crimes and calls for service. The Detective Squad handles in depth investigations, covert operations and are normally less visible to the public. Conceptually in a [JEA] with NOAA OLE, the state officers provide the Patrol function and NOAA OLE provides the Detective function. Obviously there are necessary deviations from this concept with regard to specific cases. Quite often egregious violations impacting state resources become joint investigations. However, the JEA concept strongly encourages the less egregious fishery violations be handled as a state violation when possible." February 26, 2010

The Commission fully supports efforts to increase funding of the JEAs to adequately provide resources which the states' enforcement agencies expend toward fulfilling federal initiatives. In addition, it has been brought to our attention that cost of operating the JEAs at the state level has increased since its creation in 2001 and funding, like many programs, has not kept up with the current U.S. and world economy. Any program that remains relatively level funded for more than a couple years falls behind quickly. In the case of the JEAs, the current funding in 2009 dollars should be around \$18.2M just to remain equal. The current funding, in 2009 dollars, is only worth \$12.4M or has eroded by roughly 17% due to inflation. We would like to formally request additional funds be provided to the JEA program, increasing it from \$15 million to \$30 million nationally. We all understand the hard times our current market economy is facing, but the work remains to be done in both homeland security and marine fisheries. The JEA program is being asked to complete more work at higher operating costs with less resources.

Thank you in advance for your consideration and if you have any questions or would like additional information, please do not hesitate to contact me.

Larry E. Simpson
Executive Director
Gulf States Marine Fisheries Commission

cc: Dr. Jane Lubchenco, NOAA Administrator
Dr. Eric Schwaab, NOAA Assistant Administrator for Fisheries
Chief Dale Jones, OLE
Gulf Congressional Delegation
Dr. Roy Crabtree
Dr. Bonnie Ponwith
C & P et al.
LEC/LEAP

Ms. BORDALLO. You are welcome, Colonel Buckson, for your input and testimony, and we will have questions for you later. Now I would like to recognize Mr. Walsh. It is a pleasure to welcome you, and you can begin your testimony.

**STATEMENT OF JAMES P. WALSH, PARTNER,
DAVIS WRIGHT TREMAINE LLP**

Mr. WALSH. Thank you, Madame Chair. It is a pleasure to be back before you again. As indicated in my testimony, I have a somewhat unique experience since I helped draft the Magnuson Act, and probably am to blame for the enforcement provisions which were borrowed mostly from other statutes, and probably were not as complete as should have been prepared at the time. But we had other things on our mind.

In addition, I was the deputy administrator of NOAA, and I was responsible for overseeing the General Counsel's Office and for en-

forcement cases. In private practice, I am a litigator, a trial lawyer, and I represent companies that have been charged both with civil penalties and with civil forfeitures. And in my case that I mentioned in my testimony in Guam, the captain of that boat was charged with a crime.

The message that I believe the OIG clearly sent in 1998, and again most recently, is it can be broken down fairly simply at the management level. The message is NOAA management be a client. What does that mean? Well, for lawyers it means that when you are in law school, you are told a very basic principle, and I think it is also true in real life, and that is if you represent yourself, you have a fool for a client. You should have a client. I can't act without a client. Today, I am acting without a client; I am acting on my own behalf. If you do not have somebody in the civil penalty system for you to go to and say, regional director, or whoever is heading fishery enforcement in the region, I want to bring a penalty case against so-and-so, and I want to charge the following penalty. Should I do so? Now the problem that the OIG has identified very directly—and Dr. Lubchenco has just admitted—is that the investigators and the enforcement lawyers operate on their own, sometimes apparently without a client. They basically have operated apart from other lawyers in NOAA. They operate apart from the management.

Again, there are reasons for this. I will personally take some blame because originally at NOAA we crafted the delegations of authority. We debated the issue as to whether the NOAA regional administrator should have some say over the setting of a penalty. And what happened is that we debated this issue, and felt that no, that might be too risky, or what might happen is that fishery enforcement cases would be brought solely on the basis of politics, or would not be brought solely on the basis of politics, an issue which everyone should be familiar with—with regard to the appointment of U.S. attorneys.

But I think what has happened is it has gone too far now. The delegations of authority should be looked at in the continuing review by NOAA because those delegations are important. All the people who should make the decision as to whether a case should be brought or not don't ever get together. So you have a situation where somebody says, well, you have violated a quota. But you have to have somebody from the management side that agrees with that.

I think that is one very, very important issue, and I hope that—and it sounds like they are going to address it. Another issue which I don't think is going to be solved by what Dr. Lubchenco has proposed—and that is the whole problem of the civil penalty schedule. Many of us, including those of us that worked at NOAA, have been somewhat dismayed by representing clients in the civil penalty process. The civil penalty lawyers wrote the rules. They, of course, select the penalties. They garner the evidence. NOAA hires the ALJs, although there are Coast Guard ALJs, and they are considered independent. Then, of course, they have almost exclusive authority to settle.

So when you go before a civil penalty proceeding, it is not like going into Federal District Court. You basically have a choice, pay

the penalty or try the case. If I go to Federal District Court, my case will go before one or two or even three dispute settlers to try to get it resolved before there is a trial, whereas the fisherman is offered a choice: pay the penalty or settle it, or suffer the consequences of going to trial. A trial is expensive. Most people settle and pay. I think they are going to have to review the civil penalty proceedings and the procedures, and they are probably going to have to subject them, I think, to a new rulemaking. And I think they ought to get experienced legal practitioners, although they probably won't like that—it makes it a little more difficult for them—and experienced Federal judges to help them craft rules that are more fair.

In the end, the biggest issue, of course, is the setting of the penalty. I can verify what the OIG has found, and a NOAA attorney does it. But it is even worse than they described it because what happens is that the penalty is selected; the NOAA attorney tells the administrative law judge, here is my penalty, and doesn't say anything more than, here is my penalty. And then I would move, for example, and say, well, all right, I want to depose someone or I want evidence for the basis of that penalty. And the lawyer says, well, I decided it, and you can't depose me because of the attorney-client privilege.

There is no question in my mind that that process—and I have to say, I have come to it recently to look at it more closely—it is just basically unconstitutional. There is no authority, in my opinion, for a charged party not to be able to discover the basis for a penalty. What are the facts? What are the judgments?

So in the end, I think those things need to be changed, and they probably can be changed very clear. I also have some suggestions for, I think—we need to change the law. We need to look at more robust enforcement provisions, say, in the Clean Water Act, which have been well thought out.

Let me conclude about whether this is a problem that is just within NOAA. It is not. These problems find themselves into Federal District Court either in criminal proceedings or civil penalty proceedings because, quite frankly, sometimes the NOAA attorneys—I mean, excuse me, the NOAA criminal enforcement agents really aren't very well trained, it would appear. I think that the case I cited in my testimony about Mr. Hayashi, where the Ninth Circuit Court of Appeals, which is generally considered fairly liberal, stated that—reversed the case. A criminal conviction of this man who shot at dolphins in order to scare them away from his fish. He didn't shoot at them; he shot away. And he was indicted, indicted basically on his own cooperative testimony. He was then tried before a magistrate judge, convicted, appealed to a full judge, an Article III judge. The conviction was then confirmed. It went to the Ninth Circuit, and the Ninth Circuit said, more or less in nice judicial language, how could you guys be so stupid to have done that.

This is rather stunning. And for Mr. Hayashi, he had a criminal charge hanging over his head for three years. He had to defend it. He had to use his own resources. You wonder how—I mean, the court said that the error came not from a misunderstanding of obscure interpretative gloss on the statute, but from a basic mis-

understanding of clear statutory and regulatory commands. And the court is saying, why did you do this?

In my case in Guam, even though we settled fairly—and I know that my client, the Marshall Islands Fishing Company, was very happy with the settlement, and we were appearing before a fine judge in Guam. They arrested the vessel near Baker and Howland Island. It was a long way from Guam a few days. They arrested the vessel. Of course, at that point, the Coast Guard is escorting the vessel back to Guam, which takes seven days. And a NOAA enforcement agent comes on board the vessel and starts interrogating the captain.

Now the question came up with Mr. Zinser with regard to when do you issue a Miranda warning. Well, you don't necessarily have to issue a Miranda warning, and every criminal investigator knows this rule, unless the individual is a target or is put in a situation where he is not free to leave. So in the case of the Marshall Islands Fishing Company, the captain was, of course, not free to leave. The Coast Guard was taking him back to Guam for the vessel to be bonded. And by the way, he was later charged with a crime.

So I deposed the NMFS investigator, and I said, well, you know, what was it about the fact that he was on this boat that led you to believe that you didn't have to give him a Miranda warning. Why didn't you tell him he had a right to talk to a lawyer? He wasn't going anywhere. The Coast Guard had arrested the vessel. And he looked at me with a stunned look on his face as if he had never been trained as a criminal investigator.

Then the captain—we put up a bond. The boat was released. And this I think is also the U.S. Attorney at work. And we brought the captain back after the vessel was released, put up a bond. He was deposed for the civil forfeiture case. He went to the airport, and he was arrested. The captain was arrested. And so, again we scratched our heads and said, "Well, why did you arrest the captain?" And they would say, well, there is evidence in the file that he didn't stop right away when the Coast Guard vessel in the middle of the ocean—which, by the way, was a buoy tender and not a cutter—why he didn't stop right away. And he, you know, basically was confused. So they charged him with a crime under the Magnuson Act for failure to stop, which is a misdemeanor.

We then filed a habeas corpus petition, saying, how could you possibly do this because, under customary international law, there are five Law of the Sea Treaty tribunal decisions stating that, under international law, once a fishing vessel has been seized in U.S. waters and a bond posted, the crew must go free. You can't arrest them for this crime.

So they scratched their head, and they admitted maybe they couldn't, and they let him go. But then they announced they were going to—and they did—convene a grand jury and indicted him under the terrorism laws for a felony, for failure to stop. And that warrant for his arrest is still outstanding. And you have to ask yourself, is there anybody who can sit down with these cases and give them a real world vetting to say, do we really have to do this. Do we really have to go this far? And in some cases, you will. But in those cases, like Mr. Hayashi's, you should never have gone that far.

And the new General Counsel at NOAA is a very highly skilled Justice Department attorney, and I am sure she is going to get on top of these things. But you are going to have to find a way to get to the individuals who are there now to change the way they are doing business and their attitude. And they can do a lot better. I think many of them want to do a lot better because I don't believe the kind of problems we see in New England are necessarily in the other parts of the country, but they crop up now and again. And I tend to have, you know, the larger cases, some of the more complicated cases, and they are just as difficult, and they are just as expensive, and I see the same things that are happening in New England. And I am glad that you are paying attention to it and that you are pressing for some resolution. And I thank you for the chance to testify again.

[The prepared statement of Mr. Walsh follows:]

Statement of James P. Walsh, Partner, Davis Wright Tremaine LLP

Chairwoman Madeleine Bordallo and Members of the Subcommittee:

Thank you for the opportunity to testify this afternoon on the important questions surrounding enforcement of our nation's marine resource laws and regulations by the National Oceanic and Atmospheric Administration (NOAA). My name is James P. Walsh and I am a partner in the law firm of Davis Wright Tremaine LLP, based in its San Francisco, California office. I am essentially a litigator, mostly in federal courts, but I also act as defense counsel in civil penalty proceedings and in an occasional criminal case. My litigation practice has been split roughly fifty-fifty between oil spill cases, where our firm represents those injured by oil contamination, and natural resources and business matters where we represent, among other clients, many in the fishing industry, primarily on the West Coast and in the Pacific. Recently, I defended the Marshall Islands Fishing Company, owned in part by the Government of the Marshall Islands, in a fishing vessel civil forfeiture case in Federal District Court in Guam, a case that was settled just before trial last May. I am also a member of the firm's Quality Assurance Committee and regularly provide advice to my colleagues on ethics and competence issues. I am not speaking on behalf of any client at this hearing today and the views I offer are purely my own.

Framing the Issues

I believe this is a very opportune moment for Congress to closely examine federal fishery enforcement practices. Today, I would like to address three issues with the Subcommittee: (1) the need for reform in the way NOAA internally manages its fishery enforcement cases; (2) the need to change in several important respects the manner in which administrative penalty cases are handled, in particular under the civil procedure regulations found at 15 C.F.R. Part 904; and (3) possible amendments to the enforcement provisions of the Magnuson-Stevens Act. I believe reforms at all three levels are needed to bring about a greater perception of fairness and balance to the NOAA enforcement process and to more strongly inculcate due process principles in the enforcement program at NOAA. Overall, my sense is that the lawyers and investigators at the agency are dedicated and well-meaning but, because of lack of management oversight and accountability and an absence of the strong advocacy that brings balance in our judicial system, the NOAA enforcement program has developed a kind of "tunnel-vision" about what is important and what is fair.

The bottom line is that fishery enforcement will always be primarily reliant on self-regulation and compliance. Punishing transgressions will definitely, in the right circumstances, be needed, and will often be welcomed by others in the same fishery. But heavy-handedness by enforcement officials can backfire, particularly in many of our fisheries where the regulations have become so incredibly complex and economic circumstances so stressful. I strongly believe that the basic fairness and due process principles I speak about today are not the domain of any political party or any public or private interest group, but are recognized and shared by all of us. Moreover, the enforcement problems at the agency cannot simply be approached as an academic or ideological issue. Practical solutions can and should be found.

Concerns about the NOAA enforcement have been brewing for some time. Many in the fishing industry have long grumbled about fishery enforcement practices, but most have remained silent and paid their fines. But, ironically, it was the U.S. De-

partment of Commerce's Office of Inspector General (OIG) that in September 1998 first identified serious management problems in the law enforcement program (Audit Report No. STL-9835-8-0001). The OIG found that leadership from the National Marine Fisheries Service (NMFS) was urgently needed to provide the Office of Law Enforcement with more specific policy guidance to assist it in addressing its goals and objectives and allocating its resources. NOAA management at the time apparently agreed with this and other recommendations. As the more recent OIG Report (Review of NOAA Fisheries Enforcement Programs and Operations; No. OIG-19887; January 2010) indicates, the problems have only gotten worse.

My Background and Experience

Let me provide some further background so that the Subcommittee can understand my perspective. In 1972, I was hired by Senator Warren G. Magnuson as staff counsel to Subcommittee on Oceanography of the U.S. Senate Committee on Commerce, Science and Transportation and later served as the Committee's General Counsel. I was also one of the initial staff members of the Senate's National Ocean Policy Study. Senator Magnuson tasked the staff of the Committee to implement ocean program recommendations by the 1969 Stratton Commission on Marine Science, Engineering and Resources. From 1972 until 1977, I was responsible for staffing the enactment each year of between 10-15 new laws, or major amendments to existing laws, which, among others, included the Marine Mammal Protection Act, the Endangered Species Act, the Coastal Zone Management Act, various fishery laws, vessel and tanker safety statutes, oil spill liability provisions, U.S. Coast Guard laws, and other maritime and ocean statutes.

One of those laws I helped draft was the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the first comprehensive federal fishery management program which applied out to the newly expanded coastal jurisdiction of 200 nautical miles. Three points are important to recall about enactment of that 1976 legislation. First, the federal government at the time had no nation-wide comprehensive fishery management and conservation program. Domestic fisheries were almost entirely regulated by individual coastal states to the three-mile coastal boundary at sea; federal management was limited to international treaty implementation and enforcement of the Lacey Act and some other specific but narrow laws. Second, enactment of the Magnuson-Stevens Act was viewed as a unilateral act under international law given that the U.N. Law of the Sea Treaty was still under development. The sponsors of the legislation, however, grew impatient with the international process and were concerned that any treaty would come too late to prevent serious overfishing by foreign fleets operating close off U.S. shores, particularly in New England. The Magnuson-Stevens Act is basically a conservation measure, but Congress has always also been concerned about management impacts on coastal fishing communities. Finally, enactment of the Magnuson-Stevens Act was the result of cooperative bi-partisan efforts between the House and the Senate and representatives of both parties. For the most part, the content of the Magnuson-Stevens Act was sui generis, something quite different than what had gone before, except perhaps for the enforcement provisions which were largely borrowed from other statutes.

In 1977, President Jimmy Carter appointed me to be the Deputy Administrator of NOAA, a position that then required Senate confirmation. Beginning in 1978, I became responsible for management of the agency's ocean programs, including early implementation of the Magnuson-Stevens Act. I also was responsible for agency testimony before Congress, assisting with the agency's budgets, and hiring and supervising agency leadership. I served in that position until August 1981. From January to August 1981, I also served as Acting Administrator of NOAA until Dr. John Byrne, President Reagan's selection for NOAA Administrator, was confirmed.

Therefore, my perspective on fishery enforcement derives from experience in each of the federal government's branches: legislative, executive and, most recently, the judicial.

Back to Basics: Ensuring that the rule of law controls and that prosecutorial discretion is reasonably exercised

The fishery management enforcement system managed by NOAA sits within the larger context of relevant constitutional limits on government and Congressional guidance on how enforcement is to be conducted. Several first principles must always be kept in mind:

First, the Fifth Amendment to the U.S. Constitution mandates that federal agencies may not deprive individuals of "liberty" or "property" interests without providing the charged individual with procedural due process. Under the Magnuson-Stevens Act, civil penalties may not be imposed without providing notice and an op-

portunity for a fair hearing before a neutral decision-maker. The hearing process must be structured with due regard for the risk of an erroneous deprivation of such interests.

Second, pursuant to the Administrative Procedure Act's (APA) formal hearing procedures, which are incorporated into the Magnuson-Stevens Act, the agency must bear the burden of proof on all matters, including the penalty to be assessed. The APA also provides the charged party with the ability to rebut the allegations of the agency, including by cross-examination of witnesses, which many consider to be the most important defense right for a charged individual or company.

Third, the due process clause requires that agencies must provide "fair notice of what conduct is prohibited before a sanction can be imposed." U.S. v. Approximately 64,695 Pounds of Shark Fins, 520 F.3d 976, 980 (9th Cir.). To meet this notice standard, a statute or regulation must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so he or she can act accordingly. Courts have also said that vagueness in a statute or regulation can encourage arbitrary and discriminatory enforcement by failing to provide explicit standards for enforcement officials. This due process requirement is particularly important with respect to violations of the Magnuson-Stevens Act, which generally are considered strict liability offenses where liability attaches without regard to intent or negligent behavior. And we are all presumed to know the law.

Fourth, the penalty assessed for a particular violation must, under the Excessive Fines Clause of the Eighth Amendment, bear some relationship to the gravity of the offense. In 2003, a Federal District Court in Massachusetts confirmed that this principle applied to forfeiture under the Magnuson-Stevens Act. *Roche v. Evans*, 249 F.Supp.2d 47, 59 (D.Mass.2003).

As you can see, these concepts are quite general in nature and require close attention to ensure compliance in actual application. While some of the controversy in New England emanates from the dislike of the entire fishery management system by some fishermen, there is a legitimate debate, I believe, about whether NOAA's fishery enforcement program is true to these basic principles.

One of the most important powers in any law enforcement program is the power of prosecutorial discretion: i.e., the decision to bring, or not bring, a particular case. This agency power is also implicated in the OIG's 2010 Report. A good way to highlight the issues associated with the exercise of prosecutorial discretion is to recount a fishery enforcement action that found its way to the Ninth Circuit Court of Appeals from Hawaii, a true horror-story for the fisherman involved. Mr. Hayashi and his son were fishing from a boat off Hawaii and porpoises were attempting to seize the fish they caught. To scare them off, Mr. Hayashi fired two rifle shots behind, but away from, the porpoises. This conduct was reported to NMFS enforcement agents and Mr. Hayashi was then charged with a criminal violation of the Marine Mammal Protection Act (MMPA). The main evidence appears to be statements cooperatively given by Mr. Hayashi and his son to the NMFS investigators. Mr. Hayashi was then convicted.

On appeal, the conviction was reversed. In its opinion, the Appeals Court made the following rather remarkable statements:

"Initially, we note that two substantial errors infected the proceedings before the magistrate judge and the district court. First, both parties, the magistrate judge, and the district court all employed the incorrect regulatory definition of the charged crime. Second, the district court's affirmation rested, in part, upon the erroneous belief that negligent acts are criminally punishable under the MMPA.

These errors affected the two most basic elements of every criminal prescription—the actus reus, or act itself, and the mens rea, or mental element required for criminal liability. The errors resulted not from a misunderstanding of obscure interpretive gloss, but from a basic misreading of clear statutory and regulatory commands. Although every lawyer involved was complicit in these errors, the responsibility for prosecuting the correct crime lies ultimately with the government.

We hold that reasonable actions—those not resulting in severe, sustained disruption of the mammal's normal routine—to deter porpoises from eating fish or bait off a fishing line are not rendered criminal by the MMPA or its regulations."

The case took nearly four years to resolve, left Mr. Hayashi with a criminal charge hanging over his head for all that time, and required him to invest his financial resources and his time into fighting a case that should never have been brought. NOAA should manage its fishery enforcement to avoid ever imposing this kind of horrible experience on those who are subject to its regulations.

Possible Reforms

A. NOAA/NMFS Management: Be informed and involved clients

Based on my own experience at NOAA, one of the agency's great strengths is the cadre of superb scientists who are at the helm managing its many important public tasks. I have great respect for NOAA and NMFS managers, both at the top and at the mid-level where much of the work gets done, and I admire their scientific experience and capabilities. However, that same strength is a weakness when it comes to law enforcement. Very few NOAA managers I worked with wanted to be involved, at all, in enforcement matters, because it was not their interest and requires a set of skills one does not develop as a scientist or as a tenured faculty member at a university. Consequently, top management at NOAA and NMFS do not regularly pay much attention to the fishery enforcement process, nor is it likely they fully understand how it should function best. After all, NOAA is not the Department of Justice.

During the time I was at NOAA, we debated how to deal with the agency's enforcement responsibilities in the context of formal delegations of authority. Delegations of authority are important in a federal agency and documents govern who is authorized to do what. Currently, nearly all management decisions under fishery management plans, including those that might be implicated in an enforcement action (i.e., was the quota actually reached?) are delegated to NMFS regional administrators. However, the NMFS Office of Law Enforcement, in the agency organization chart, reports to the NMFS Deputy Assistant Administrator of Operations, not the regional administrators. Finally, according to another formal delegation, the powers and authorities of the Secretary of Commerce to assess penalties is given exclusively to the Office of General Counsel, which reports directly to the NOAA Administrator. It is not clear how, if at all, these divergent delegations allow the proper level of management authority to come together to make decisions where the authority of each (NMFS regional administrator, NMFS administrator, NOAA attorneys, and NOAA administrator) must be brought to bear, which should be at the outset of the case.

The sum total of these management attitudes and delegations, over the years, has been to allow those in fishery enforcement, in the General Counsel's Office and NMFS Office of Law Enforcement, to do their own thing. In fact, individual lawyers within the Office of General Counsel appear to be in charge, admittedly with supervision by an Assistant General Counsel for Enforcement and Litigation, but not by top NOAA and NMFS management officials who are supposed to be managing the fisheries. Moreover, lawyers are the sole determinant of the penalty to be assessed. The discretion given the Secretary of Commerce in determining a penalty under the Magnuson-Stevens Act is quite broad. Although enforcement attorneys refer to a published penalty schedule, the assessed penalty can deviate from those suggested on the schedule and often do. The penalty schedule has never been subjected to public notice and comment that I can remember. It has been my experience that neither senior NOAA nor NMFS management is consulted in a penalty determination by NOAA enforcement attorneys. The recent OIG Report confirmed that this is, in fact, the practice and labeled it "arbitrary."

A basic legal/ethical issue is created by these enforcement arrangements: who is the client and are NOAA enforcement lawyers acting as both lawyer and client? Under all bar association rules, an attorney has ethical duties to his/her client, for example not to act without a client's approval, to keep the client fully informed, and to gain approval of the client for settlement purposes, among other decisions. There is also a very practical aspect to these duties: the client serves as a "check-and-balance" on the lawyer, and vice versa. Both have duties and responsibilities to fulfill in our system of justice. The suggestions of the 1998 OIG Report, in my mind, can be summarized as follows: NOAA and NMFS management—please act like an involved and informed client and guide the enforcement activities of the agency and do not simply leave all major decisions to the lawyers and the investigators. It has been my experience that, when it comes to litigation over fishery management plans in federal district court, the agency and its lawyers function together as attorneys and clients, but not necessarily in the enforcement realm. I believe that both the lawyers and agency management will be better off if the enforcement program operates consistent with the proper attorney-client relationship.

It may be useful to create an agency Enforcement Committee including NOAA/NMFS management and its lawyers, either centrally or regionally, to vet cases before they are filed and to follow them at key points through the process, either when going to Federal Court or when starting a proceeding before an Administrative Law Judge. Requiring the lawyers to explain their cases, and the basis for the requested penalty, to NOAA/NMFS management and then get client approval could well generate the kind of "down-to-earth" case assessments that would prevent the problems

noted in the OIG's 2010 Report. It might even prevent cases such as Mr. Hayashi's from ever going to court.

B. Make the Civil Penalty Process More Balanced and Fair

It is a general impression by most that go through the agency's civil penalty process, as set forth in 50 C.F.R. Part 904, that it is not fair and is heavily balanced in favor of the agency. Rightly or wrongly, that is the perception. One reason for this perception may be the fact that the agency writes the rules, brings the case, hires the administrative law judges, appeals the decisions to itself, and prevails more often than not. Most lawyers who practice in this area generally advise their clients to settle, at the outset of the agency demanded penalty amount, given the cost of going through the process and the likelihood of winning. In making this observation, I do not in any way wish to cast aspersions on those who function under the established guidelines and regulations. I have settled cases on fair terms for all parties. But the difficulties in the program are systemic and require broader attention.

Unlike the rules in federal district court, the agency's procedural rules were not hammered out through the involvement of those likely to be affected by its outcome. In my experience, those in the fishing industry do not plan to violate fishery management laws and regulations, but allegations of violations do occur, even to the most conscientious. NOAA's civil penalty rules were not subjected to the rigorous analysis of seasoned federal court litigators or experienced judges before they were enacted. Agency lawyers largely wrote them. For example, in the current civil penalty process, a charged individual is given a simple choice: pay the penalty assessed by the agency or request (and suffer the cost of) a formal hearing. In federal court, the agency allegations could be challenged in a number of ways prior to trial and there is constant pressure to settle cases without the need for trial. Independent judges and mediators are available to give the parties a third-party assessment of each side's case and to urge settlement. I have never tried a case in federal court without there being at least one serious settlement session. NOAA lawyers follow the agency rules and, thereby, get an advantage procedurally, at least in my opinion, over a charged party, given that settlement is purely at the discretion of NOAA attorneys and they set the penalties.

The assessment of the penalty under NOAA rules is the most seriously deficient aspect of the entire procedure. First, the NOAA lawyer assesses the penalty, more or less on his/her own. That lawyer-determined penalty amount is then presumed, based on past precedent, to be properly determined by agency in the proceeding and the charged party must then rebut the basis for the assessment. But because the lawyer determined the penalty, he or she cannot also be a witness in the same case and could refuse to allow any discovery of that assessment based on the attorney-client privilege. When this conundrum came on appeal to the NOAA Administrator in 2001, the agency ruled that the charged party could not depose or seek answers to written questions from the attorney based on the attorney-client privilege and the convenience of the agency. In the Matter of AG Fishing Corp., 2001 WL 34683652 (March 17, 2001).

In my view, the presumption that a penalty which has been assessed is correct under the facts and the law does not comport with statutory and constitutional due process, and is not authorized by the Magnuson-Stevens Act and is contrary to the APA (5 U.S.C. §§ 554 and 556). Moreover, the ability of a charged party to undertake discovery of the reasons for the assessed penalty, and to cross examine an agency witness at a hearing, is uncertain and, therefore, also violates fundamental principles of due process if not allowed. How else can one challenge the factual and discretionary bases for the assessment?

These and other problems are endemic to the practices and procedures under the agency civil penalty regulations. It is time for the agency to reconsider its rules of procedure in civil penalty cases, perhaps by appointing a task force to review the regulations that would include seasoned legal practitioners, agency lawyers, sitting administrative law judges, and perhaps even retired federal judges. Unfortunately, I did not see this task on the NOAA Administrator's February 3, 2010 list of actions to be taken in response to the recent OIG Report. I do not believe that the actions she has identified in that Memorandum will solve all the core problems identified in the OIG's 1998 and 2010 Reports.

C. Amend the Enforcement Provisions of the Magnuson-Stevens Act

Finally, it is time to consider amendments to the enforcement provisions of the Magnuson-Stevens Act, based on more than the views of NOAA's enforcement attorneys. One such possible amendment would be make much more specific the factors to be considered by the Secretary of Commerce in setting the penalty (16 U.S.C. § 1858(c)). The basis for a penalty amount must be more transparent and understandable.

Another issue that merits examination is the issue of forfeiture of vessels. It has been the position of the agency that any vessel is subject to forfeiture for a violation, at the discretion of the agency. In my case in Guam, we never resolved the issue of whether the Civil Asset Forfeiture Reform Act of 2000 (18 U.S.C. § 983) applies to fishery enforcement actions. That law sought to rein in runaway agency forfeiture actions that appeared to be based on the need for income rather than the dispensation of justice. For example, why should a fishing vessel be forfeited for a single violation which would only be subject to a \$140,000 civil penalty.

Another possible amendment would be to create a new category for judicial civil penalties, similar to the remedy found in the Clean Water Act (33 U.S.C. § 1319), for large civil penalty cases, such as for cases with over \$250,000 in assessed penalties. I would also favor a jury trial in such cases as well. I do not believe that the NOAA civil penalty rules were ever fashioned for large cases.

Finally, the Committee could consider making the Equal Access to Justice Act now in the Federal Rules of Civil Procedure available in civil penalty administrative proceedings.

I am sure others will have ideas for new legislation as well.

Again, thank you for the opportunity to present this testimony today. I would be happy to try to answer any of the Subcommittee's questions.

Response to questions submitted for the record by James P. Walsh

As requested, I am responding to the Subcommittee's questions regarding the fishery enforcement programs of the National Oceanic and Atmospheric Administration (NOAA), the subject of the hearing on March 3, 2010.

Question: How are the penalty schedules set in other agencies? Is there generally a public notice and comment period?

Although we have not done a complete review, other agencies have much more extensive enforcement policies than NOAA, which includes guidance on penalty amounts, and some have used the public notice and comment process not only to alert the public to agency policies but to obtain comment on their proposals as well. Of course the most elaborate process, that includes public notice and comment, is followed by the United States Sentencing Commission which addresses criminal penalties in federal court. See 28 U.S.C. § 994(a); U.S. Sentencing Commission, An Overview of the Federal Sentencing Guidelines (1998). Some agencies have used formal notice and comment to announce enforcement policies. Attached as Exhibit 1 is a copy of a recent final rule issued by the Office of Foreign Assets Control, U.S. Treasury entitled "Economic Sanctions Enforcement Guidelines" (74 Fed. Reg. 57593-608; Nov. 9, 2009). Other agencies, such as the Environmental Protection Agency (EPA) and the U.S. Coast Guard have adopted extensive policies that guide agency penalty assessment procedures. I do not believe they were subjected to notice and comment. Exhibit 2 (EPA's Policies) and Exhibit 3 (the Coast Guard's Policies). In contrast, NOAA's enforcement guidance and policies are much more limited and the agency has given almost total discretion to its enforcement attorneys in the setting of penalty amounts.

Question: You note that there was an Inspector General report issued in 1998 that also recommended changes in the law enforcement program. Why do you think the agency has not followed the recommendations of the report?

The top management of NOAA, including the Administrator and the General Counsel, simply did not focus management attention on the issues of enforcement, leaving decisions on the enforcement program to managers lower in the agency. With no management guidance, the program was left to continue as before. Clearly, Dr. Lubchenco has asserted management responsibility and is taking a fresh look at the program, which is long overdue.

Question: You note that you think the "penalty assessed for a particular violation...must bear some relationship to the gravity of the offense." Do you believe that NOAA law enforcement should have a data system that tracks repeat offenders?

The requirement that the penalty must bear some relationship to the gravity of the offense is a constitutional requirement under the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution. Therefore, the agency must document how it reached the penalty amount in a particular case and provide a rational basis for its decision. NOAA already has a data system for tracking repeat offenders.

Every civil penalty case that is resolved is in a database and is used each time the same person is charged with a new offense.

Question: Do you think that the fisheries general counsel staff should report to the Assistant Administrator for Fisheries rather than the Under Secretary? If so, why would this make sense and why do you think it has not been done?

I do not believe a change in reporting is required. What is required is a civil penalty charging and assessment process that brings the various offices together for a consensus before a case is charged. Note in the EPA and Coast Guard documents that the program and regional offices of those agencies are integrally involved in the decisions to bring a case and what amount of penalty is appropriate. NOAA allows its fishery enforcement attorneys to make these important decisions on their own.

As you know, NOAA has issued a proposed rule that would eliminate the presumption that a penalty amount assessed in a Notice of Violation and Assessment is correct. See 75 Fed. Reg. 13050-51; March 18, 2010. Further steps were announced in a Memorandum from the Administrator dated March 18, 2010. We hope the Subcommittee will continue to exercise its oversight as NOAA moves forward with improvements in its fishery enforcement programs.

If I can be of further assistance, please let me know.

Attachments

Ms. BORDALLO. Thank you. Thank you very much, Attorney Walsh. I am sure you have many interesting stories to tell, and I let you run overtime because this was my region you were talking about, and very interested to hear about it. And you did come up with some of your ideas, which will be solutions to some of our problems, hopefully, in the future.

I have some questions, just a couple of questions for each of you. Lieutenant Colonel Buckson, do you think it would be helpful if NOAA OLE agents were more visible?

Mr. BUCKSON. One of the—I will answer your question. But—

Ms. BORDALLO. Will it be yes or no or—

Mr. BUCKSON. Yes is probably the short answer. One of the challenges for conservation law enforcement folks is being able to participate as law enforcement folks unlike a normal PD or someone from the sheriff's office. We are confronting people with weapons on a daily basis. When we are in the woods, we run across people with guns all the time. A city police department would frantically deal with that situation in a much different way than we do. We have to have the ability to be able to communicate with our stakeholders, those folks that are using the resources, in being able to get a good grip on exactly when it is time to use the law enforcement parts of your career and your training. And the biggest part of that is done with interaction with those stakeholders.

Ms. BORDALLO. So more visible. Given your experience with the law enforcement committee for the Atlantic States Marine Fisheries Commission, how can law enforcement personnel be better made a part of the fishery management process, in your opinion?

Mr. BUCKSON. In my written testimony, I discussed that just a little bit. And the Atlantic States Marine Fisheries Commission is one of the Commissions—actually, all of them have really pushed hard to get the law enforcement committees involved in the process from the very beginning. And when I say involved in the process, I am talking about the management process. When they are developing regulations, historically what was found—and I believe we are getting better, but yet still not there—is regulation managers

would find a situation that needed to be addressed, and when they determined a way to address it, whatever the management plan might be, whether it was a size limit, a bag limit, a season closure, or tow times, for example, the length of time or period of time that you can fish, quite often there wasn't the opportunity for law enforcement to have input in that to give some sort of indication whether or not it is an enforceable regulation or not an enforceable regulation.

I think the process is both the councils and the commissions are beginning to look at that at least a little bit more. My experience with some of the councils down south is though we have provided input, we are very clear to explain to those councils whether or not we have the ability not just to agree with what the regulation is, but the ability, the staffing, the assets to enforce those regulations. Sometimes they still move forward with a different regulation than maybe what we would have hoped to be able to do.

Ms. BORDALLO. How are the priorities for Federal fishery regulations enforcement established with state partners? Just give me a brief answer on that.

Mr. BUCKSON. Yes, ma'am. In the State of Florida, we have meetings with the regional law enforcement officials with OLE. The deputy has special agents in charge with upper echelon staff. We just recently, within the last few months, had a discussion with them, and we basically discussed exactly what you said. What are your priorities? What would you like to see the state enforcement officers focusing their enforcement efforts on?

I don't have a list of those in front of me now, but we pass that on to our regional commanders, and that actually gives both agencies a very high level of comfort in knowing that we are at least approaching and attempting to enforce those regulations that are important to both partners, state and Federal.

Ms. BORDALLO. Good. So you do have a set of priorities, and you discuss it among yourselves. Attorney Walsh, what do you think of the recommendation of having ombudsmen to act as a trust intermediary between the fishing industry and NOAA?

Mr. WALSH. I see an ombudsman more on the general policy side. I see the ombudsman to be somebody you can go to with general policy considerations. But it seems to me in particular cases, we need better exercise of prosecutorial discretion. We need a fair process so we can sort out the good cases from the bad. And we need penalties that are fair. I don't think an ombudsman would be good for those particular cases, but it would be good to get the feedback because, as you know, sometimes it is not your friends that tell you the truth, it is your enemies. And sometimes it is good to have a place to go and complain.

Ms. BORDALLO. So the ombudsman—

Mr. WALSH. Might help.

Ms. BORDALLO. Might help, I see.

Mr. WALSH. Might help. But I really do think that the fundamental due process requirements in our constitution need to be strengthened as they are reflected in the NOAA civil penalty regulations. That is probably the best thing that can be done.

Ms. BORDALLO. Can you explain how your idea of an agency enforcement committee could be structured and implemented?

Mr. WALSH. Well, I do know that in other agencies—I have an associate who worked for the Federal Trade Commission, and they basically have, you know, sort of the directors of particular bureaus or branches or offices or managers get together with their lawyers and decide whether they should go to court. So what would happen, basically, either through general policy guidance or some specific cases would actually go fairly high up in the agency, at least to the regional administrator of the National Marine Fisheries Service, where the lawyer would basically say, here is my case, here is what I would like to do. I think this should be brought, or I think this should be referred to the U.S. Attorney, or I think this vessel should be seized. And the client listens to the case, as happens with my clients on everything I do, and the client gives feedback and says, OK, that is a good case, let us go with that. No, I think that case there may be weak.

You know, it is just a system where the lawyers explain what they want to do to their clients, who then give the kind of feedback you need from a client.

Ms. BORDALLO. Thank you very much, Attorney Walsh. I want to thank both of you for your thoughtful testimony, and for taking the time to be here. This has been quite a lengthy hearing. And I apologize that more Members are not present to hear what you had to say. But don't take it personally. We have everything on record. And it is just the way Congress works on a Wednesday. A Tuesday and a Wednesday and a Thursday. Those are the three busy days.

Mr. WALSH. Madame Chair, I think this is my 101st or 102nd time testifying before Congress.

Ms. BORDALLO. Well, then you understand perfectly. I want to thank all of the witnesses for their participation in the hearing today. And members of this Subcommittee may have some additional questions for the witnesses, and we will ask you to respond to these in writing.

In addition, the hearing record will be held open for 10 days for anyone who would like to submit additional information for the record. And if there is no further business before this Subcommittee, as Chairwoman, I again thank the members of the Subcommittee and our witnesses for their participation here this afternoon. And this Subcommittee now stands adjourned.

[Whereupon, at 4:08 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows:]

[A letter submitted for the record by Patrick Flanigan, Law Offices of Patrick Flanigan, Swarthmore, Pennsylvania, follows:]

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March 11, 2010

VIA FACSIMILE

Mrs. Madeleine Z. Bordallo, Guam, Chairwoman
Subcommittee on Insular Affairs, Oceans and Wildlife
1337 Longworth House Office Building (Insular Affairs)
Washington, D.C. 20515

Re: Setting the Bar for Accountability: Improving NOAA Fisheries Law
Enforcement Programs and Operations: March 3, 2010

SUPPLEMENTAL COMMENTS

Dear Madam Chairwoman Bordallo:

This correspondence is to supplement my prior comments of February 28, 2010.

a. Ombudsman: Not useful to address the enforcement matters raised in the Review of NOAA Fisheries Enforcement Programs and Operations (Final Report No. OIG-19887 January 2010). But such a program is long overdue and very necessary for dockside education and outreach purposes to the regulated industry. There are frequent complaints by fishermen stating that they telephone the NMFS office in Gloucester, MA and get different responses concerning regulatory questions or even refusal to answer a question for “legal” reasons.

b. As an attorney practicing in the area of NOAA enforcement I have encountered numerous due process issues, some of which I shared with the OIG during their investigation. One example I did not share with the OIG is a case where the NOAA attorney assessed a civil fine of \$1.24 million dollars and life-time removal of the fishermen from the industry. This is a civil case in which the NOAA attorney repeatedly stated to me that he had a personal dislike for the fisherman and wanted the captain of the vessel to “change” his testimony such that it would be more harmful against the vessel owner. During the civil proceedings, I motioned to compel the deposition of the NOAA attorney to query whether the attorney has complied with the (NOAA/OLE) Penalty Schedule guidelines, which set forth a balancing of numerous factors under “Aggravating/Mitigating Circumstances” in assessing the NOVA and NOPS. The ALJ denied the motion and further denied cross-examining the NOAA attorney during the hearing. While I understand the privileges raised by the NOAA attorney, the system is perverse. The NOAA attorney has sole discretion to evaluate the case, controls the record and what is produced, determines fines and penalties, has exclusive settlement authority and then goes before an ALJ as the opposing party—yet cannot be cross-examined. As I previously stated, the OIG’s findings are not surprising to the regulated industry because NOAA attorneys have long been acting as the enforcer, the judge and the jury.

c. There are many other due process concerns that occur at various stages of 15 C.F.R. §904 et seq. This correspondence is a specific request that there be congressional inquiry into these civil procedures with appropriate rulemaking to address the concerns.

Thank you for your consideration of this important matter.

Respectfully submitted,

PATRICK FLANIGAN

