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## IG report finds NOAA 'abusive conduct' vs. auction

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A federal inspector general's investigation found evidence of "overzealous or abusive conduct" in multiple actions against the Gloucester Seafood Display Auction by agents and attorneys of the National Oceanic and Atmospheric Administration.

Those acts included using "false information" to obtain a search warrant, "unauthorized" entry to the auction — a complex of offices, auditorium, cold storage and unloading docks on Gloucester's Inner Harbor — and attempting to impose a fine more than 10 times greater than warranted by the facts as determined by a judge.

The report concluded that the government had decided to "target" the business.

U.S. Commerce Department IG Todd Zinser's report, which runs more than 100 pages overall and was released in full two weeks ago, also cites a pattern of "arbitrary and untimely" action with a lack of "transparency" in the government's pattern of selective enforcement regarding a technical requirement for fishermen to have a so-called "yellowtail" authorization letter.

As outlined by the final report of the 1 1/2-year investigation, the government did not levy a single fine for not having the yellowtail letter while it was required, from August 2002 through November 2006.

But after the letter requirement was rescinded — and after NOAA in February 2009 served the auction with a massive 59-count allegation as the agency sought to close the business for 120 days and take more than

\$300,000 in fines — NOAA agents and litigators "retroactively" cited 14 fishermen, all auction customers, for not having had a yellowtail authorization letter at the time.

Many of those charged with not having a yellowtail letter told the Times — as reported in a May 2009 story — that NOAA law enforcement agents offered leniency or immunity for evidence implicating the auction in black market fish brokering.

"They were trying to get me to rat out the auction," one fishermen told the Times.

"I believe all of us with yellowtail letters were asked to help them put down the fish auction," said fisherman Bill Lee.

None of the fishermen took the offer, however. And after the announcement that the IG was opening his investigation in June 2009 — and the settlement of the case against the auction in March 2010, with no liability on the part of the auction and payment of \$85,000 — the yellowtail cases were dropped or settled with no more than token penalties.

The final report by the IG said the pattern of law enforcement action in the yellowtail episode "confirmed complaints of disparate treatment" of a "fish dealer." The auction is not named in the report, but the narrative of the campaign against the Ciulla family business make the references to the Gloucester facility unmistakable.

The call for an independent investigation of NOAA law enforcement practices emanated from the Gloucester community immediately after the February 2009 issuance of the 59-count NOVA or Notice of Violation and Assessment — the administrative law equivalent of an indictment — against the auction. The push for the probe came through a letter from the state legislative leadership and a caucus of fishing port lawmakers, asserting that NOAA law enforcement continued to "demean and harass" fishermen.

The multiple improper actions against the auction were among 19 specific incidents out of 27 that were studied and warrant further review, according to the report, but a much larger number of incidents remain in play — including some never previously brought to the IG's attention, according to announcements Monday by federal Commerce Secretary Gary Locke and his office.

Over the summer, as the IG was completing work on his final report, Locke stepped forward to become the visible face of the Obama administration's fisheries policy, more so than NOAA administrator Jane Lubchenco.

In April 2009, acting as appellate judge in the administrative law court system used to enforce fishery conservation laws, notably the Magnuson-Stevens Act, Lubchenco affirmed without review the decision of her predecessor, former NOAA administrator Conrad Lautenbacher Jr., to uphold a \$10,000 fine and 20-day closing penalty against the auction — even though the trial judge had thrown out the charges.

The IG cited this case — known derisively in Gloucester and New England as the "one-fish case" because of the allegation that a tote of cod in 2005 weighed a few pounds more than allowed — as an example of "overzealous and abusive" enforcement.

NOAA's senior enforcement and litigation attorney, Charles Juliand, had asked for a \$120,000 fine and a 90-day suspension, based on the theory that an earlier, one-count case against the auction actually comprised 24 prior violations because an auction employee was charged with misweighing fish 24 times.

Judge Peter Fitzpatrick found there was no violation; the auction testified that the weight written on the tote was an estimate, and the actual weighing of the catch hadn't occurred.

But Lautenbacher overturned the finding without any hearing and remanded the case for sentencing.

Another judge, Michael Devine, scoffed at Juliand's theory of 24 previous violations but had no choice but to approve the penalty that Lautenbacher had ordered.

The IG agreed with Devine. The report quotes his finding that the penalty sought by NOAA law enforcement was "contrary to the interest of justice" and "would essentially put the auction out of business."

Lubchenco's decision in April 2009 to uphold Lautenbacher's ruling was used in June as the justification for a press release campaign to wrongly tell fishermen the auction was about to be temporarily shut down. That effort was carried out by Andrew Cohen, the agent-in-charge of the Northeast regional offices in Gloucester who was shifted out of his post last month and this past week filed resignation papers to leave the agency.

Because the auction had appealed the Lautenbacher ruling into federal court, U.S. District Court Judge Douglas Woodlock chastised NOAA and Cohen for going into the public relations arena to impose a penalty in an unsettled case.

The use of "false information" to get a search warrant followed the "unauthorized entry" to the auction in November 2006, an incident documented previously through a Gloucester Police Department report. The search warrant and raid were aimed at building the government's case filed in February 2009.

The IG concluded that the government used the yellowtail letter to "target" the auction rather than protect fish stocks.

The report recommended "further review" of Juliand's rationale for seeking draconian penalties.

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