



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



*National Oceanic and
Atmospheric Administration*

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

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

Office of Investigations

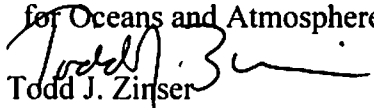




UNITED STATES DEPARTMENT OF COMMERCE
The Inspector General
Washington, D.C. 20230

September 23, 2010

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

FROM: 
Todd J. Zirser

SUBJECT: Final Report – Review of NOAA Fisheries Enforcement Programs and Operations

This presents the results of our examination of 27 specific complaints raised by fishermen, during our *Review of NOAA Fisheries Enforcement Programs and Operations*, alleging unfair treatment and overzealous enforcement by NOAA's Office for Law Enforcement (OLE) and Office of General Counsel for Enforcement Litigation (GCEL). Our complaint examination is a follow-up to our January 21, 2010, report, *Review of NOAA Fisheries Enforcement Programs and Operations*, and our July 1, 2010, report, *Review of NOAA Fisheries Enforcement Asset Forfeiture Fund (AFF)*. You requested that we review these matters based on issues and concerns raised by members of the fishing industry and Congress, particularly involving OLE and GCEL enforcement practices in NOAA's Northeast Region. This is our final report in response to your June 2009 request.

Since we issued our report in January, three Congressional hearings have added significantly to the record concerning this matter. For example, the Congressional record now includes documentation that a representative of the industry in the Northeast petitioned NOAA and the Congress in 2001 articulating many of the very issues that we reported on in our January 2010 report. Our January 2010 report focused on the overall management of the programs and operations related to fisheries enforcement. To illustrate the experience some in the fishing industry have had with NOAA dating back many years, the report included examples of the many complaints we received from the fishing community. These examples also provided information about the factors that contributed to the deteriorated relationship between NOAA and the industry, especially in the Northeast. However, our report stated that allegations of abusive treatment were not widespread, and we also included a summary of NOAA's perspective about the complaints we received.

As highlighted below, this latest report is being issued against a backdrop of initiatives and reforms to NOAA's fisheries enforcement program you have directed in response to our previously reported findings and recommendations. As such, our report addresses specific complaints involving enforcement actions and circumstances that occurred in the past—before you directed the reforms currently underway. Accordingly, some issues implicated by particular complaints may be resolved or mitigated by measures taken by NOAA to date in key areas such as leadership and management; policy, process, and regulations; workforce structure; and communications and outreach.



In addition, as noted below, the Department has advised us that the Secretary has decided to put in place a process to assess whether to take action to modify or remit the penalties in cases that have come to our attention during our review using his authority under Section 308(e) of the Magnuson-Stevens Fishery Conservation and Management Act. Under such a process, the Secretary will retain ultimate authority to decide what actions to take in the cases reviewed.

As the critical findings included in this report are driven by the activities and actions of some NOAA GCEL and OLE personnel in the Northeast, it would be unfair to discredit the reputation of all GCEL attorneys and OLE agents based on these findings. The actions planned by the Secretary and the reforms you have been implementing to promote equity and even-handedness in NOAA's enforcement processes should go a long way toward precluding claims of unfairness and bias, both in the Northeast and elsewhere. Certain reforms you have undertaken, such as instituting higher level reviews of proposed charging decisions and permit sanctions, as well as for proposed settlements, provide important safeguards against unilateral and unchecked decision-making by individual enforcement officials. Notwithstanding, NOAA is at a critical juncture and, in our view, must take affirmative, equitable action to restore the reputation and soundness of its enforcement program in the Northeast and ensure that corrective actions to address systemic issues are applied nationwide.

We are continuing to devote resources and attention to NOAA fisheries enforcement matters and will continue to do so during my tenure at the Department of Commerce to ensure that this important program receives greater independent oversight than it has received in the past. Next, we will be initiating a formal review of NOAA's progress in implementing the corrective action plans to which you have committed in response to our findings and recommendations with respect to (a) our January 21, 2010 report (<http://www.oig.doc.gov/oig/reports/2010/OIG-19887.pdf>); (b) our report in April 2010 concerning the destruction of OLE documents during our review; (c) our July 1, 2010 report on NOAA's Asset Forfeiture Fund (AFF) (http://www.oig.doc.gov/oig/reports/correspondence/2010.07.01_IG_to_NOAA.pdf); and (d) actions planned in response to the recommendations included in this report.

NOAA Corrective Actions to Date

In response to the issues we have reported on over the past eight months, NOAA has taken a number of measures to improve its fisheries enforcement program with needed transparency and accountability. These include the following immediate actions and longer term strategies pertinent to our findings in this report:

- **Leadership and Management:** Appointments of NOAA General Counsel; Assistant General Counsel for Enforcement and Litigation; Assistant Administrator, National Marine Fisheries Service; Interim Director of OLE; and Acting Special Agent-in-Charge of OLE's Northeast Division. As of this date, a senior GCEL attorney in the Northeast Region, who has been the subject of numerous complaints from fishermen and their attorneys, remains in position; however, process changes identified below have curtailed the unilateral and independent nature of this attorney's enforcement actions.
- **Policy, Process, and Regulations:** Requiring high-level review of all proposed charges for alleged violations and of all settlements by the General Counsel for NOAA; finalizing a rule to

place the burden of justifying a particular civil penalty or sanction on NOAA rather than the respondent in cases before Administrative Law Judges (ALJs); developing a new penalty policy, including a revision of the penalty and permit sanction schedules; creating or reviewing and revising NOAA law enforcement and general counsel operations manuals; providing explanatory notes to enforcement case files; tracking priorities; establishing a new case tracking database that links enforcement and legal case management systems; providing public access to information on charges brought and cases concluded; shifting oversight of the AFF from NMFS to NOAA's Comptroller; and requiring justification and approval from NOAA's Comptroller for any AFF expenditure greater than \$1,000.

- **Workforce Structure:** Freezing the hiring of OLE criminal investigators until a workforce analysis is completed and approved by the Under Secretary that addresses the appropriate mix of criminal investigators and civil enforcement officers.
- **Communications and Outreach:** Developing a communications plan to provide greater outreach to fishermen and fishing communities, and other fisheries stakeholders; increasing communications with the Fishery Management Councils, especially in the Northeast; and holding a National Enforcement Summit with over 60 stakeholders, which was broadcast via the internet and remains available on NOAA's website.

The following are links to relevant NOAA website postings regarding its actions in response to the results presented in our prior reports:

http://www.noaanews.noaa.gov/stories2010/20100121_inspectorgeneral.html (January 2010)

http://www.noaanews.noaa.gov/stories2010/20100203_inspectorgeneral.html (February 2010)

http://www.noaanews.noaa.gov/stories2010/20100318_enforcement.html (March 2010)

http://www.noaanews.noaa.gov/stories2010/20100803_enforcement.html (August 2010)

<http://noaaenforcementsummit2010.ecr.gov/> (August 2010)

Summary of Complaint Examination Results

Our January 2010 report referenced 11 specific complaints and we committed to do what we could to get to the bottom of those complaints. We also identified 16 additional complaints for further review from the 131 complainants with whom we spoke during our review through December 2009 (76% of whom were in the Northeast Region). These 16 additional complaints involved some of the most serious issues and concerns raised. Of the 27 complaints we examined, 26 were from the Northeast, and all 27 combined complaints pertain to matters that fall under the Magnuson-Stevens Fishery Conservation and Management Act. Our examination of the 27 complaints included interviews with complainants and, in some instances, their attorneys, as well as OLE agents and GCEL attorneys. We also examined NOAA files and documents that were available. (See Appendix B for a description of the methodology we applied in selecting these complaints for further review.)

As depicted in the table below, of the 27 complaints we examined, we confirmed 9—including cases involving false information in an affidavit for an inspection warrant; entry into a facility for

other than authorized purposes; excessive fines, including for first-time violators; and comparatively steep assessed penalties in the Northeast Region which leverage settlement while deterring respondents from taking their cases to hearing. We found 5 complaints to be not substantiated—including one involving alleged witness intimidation and harassment by OLE agents; and a complaint in which a Northeast fisherman suspected he was being unfairly charged with exceeding his permitted days-at-sea allocation. We found 13 other complaints inconclusive, due to factors such as unreconciled, divergent accounts from witnesses on either side of the issue and lack of documentary evidence. Complaints we classified as inconclusive include an allegation that GCEL unfairly delayed the sale of a fisherman’s vessel and release of the vessel’s permit for two years, which, according to the fisherman, caused undue financial hardship; and a complaint by a fish dealer that OLE agents searched his desk and files without permission and were unable to articulate their legal authority for it.

We have summarized the 27 complaints and the results of our examination in Appendix A. We have indicated those that, in analysis of the facts we were able to gather, were confirmed, not substantiated, or remain inconclusive. We have taken these complaints as far as we can in our oversight role. Our review of these 27 complaints will not address the public and Congressional requests that NOAA has received to make whole those fishermen who believe they were treated unfairly, either through apparent arbitrariness in how NOAA’s enforcement system functioned in their cases, or by what they view as overzealous enforcement.

Complaint Category	Classification			
	Confirmed	Not Substantiated	Inconclusive	<i>Appropriate for Further Review</i>
<i>Broad and powerful enforcement authorities led to overzealous or abusive conduct (13)</i>	3	4	6	7
<i>Regulatory enforcement processes are arbitrary, untimely and lack transparency (9)</i>	4	0	5	9
<i>Unduly complicated, unclear, and confusing fishing regulations (5)</i>	2	1	2	3
Source: OIG Total (27)	9	5	13	19

Complaints Appropriate for Further Review

Many of the individual complaints we examined are credible, have merit, and we consider appropriate for further review. As the complaints we examined vary in terms of the issues involved and their complexity, the 19 complaints we have classified as “Appropriate for Further Review” should, in our view, involve one or more of the following actions by NOAA and/or the Department:

- (a) create an independent process for equitable relief or resolution of past enforcement cases meeting appropriate eligibility criteria;
- (b) effect appropriate changes to regulations, policies, procedures, or practices; and/or

(c) timely address and remedy employee performance or conduct matters.

As we heard in March 2010 during testimony before the Domestic Policy Subcommittee of the Committee on Oversight and Government Reform, counsel for members of the fishing community in the Northeast Region have been petitioning NOAA and Congress for more equitable treatment by NOAA in its enforcement of fishing regulations since at least 2001. The primary result of our review of these cases is to confirm that the types of issues, first raised to NOAA as far back as 2001, pertaining to the Northeast Region, continued through the decade. While the reforms you have committed to will arrest those issues if effectively implemented, there is a compelling basis to look back at NOAA's enforcement cases to determine whether there are individual complaints and cases that require action to correct unfair enforcement.

The actions planned by the Secretary to establish such a process are significant and would address this finding. In addition, we are prepared to share our investigative results, as appropriate, in support of the process established by the Secretary.

Separate and apart of any independent process that may be established to look back, looking forward NOAA needs to establish some means of continual, direct interface with the fishing community to improve communications and reduce the adversarial nature of the relationship, particularly in the Northeast. As we recommended in our January 2010 report, and reinforced by our findings here, many of the complaints we heard are more suitable for resolution by an ombudsman reporting independently to the Undersecretary, and not an OIG investigation. While NOAA has concurred with and taken or announced steps to implement most recommendations we have made to date to improve its fisheries enforcement programs and operations, it has not yet acted in response to this recommendation. We recommend that this be seriously considered.

Additionally, or as an alternative to an ombudsman, NOAA's enforcement program would benefit from the establishment of an independent office empowered to advocate or advise the regulated community on violation avoidance, compliance assistance, and defense and settlement advocacy. We recommend that this also be seriously considered.

Additional Observations

Based on our examination of individual complaints and our previously reported results, we have several observations regarding NOAA enforcement practices. NOAA has a large and vital regulatory mission involving more than just the Magnuson-Stevens Act, and enforcement of the many regulations is a critical component of NOAA's successful completion of its mission. This includes sufficiently penalizing unscrupulous and recidivist operators, guarding against future violations of law through deterrence, and promoting a level playing field for the honest, hard-working members of the industry who respect the rules and support enforcement against the minority who do not. Nonetheless, some of what we have seen in our body of work suggests a new enforcement orientation within NOAA is needed to reinforce and ensure fairness. Beyond our prior findings and recommendations and what NOAA has done, or has committed to do, to implement our recommendations, NOAA also needs to focus attention on these important issues.

- ***GCEL’s Northeast Division fine assessments and number of charged violations (counts) appear excessive and intended to force respondents into settlement.***

Several cases we examined, supported by GCEL data cited in our January 2010 report (pp. 13-14), evidence a troubling pattern in the Northeast Region of respondents giving up their right to due process in having their cases heard before a third party. Simply put, the higher the assessed fines and number of violation counts charged, the greater the risk for respondents if they opt for a hearing before an Administrative Law Judge (ALJ). Such risk leverages respondents into settlements with GCEL, because if they fail to prevail at hearing, they face substantial monetary liability for up to the full penalty for the total of assessed fines and counts charged. There is also a lack of confidence on the part of fishermen that the ALJ process is fair, transparent, and impartial.

In general, GCEL’s standard letter to alleged violators transmitting Notices of Violation and Assessment (NOVAs) includes a paragraph informing them of their right to a hearing. The paragraph concludes with the statement, “The judge is not bound by the amount assessed in the NOVA, but may fix a penalty based upon his judgment of what is appropriate up to the statutory maximum of \$140,000 per count.” This language, coupled with NOAA regulations that provided a standard presumption that NOAA’s assessed fine was appropriate when brought before an ALJ, makes it understandable that fishermen have perceived the system being unfair so as to pressure them into settlement. In response to our January 2010 report, NOAA has changed the presumption requirement, now properly placing the burden on NOAA. Still, GCEL’s letter transmitting NOVAs should fairly inform respondents that the ALJ may independently decide on a penalty at, below, or above the amount assessed in the NOVA.

GCEL data for closed cases between July 2004 through June 2009 shows the Northeast as the region with the greatest percentage reduction from initially assessed to settled fine amounts (approximately \$5.5 million assessed to approximately \$1.6 million settled—a *nearly 70% reduction.*) A senior GCEL enforcement attorney in the Northeast Region explained the strategy for settlement to us as follows:

“A 50% monetary settlement, absent an inability to pay or other mitigating factors, is a common practice. This gives the respondent an incentive to settle pre-hearing, but – as long as the initial assessment is high enough – ensures that the goals of punishment and deterrence are reached.” [emphasis added]

Congressional testimony in March 2010 given by an attorney representing fishermen in the Northeast, included the following on this issue:

“Although defending an enforcement action is costly, most fishermen, having little faith in the administrative process and judges paid by NOAA, decide to seek a settlement because of the threat in the NOVA that by challenging it the fine can rise to \$140,000, and the mental stress from having to deal with the concept of heavy fines hanging over them for months to years.”

Additionally, the attorney informed us that in discussing one particular case, the same senior GCEL attorney in the Northeast told him the fine could increase to \$140,000 if challenged at

hearing; this is consistent with and further evidences the disincentive, created by the senior GCEL attorney and GCEL, for respondents to take cases to hearing. In addition to changing the regulation to place the burden of justifying penalties or sanctions on NOAA rather than the respondent in cases before ALJs, NOAA has committed to reforming the penalty schedule to reduce the broad discretion of their attorneys and thereby reduce the potential for abuse of such discretion.

- ***The words, and reported words, of a GCEL senior enforcement attorney in the Northeast foster a perception of predisposition against certain fishermen and their counsel. Such a perception contributes to a loss of confidence in the ALJ system.***

The below remarks by a senior GCEL attorney in the Northeast Region—in an email, selected examples from official enforcement case file notes, and a comment made in public—are, in our view, highly inappropriate. They support an adverse perception in the Northeast regarding the attorney’s mindset and posture, and thus that of GCEL, about assessing fishermen fines and penalties in NOAA’s regulatory enforcement cases. This perception, in turn, has been imputed to the ALJ system.

- In a September 2007 email to another Northeast GCEL enforcement attorney, the senior GCEL attorney stated, “**I’m definitely interested in whacking him civilly (with a kid glove?) too.**” This email was in reference to a fisherman who was convicted on a state misdemeanor charge of assaulting a state JEA officer by attempting to throw a fish overboard and struggling with and pushing the officer in the process. The state ordered the fisherman to pay a \$500 fine plus court costs, but no incarceration was imposed. The senior GCEL attorney told us that the fisherman had ample money to pay and that the \$500 state fine would not be a deterrent for assaulting an officer. Based on this expressed opinion, the senior GCEL attorney proposed a \$60,000 civil fine for one count of interference with an officer, which was ultimately settled for \$20,000. Thus, the senior GCEL attorney used NOAA’s authority to also punish the fisherman federally through a leveraged fine that was *4,000 percent greater* than that which was imposed in the previously adjudicated state case.
- In October 2007 case file notes regarding the above respondent and matter, the senior GCEL attorney annotated, “**Jack up the fine to the proper level.**” [emphasis in original]
- On a copy of a respondent’s letter to NOAA’s Northeast Regional Administrator in September 2002, the senior GCEL attorney wrote “**Bad move**” in explicit reference to the fisherman’s statement that he had consulted with a particular attorney.
- On this same letter from the respondent, the senior GCEL attorney annotated, “**You sure did fail, buddy...**”, in direct reference to a respondent’s assertion in a letter that he regrettably failed to notify NMFS that an engine upgrade had taken place. [emphasis in original]
- The senior GCEL attorney also wrote on the copy of this letter, “**Tell it to the ALJ!!**”, in reference to the fisherman’s assertion that “NMFS had given me every reason to believe that I could proceed with the installation of the engine.” The senior GCEL attorney further

annotated, **“I think not, sir!”**, in reference to the respondent’s closing sentence that he tried to act in good faith. [emphasis in original]

- In other case file notes, the senior GCEL attorney wrote, **“Same day!? – FAT Chance!!”**, in reference to a respondent’s reported assertion to OLE on a particular date in November 2007 that the respondent had a days-at-sea lease in process and expected it to be transacted that same day.
- Regarding this same respondent, the senior GCEL attorney also made an annotation on a NOAA document containing another person’s handwritten notes. The other handwriting included the statement, “Close friend of [attorney representing fishermen] – good guy.” The senior GCEL attorney circled this statement with a marker, drew an arrow to the name of the attorney, and wrote **“that’s gonna ‘help’ him??”**
- In a court filing, counsel for a fish dealer identified a fisherman who reported witnessing the senior GCEL attorney characterize the dealer as a **“lying piece of s***.”** We spoke with the fisherman, who gave a consistent account and also told us the senior GCEL attorney had expressed that he would **“get him [the fish dealer].”** The senior GCEL attorney acknowledged to us that he has used words to the effect of the former term on occasion. He told us about a particular occasion where, in a public place (a gym), he read a newspaper article about an enforcement case concerning the dealer’s facility and exclaimed **“lying sack of s***”** to a NOAA colleague who was with him. He further told us that as he uttered this, someone he thought may have been a fisherman came up behind them. The senior GCEL attorney told us his use of the above term concerned an individual involved with the article (whom he declined to identify to us), but not the fish dealer, and he denied ever saying that he would “get” the dealer.

When asked about his annotations in the case file notes, the senior GCEL attorney’s reaction was telling us he had assumed nobody would ever see them. We found no comparable remarks in the case files and notes of the other two GS-15 senior enforcement attorneys in GCEL’s Northeast Region.

Beyond the foregoing statements, the Congressional record includes sworn testimony in March 2010 from one fisherman, who recounted, as follows, the senior GCEL attorney referring to the Administrative Law Judges (ALJs) who hear NOAA’s enforcement cases, as **“my judges”**:

“I was fined by [the senior GCEL attorney] \$27,000 and I called [my attorney]. As time went on, [the senior GCEL attorney] said that if you don’t pay \$27,000 right now, if you want to go in front of one of my judges, you’ll be paying \$120,000 to \$140,000. I settled for \$25,000 bucks. I was scared to death. They wouldn’t give me the boat back. I couldn’t get the boat back to fish and make payments until I paid the fine.”

Such sworn testimony implies that this senior GCEL attorney in the Northeast Region believes that the ALJs who hear NOAA enforcement cases will decide cases in NOAA’s favor regardless of the evidence. While the **“my judges”** statement was denied, the proclivity for setting fines initially high to pressure settlement, in conjunction with undeniable enforcement case file annotations exhibiting animus towards members of the regulated community and

inappropriate behavior, as shown above, lend significant credibility to this fisherman's account before Congress. Such written remarks, actions, and predispositions from a federal government attorney empowered with virtually unchecked prosecutorial discretion constitute serious lack of judgment and conduct unbecoming a federal government attorney charged with enforcing the law.

As noted in our January 2010 report, we concluded that a lack of management attention, direction, and oversight led to regional enforcement elements operating autonomously, particularly in the Northeast. When interviewed, the then-Assistant General Counsel for Enforcement Litigation told us he had afforded "maximum discretion" to GCEL's attorneys and gave them independence to apply their professional judgment and discretion. Moreover, the Deputy Assistant General Counsel for Enforcement Litigation advised us that GCEL attorneys had received inconsistent oversight and guidance.

Regardless of whether the senior GCEL attorney ever referred to the ALJs as "my judges," and, if so, whether it was uttered purposefully, as a result of arrogance, or otherwise, a perception nonetheless exists in the Northeast that the attorney—along with the office—has lost proper perspective and harbors bias. Such a perception, in turn, has resulted in loss of confidence in the ALJ process by members of the fishing community in the Northeast. In general, irrespective of motive or intent, when evidence reflects that government attorneys have lost critically important perspective on their duty and obligations, the agency must consider the impact and ramifications that such loss might have and act to safeguard the integrity of the affected program.

- ***While GCEL guidance provides for prior violations as an aggravating factor justifying increased penalties, it does not conversely identify first-time violations as a mitigating factor.***

GCEL's Penalty Schedule states, "NOAA enforcement attorneys are expected to use their prosecutorial discretion in determining the appropriateness of a recommended penalty or permit sanction, basing their decisions on the particular facts of the cases, including aggravating and mitigating circumstances." During our examination, we identified several instances in which first-time violators were assessed at the higher end of the penalty schedule. In one case we examined, a fisherman increased the horsepower of his boat's engine in violation of the regulations. Although it was his first offense, GCEL charged him with three counts totaling \$150,000 and a 270-day suspension—the maximum penalty. In another case, two fishermen operating as partners were fined a total of \$270,000 and their permits were suspended for one year for failing to file all required fishing trip reports, despite this being their first offense. While we recognize that some first-time offenses would warrant maximum assessed penalties, to address the issue of perceived excessive penalties for first-time violators, GCEL guidance should explicitly identify first-time violations as a mandatory mitigating factor.

- ***Although fishing regulations promulgated by the Fisheries Management Councils are complex and can change significantly, NOAA appears overly rigid in its interpretation and application of provisions of the regulations. This contributes to industry’s negative belief that NOAA only exercises its regulatory discretion to its own benefit.***

While NOAA’s fisheries enforcement program operates according to a strict liability system, an element of discretion in the issuance of some citations and in the assessment of penalties is authorized. In our examination, we found an instance where NOAA refused to exercise discretionary leniency in a case that appeared appropriate for such, citing absence of specific policy direction and taking the position that doing so leads them down a “slippery slope.” Specifically, a fishing vessel experienced a mechanical breakdown and returned to port, never setting its gear to capture fish, yet NOAA charged the vessel for fishing during that time because it has no policy to credit vessel days-at-sea for mechanical breakdowns and NOAA officials did not want to set a precedent even though it would have promoted a fair implementation of the regulations.

Also, we confirmed complaints of disparate treatment and inconsistent penalties for NOAA’s enforcement of restrictions on fishing in yellowtail flounder stock areas. During the approximate four-year period when fishermen were required to have a NOAA Letter of Authorization (LOA) to fish in yellowtail flounder stock areas in the Northeast Region, GCEL did not impose a single fine on any of the 7 cases that were referred to it for enforcement action. However, after the LOA requirement was eliminated, GCEL nonetheless retroactively charged 14 LOA cases—one of the original 7 and 13 new—resulting in assessed penalties ranging from \$1,600 to \$58,700. All 14 cases were charged solely for the referenced LOA violation. These cases caused many fishermen to believe that GCEL was levying fines to target a particular fish dealer facility and those who did business there, rather than enforcing statutes and regulations for the expressed purpose of protecting the fish stock.

- ***Untimely enforcement actions impair both deterrence and the ability of respondents to defend themselves.***

In our review we confirmed complaints about the time-consuming, lengthy process which makes it difficult for fishermen to defend against charges, because of such problems as having to recall details from a single incident years in the past. Delays in case disposition fuel the industry’s negative perception of NOAA’s motives and clearly exhibit NOAA’s willingness to pursue stale claims and call into question the integrity of NOAA’s adjudicatory processes. In one case we examined, nearly two years after a fisherman allegedly exceeded the limit for codfish on a single day, OLE notified him of the violation. The fisherman eventually settled the case in September 2009, forfeiting 10 days-at-sea (DAS) from his 2009 DAS allocation, nearly four years after the date of the alleged violation. As an OLE agent told us, in concurring with this observation regarding the timeliness of GCEL enforcement actions, “Justice delayed is justice denied.” Our findings illustrate that NOAA needs better case management policies and guidelines for timeliness. We note that NOAA is working to reduce its backlog of enforcement cases, including for the purpose of improving timeliness.

- *OLE agents lack necessary guidance to ensure that warrantless inspections are conducted properly.*

We found that OLE agents have been provided limited training and inadequate guidance for warrantless inspections, particularly concerning the extent of their permissible access to inspect records and documents and, in at least one significant instance, to properly state the nature and purpose of their entry into a facility. As such, NOAA should review its regulations and internal guidance concerning warrantless inspections and provide detailed direction to OLE agents. While OLE internal policy addresses the administrative inspection warrant process, it does not guide the discretion of enforcement agents conducting warrantless inspections. Without such limitations, NOAA risks subjecting regulated entities to acts that could constitute unconstitutional searches and seizures. This could violate citizens' constitutional rights and result in meritorious cases being successfully challenged.

Complaint Examination Findings

See Appendix A, "OIG Examination of 27 Selected Fisheries Enforcement Complaints," for a classification breakdown and summary analysis of the 27 complaints we examined.

Recommendations

- The 19 complaints we have classified as "Appropriate for Further Review" should, in our view, involve one or more of the following actions by NOAA and/or the Department:
 - (a) create an independent process for equitable relief or resolution of past enforcement cases meeting appropriate eligibility criteria;
 - (b) effect appropriate changes to regulations, policies, procedures, or practices; and/or
 - (c) timely address and remedy employee performance or conduct matters.
- As previously recommended in our January 2010 report, NOAA must seriously consider establishing an ombudsman position for the fishing community that reports independently to the Under Secretary.
- Additionally, or as an alternative to an ombudsman, NOAA's enforcement program would benefit from the establishment of an independent office empowered to advocate or advise the regulated community on violation avoidance, compliance assistance, and defense and settlement advocacy. NOAA should consider this given the overall results of our reviews; persistent complaints about the complexity of the regulations; and the fact that the penalty assessment and defense process can put members of the fishing industry—predominantly small business owners—out of business without recourse.
- That NOAA review its regulations and internal guidance concerning warrantless inspections and provide detailed direction to OLE agents.
- That GCEL guidance explicitly identify first-time violations as a mandatory mitigating factor.

We appreciate your continued personal commitment and attention to restoring public trust and confidence in NOAA's fisheries enforcement program. Please apprise us within 60 days of any action in response to our results in this matter. If you have any questions, or if we can be of further assistance, please do not hesitate to call me at 202-482-4661.

cc: The Honorable Gary Locke, Secretary of Commerce

APPENDIX A

U.S. Department of Commerce – Office of Inspector General

OIG Examination of Selected Fisheries Enforcement Complaints (as Referenced in Accompanying Report)

The 27 individual complaints examined (classified as “Confirmed,” “Not Substantiated,” and “Inconclusive”) vary in terms of the issues involved and their complexity. Accordingly, those designated as “Appropriate for Further Review” in the table below should, in OIG’s view, involve one or more of the following actions by NOAA and/or the Department: (a) create an independent process for equitable relief or resolution of past enforcement cases meeting appropriate eligibility criteria; (b) effect appropriate changes to regulations, policies, procedures, or practices; and/or (c) timely address and remedy employee performance or conduct matters.

COMPLAINT CATEGORIES:		Complaint Category	Appropriate for Further Review
<ol style="list-style-type: none"> 1. Broad and powerful enforcement authorities have led to overzealous or abusive conduct. 2. Regulatory enforcement processes are arbitrary, untimely, and lack transparency. 3. Unduly complicated, unclear, and confusing fishing regulations. <p style="color: white;">*Denotes the 11 complaints identified in OIG’s January 2010 report.</p>			
CONFIRMED (9)			
1	<p><i>We confirmed an allegation that an OLE agent’s affidavit for issuance of an Administrative Inspection Warrant for a fish dealer’s records contained false information. (The warrant was executed in December 2006).</i> While we did not find evidence of willful falsification by the agent, the affidavit nonetheless was relied upon by a Federal Magistrate to issue an Administrative Inspection Warrant, which was subsequently executed by NOAA Office for Law Enforcement (OLE). During execution of the warrant documents were seized, which led to charges against the dealer and fishermen who used the facility. We concluded the inaccurate information resulted from a flawed database used by NOAA. We further found that the agent had intended to use a demand letter for records, which is consistent with a civil regulatory enforcement approach, and did not believe an inspection warrant was necessary, which is generally more consistent with a law enforcement approach. OLE management and/or NOAA’s Office of General Counsel for Enforcement Litigation (GCEL) did not agree with the agent, instead directing that a warrant be obtained.</p>	1	✓

APPENDIX A

COMPLAINT CATEGORIES:		Complaint Category	Appropriate for Further Review
<ol style="list-style-type: none"> 1. Broad and powerful enforcement authorities have led to overzealous or abusive conduct. 2. Regulatory enforcement processes are arbitrary, untimely, and lack transparency. 3. Unduly complicated, unclear, and confusing fishing regulations. <p style="color: white;">*Denotes the 11 complaints identified in OIG’s January 2010 report.</p>			
2	<p><i>We confirmed an allegation that an OLE agent gained unauthorized access to a dealer facility. (The incident occurred in November 2006.)</i> Upon arrival at the facility, the agent found the front doors locked so he went around the side of the building where he found a door unlocked, which he used to access the facility at approximately 8:30 p.m., and in entering found no workers or activity. He proceeded to the front door and opened it to let officers accompanying him into the facility. This group of officers was there to relieve other officers taking part in a joint enforcement operation at the facility, which had been conducted earlier in the day, but which now appeared to have concluded. The agent next located an employee still at the facility who advised him they were closed for the night. The agent requested of this employee permission to give “my team a quick tour.” The employee did not give permission, yet the agent still proceeded to initiate a “tour.” OLE’s statutory authority permits its agents to conduct bona fide inspections at such locations, but nowhere are OLE agents authorized to access fishing business premises for non-official, improper purposes such as tours.</p>	1	✓
3	<p><i>An Administrative Law Judge (ALJ) ruled that GCEL’s assessed penalty of \$120,000 and 90-day suspension of a fish dealer for improper recordkeeping was excessive. (The Notice of Violation and Assessment (NOVA) was issued in March 2005 and a settlement agreement was reached in March 2010.)</i> GCEL advised that this penalty was levied because the dealer was on probation from a previous violation which involved 24 individual counts that were charged. GCEL stated that they then treated this previous case as 24 prior violations rather than as a single prior offense. The ALJ rejected GCEL’s “aggravating factor” rationale of 24 prior violations, treating the prior case as a single violation, and significantly reducing the fish dealer’s penalty to a \$10,000 fine and a 20-day suspension. The ALJ noted that GCEL’s assessed penalty would have been “contrary to the interest of justice,” and would essentially put the dealer out of business. Given the ALJ’s ruling on this case we believe the GCEL attorney’s charging rationale deserves further review.</p>	1	✓

APPENDIX A

COMPLAINT CATEGORIES:		Complaint Category	Appropriate for Further Review
<ol style="list-style-type: none"> 1. Broad and powerful enforcement authorities have led to overzealous or abusive conduct. 2. Regulatory enforcement processes are arbitrary, untimely, and lack transparency. 3. Unduly complicated, unclear, and confusing fishing regulations. <p style="color: white; margin-top: 10px;">*Denotes the 11 complaints identified in OIG’s January 2010 report.</p>			
4*	<p><i>We confirmed complaints of disparate treatment and inconsistent penalties for NOAA’s enforcement of restrictions on fishing in yellowtail flounder stock areas. (The NOVA’s for these individual cases were issued between March and May 2009.)</i> During the four-year period (August 2002 – November 2006) when fishermen were required to have a NOAA Letter of Authorization (LOA) to fish in yellowtail flounder stock areas in the Northeast Region, GCEL did not impose a single fine on any of the seven cases that were referred to it for enforcement action. After the LOA requirement was eliminated, in November 2006, GCEL nonetheless retroactively charged 14 LOA cases (13 of which were new, while the remaining one was merged with one of the seven cases referenced above) resulting in assessed penalties ranging from \$1,600 to \$58,700. All 14 cases were retroactively charged based on historical records seized during the execution of an administrative inspection warrant at a fish dealer facility (which occurred after the LOA requirement had been eliminated). All of the 14 cases were charged solely for the referenced LOA violation. This caused many fishermen to believe that GCEL was levying fines to target the facility and those who did business there, rather than enforcing statutes and regulations for the purpose of protecting the fish stock.</p>	2	✓

APPENDIX A

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<ol style="list-style-type: none"> 1. Broad and powerful enforcement authorities have led to overzealous or abusive conduct. 2. Regulatory enforcement processes are arbitrary, untimely, and lack transparency. 3. Unduly complicated, unclear, and confusing fishing regulations. <p style="color: white;">*Denotes the 11 complaints identified in OIG’s January 2010 report.</p>			
5*	<p><i>We confirmed complaints that administrative errors by two fishermen led to an excessive \$270,000 assessed fine and a one-year permit sanction for failing to call in to NOAA’s Interactive Voice Response (IVR) reporting system and for failure to file Fishing Vessel Trip Reports (FVTRs), despite this being their first offense. (The NOVA was issued in October 2008.)</i></p> <p>The fishermen appealed their case to an Administrative Law Judge (ALJ), who reduced the total penalty to \$54,000 (by suspending \$216,000 for two years which would then be eliminated if no violations occurred during that time period) and a one-month suspension. In reducing the penalties, the ALJ ruled, among other findings, that (1) no over-fishing occurred as result of the fishermen’s failure to report; (2) no fishing occurred in a closed area and at no point was the total allowable catch exceeded where they were fishing; and (3) the fishermen neither sought nor obtained economic gain from their failure to file timely reports.</p>	2	✓
6	<p><i>We confirmed a fisherman’s complaint that he was assessed an excessive \$150,000 fine (the maximum) and a 270-day suspension for exceeding the permissible horsepower on his boat, despite this being his first offense. (The NOVA was issued in April 2002.)</i></p> <p>Eventually, one of the counts in the case was settled for a \$50,000 fine and a 30-day permit sanction, which was suspended as long as the fisherman committed no fisheries violations for a year, and the remaining two counts received written warnings by the assigned GCEL attorney. GCEL’s attorney on this case told us that the maximum amount per count was charged in this case because he believed the fisherman intentionally violated the regulation and this was a “big scheme”; however, we found this position not supported by the evidence and we found the fisherman credible. Moreover, the former Northeast Regional Administrator, who was responsible for promulgating the regulations, provided a letter of support for the fisherman stating he believed it was an honest mistake.</p>	2	✓

APPENDIX A

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<p>7* <i>We confirmed that NOAA applied unduly rigid interpretation of a regulation for a situation where leniency appeared appropriate but was rejected to avoid setting a precedent. (The incident referenced below occurred in December 2009.)</i> A fishing vessel that had set sail experienced a mechanical breakdown and returned to port, never setting its gear to capture fish. Yet the National Marine Fisheries Service (NMFS), not GCEL, charged the vessel’s owner for fishing during that time because it had no policy to credit vessels for mechanical breakdowns. OLE sought policy guidance on this case from NOAA’s Northeast Region, Office of Sustainable Fisheries, on behalf of the fisherman. That office advised that a day-at-sea credit for this particular situation would “lead them down a slippery slope” and should not be granted under the current regulations. This kind of regulation and interpretation contributes to the industry’s belief that NOAA only exercises its regulatory discretion to its own benefit.</p>	<p style="text-align: center;">3</p>	<p style="text-align: center;">✓</p>

APPENDIX A

<p>COMPLAINT CATEGORIES:</p> <ol style="list-style-type: none"> 1. Broad and powerful enforcement authorities have led to overzealous or abusive conduct. 2. Regulatory enforcement processes are arbitrary, untimely, and lack transparency. 3. Unduly complicated, unclear, and confusing fishing regulations. <p>*Denotes the 11 complaints identified in OIG’s January 2010 report.</p>	<p>Complaint Category</p>	<p>Appropriate for Further Review</p>
<p>8* <i>We confirmed a fisherman’s complaint that he was not timely notified of a violation, in that he was charged nearly three years after allegedly exceeding the limit for codfish on a single day, thus depriving him of ability to defend himself. (The NOVA was issued in April 2009.)</i> OLE obtained documents from an Administrative Inspection Warrant which identified the referenced violation. Almost one year had passed between the date of violation (12/21/05) and the execution of the Administrative Inspection Warrant (12/07/06). When OLE notified the fisherman of his overfishing (10/31/2007), almost two years had passed since the date of the alleged violation on a single day of fishing. Understandably, the fisherman indicated he could not remember facts or details of a single day of fishing two years in the past, thus depriving him of his ability to defend himself. The charge was submitted to GCEL for enforcement action nine months after initial notification (7/31/08) and a Notice of Violation Assessment (NOVA) was subsequently issued 8½ months (4/16/09) after that, with an assessed fine of nearly \$20,000. The Magnuson Stevens Act contains no statute of limitation for citing a fisherman for violations of the Act. However, government-wide regulations place a five year limitation on bringing charges for civil violations of regulatory law. While NOAA is subject to this five year statute of limitation to notify fishermen of violations, such delay and case disposition for a regulatory violation exhibits NOAA’s willingness to pursue stale claims.</p>	<p style="text-align: center;">3</p>	<p style="text-align: center;">✓</p>

APPENDIX A

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9 <i>We confirmed that GCEL informed a fisherman that if he challenged his fine it could be increased to \$140,000 (from \$10,000) for each violation. (Before a NOVA was issued in this case, a settlement agreement was reached in February 2008.)</i> According to the fisherman’s attorney, the GCEL attorney handling this case advised him that if his client chose not to settle the case and it went to an Administrative Law Judge (ALJ) hearing, rather than face \$10,000 per count as originally charged, he could be subject to the ALJ imposing fines of the statutory maximum of \$140,000 per count. We found this representation consistent with GCEL NOVA language for violations under the Magnuson Stevens Act. For example, language in many NOVAs states, “The judge is not bound by the amount assessed in the NOVA, but may fix a penalty based upon his judgment of what is appropriate up to the statutory maximum of \$140,000 per count.” This language, coupled with NOAA regulations at that time that provided for presumption that a fine set by NOAA was appropriate, makes it understandable that fishermen believe the system to be unfair so as to pressure them into settlement. In fact, in response to our January report, NOAA has changed the presumption requirement, now properly placing the burden on NOAA to prove its fine as appropriate when brought before an ALJ.	2	✓

APPENDIX A

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NOT SUBSTANTIATED (5)			
10	<p><i>A Northeast fisherman suspected he was being unfairly charged with exceeding his days-at-sea (DAS) allocation. (The correspondence between NMFS and the fisherman occurred in March 2008.)</i> We found correspondence from the NMFS Northeast Regional Administrator to the fisherman informing him that he had exceeded his DAS and had a negative 1.5-day balance. The correspondence also stated that since this was an apparent violation it would be referred to OLE for review and consideration of enforcement action. Our review disclosed that there was no OLE or GCEL enforcement action related to this matter.</p>	1	
11	<p><i>We did not substantiate a complaint of OLE misconduct alleging witness intimidation and harassment by agents during preparation for an ALJ hearing. (The alleged incident occurred in February 2010.)</i> Several days before a scheduled ALJ hearing (related to case #1 in this chart), the names of two individuals were identified by defense counsel and provided to GCEL as potential witnesses. GCEL requested that OLE agents attempt to interview the witnesses to determine the basis of their testimony, in preparation for the hearing. One of the interviews was completed, without incident. The second interview, which involved this particular complaint, was not completed because the complainant refused to speak with the agents. We found no evidence of impropriety with OLE attempting to interview the identified witnesses and no evidence to indicate the OLE agents attempted to coerce or intimidate either witness into agreeing to an interview or providing a statement.</p>	1	

APPENDIX A

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<p>12* <i>We were unable to substantiate a fisherman’s assertion that he received permission from NMFS to fish without a Vessel Monitoring System since it was being repaired, but later received a NOVA for \$180,000 for fishing without it. He advised that he settled the case for a six-month permit sanction, during which time he had no income. (A written warning was issued in June 2007.)</i> We found that a written warning—not a NOVA—was issued in this case. We found that a non-enforcement sanction had been placed on the vessel’s fishing permit during this time period. However, the sanction was unrelated to the referenced warning. Instead, the sanction was a routine part of the process by which a permit is transferred upon sale of a vessel, which occurred in this instance. We made several unsuccessful attempts to gain further clarification of this matter from the complainants.</p>	<p style="text-align: center;">3</p>	

APPENDIX A

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13	<p><i>We did not substantiate a fish dealer’s complaint that GCEL failed to honor terms of a settlement agreement to reconsider a \$185,000 fine. (The NOVA was issued in January 2006.)</i></p> <p>In January 2006, the dealer was issued a \$445,000 NOVA for failing to comply accurately and timely with reporting requirements. In December 2006, a \$185,000 settlement agreement was reached, which provided 18 months for the dealer to make payment from the sale of real estate in order to satisfy the fine. The agreement included a provision for reconsideration of the terms should the sale of the property not occur. By April of 2008 the sale had not occurred. At that time, GCEL granted an 18- month extension to provide more time for sale of the property to be transacted. In June of 2009, the sale of the property had still not occurred and GCEL expressed willingness to grant another extension of time provided the dealer submitted documentation of its good faith attempts to sell the referenced property. By March of 2010 no documentation had been produced by the dealer. At that time, the dealer made an offer to GCEL to settle the outstanding fine for the reduced amount of \$10,000. In March 2010, GCEL responded per terms of the agreement that the dealer produce financial documentation in order to consider this offer. Documentation was provided in September of 2010 and GCEL is presently reviewing it. Without commenting on the appropriateness of the initial \$445,000 assessment, we did not substantiate that GCEL failed to honor the terms of the settlement.</p>	1	

APPENDIX A

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14	<p><i>We did not substantiate an allegation that a fisherman was subject to retaliation by OLE after an incident during which we was arrested and charged with assault on an OLE agent. (The alleged retaliation occurred between August 2007 and August 2009.)</i> We found that during a routine boarding in December 2006 by Delaware and Maryland state officers operating under a Joint Enforcement Agreement (JEA) with OLE, the officers found a violation for which the fisherman was cited. During that incident the JEA officers took identifying information from the passengers as witnesses to the violation, after the vessel had docked. The incident involving assault on an officer occurred during a subsequent boarding of this vessel in August of 2007 by JEA officers. The officers again found violations on the vessel and again, per their procedures, took indentifying information from passengers on the vessel. During this process the fisherman allegedly assaulted one of the officers, an offense for which he was charged and convicted by the State of Maryland. The state ordered the fisherman to pay a \$500 fine plus court costs, but no incarceration was imposed. GCEL issued a NOVA for \$60,000 for one count of interference with an officer, which was ultimately settled for \$20,000. Records indicate that all subsequent interactions with this fisherman also involved JEA partners. To date, he has been boarded four times since the assault incident in August 2007 with no problems reported and no citations issued. A JEA representative reported to us that his officers typically board 100 fishing vessels during a routine patrol and that this particular fisherman was boarded less than most. Since no violations were detected during these subsequent boardings no identifying information was requested from passengers.</p>	1	

APPENDIX A

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INCONCLUSIVE (13)			
15*	<p><i>We found inconclusive the allegation that OLE agents would cite fishermen for violations and then use the citations as leverage to build a case against another individual or entity. (The below alleged incident(s) occurred in September 2007.)</i> Multiple fishermen advised us of this allegation. One fisherman told us that two OLE agents told him they could make a fish overage disappear if the fisherman agreed to cooperate with them on another high profile case. OLE agents swore under oath, regarding two related cases, that as a matter of basic law enforcement procedure they inform fishermen that any cooperation provided during an investigation, to include information concerning other potential violators, would be noted and conveyed to GCEL for their review and consideration as part of the fishermen’s case but that they do not promise to make violations disappear. The results of our investigative efforts regarding this matter were inconclusive because of these unreconciled accounts and a lack of additional evidence. In some of the reported cases, the respondents were not charged and in others they were, meriting further review of these types of allegations.</p>	1	✓

APPENDIX A

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16*	<p><i>We found inconclusive an allegation that a fisherman, when requesting an attorney be present during an interview with an OLE agent, the agent responded that “he just made it harder on himself.” (The alleged incident occurred in May 1999.)</i> While we confirmed that the fisherman requested the OLE agent contact the fisherman’s attorney for an interview, and that the agent agreed to do so, we could not reconcile differing accounts of the conversation that took place regarding this matter. The former OLE agent told us that while he may have informed the fisherman that his particular attorney “is difficult,” he never would have said that having an attorney would make it harder for the fisherman and suggested that the fisherman misconstrued his comment. This allegation is associated with case #6 on this chart, which is a confirmed allegation.</p>	1	✓
17	<p><i>We found inconclusive, based on unreconciled accounts, a complaint that at the behest of OLE a state game warden was threatened with termination by his supervisor if he testified as scheduled on a fisherman’s behalf at a NOAA enforcement proceeding. (The alleged incident occurred around June 2001.)</i> The Special Agent-In-Charge (SAC) of OLE’s Northeast Division at the time denied, when we interviewed him, of making a request to a state game warden’s supervisors that they terminate the warden’s employment if he testified for the defense on a case. However, the then SAC acknowledged that he was frustrated with the state game warden in this case and communicated his frustration to the warden’s supervisors. We interviewed two of the state supervisors referenced in this case who indicated they did not recall the incident. In our interview with the referenced warden he was clear in his recollection that the threat was made. Ultimately the warden was not called and did not testify on this case. However, he did provide a report to defense counsel in support of the fisherman’s position. The report was submitted by the defense as part of the official record.</p>	1	✓

APPENDIX A

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18	<p><i>We found inconclusive a complaint by a fish dealer that 13 law enforcement officers invaded one of his facilities looking for paperwork violations. (The NOVA was issued in December 1997.)</i> Our review disclosed that during the execution of an Administrative Inspection Warrant on a dealer facility, two OLE agents were supported by several local and state officers, allegedly to provide perimeter security. According to the OLE agents, the local and state officers did not participate in the search but instead provided security on the outside of the facility while they conducted their search. OLE records for this case exceeded the time period for its record retention policy, as a result they were not available for our review and we were unable to identify the state and local officers who participated in the execution of the warrant, the number that participated, or the justification for the number that did participate.</p>	1	
19*	<p><i>We found inconclusive a complaint that a fisherman in the Northwest was inappropriately fined \$75,000 for fishing in a closed area on four separate occasions and over a three-day period. (The NOVA was issued in August 2008.)</i> According to the fisherman, Vessel Monitoring System (VMS) data did show that his vessel entered a closed area on several occasions. However, according to him it also confirmed that he could not have been fishing there because the course and speed of his vessel were inconsistent with the act of fishing. While the fisherman acknowledged being in the closed area, he asserted to us that the incursions were caused by extenuating circumstances and were unintentional. Given the circumstances he believes that the amount of the fine was excessive, including that this was his first offense. The case was ultimately settled for \$25,000, with a further payment of \$20,000 suspended. We were unable to assess the validity of the complainant’s claim regarding VMS data and therefore, find this matter inconclusive.</p>	2	✓

APPENDIX A

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20*	<p><i>We found inconclusive a complaint that a fisherman was charged for fishing without a valid permit, despite having timely corrected a paperwork error once notified of the error by NMFS and which had rendered his permit invalid. (Before a NOVA was issued in this case, a settlement agreement was reached in January 2010.)</i> The fisherman in question stated to us that while at sea, NMFS ordered him to return to port because he had mislabeled one of his monthly Fishing Vessel Trip Report’s (FVTR) from the previous year resulting in his not having been issued a renewal of his yearly permit. The fisherman said he returned to port, properly signed and filed a new report, and was issued a new permit, yet he was still subsequently charged for fishing without a valid permit. While we found the vessel did sail and fish without a valid permit, the record of this case indicates that all FVTR’s were submitted timely to get a permit issued, but that the process for issuance was delayed because of the referenced paperwork error. The case ultimately settled for a reduction of 18 days at sea for one of the fisherman’s vessels. Given the facts and circumstances in this case we believe it merits further review.</p>	2	✓

APPENDIX A

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21	<p><i>We found inconclusive a complaint that GCEL unfairly delayed the sale of a fisherman’s vessel and release of the vessel’s permit for a period of two years, causing undue financial hardship including possible foreclosure proceedings against the fisherman’s family home. (The NOVA was issued in June 2000, and a settlement agreement was reached in June 2005.)</i> In order to settle this case, proceeds of the sale of the vessel and permit were to pay fines levied against the fisherman. According to the complainant, GCEL rejected two purchase offers for the fisherman’s vessel and the release of its associated permit delaying sale for a period of two years. According to the fisherman, GCEL did not state any specific objections or reasons for rejecting the proposed transactions. The GCEL attorney handling the matter indicated in cases such as this they vet purchasers of vessels and permits to ensure that any such sale is legitimate and not an attempt by a charged fisherman to maintain ownership and control of a permit they have agreed to surrender. Additionally, to ensure a sale does not go to anyone with a history of violating fisheries regulations. GCEL ultimately allowed the fisherman to sell his vessel and the associated permit without sanction, enabling him to fulfill his financial obligations under the settlement agreement.</p>	2	✓
22*	<p><i>We found inconclusive a complaint made by a representative for a fisherman that a NOVA issued to his client in the amount of \$38,000 for filing Fishing Vessel Trip Reports (FVTR) with estimated weights that did not match more precise dealer reports was excessive and unfair. (The NOVA was issued in January 2004.)</i> The fisherman’s agent argued that NOAA advises fishers that weights listed on FVTRs are only good faith estimates. While this is correct, we were advised by GCEL that they generally allow for five to ten percent landing overages in cases like this one, which are based on estimated poundages. In this particular case the fisherman underestimated his fish poundage by 20 percent. We are not in a position to judge if 5 to 10 percent or 20 percent variances are reasonable.</p>	3	✓

APPENDIX A

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<p>23* <i>We found inconclusive an allegation by a fish dealer that OLE agents searched his desk and files without permission and were unable to articulate their legal authority to do so. (The incident occurred in August 2004.)</i> In this case OLE agents showed up at the fish dealer’s place of business and requested access to records based on their inspection authorities found in the Magnuson-Stevens Act. The dealer questioned this authority on Constitutional grounds and contacted his attorney. The attorney also questioned the authority and requested a specific legal citation explaining it. The agents contacted GCEL attorneys who provided the dealer’s counsel a letter specifically articulating the inspection authority. The agents recalled that they may have "searched" the fish dealer’s desk drawers and file cabinets after the letter from GCEL was provided and the dealer had "rolled out the red carpet" for them. The dealer’s employees stated the agents searched through the dealer’s desk and files before the letter was provided. We find this inconclusive based on divergent accounts. This allegation was made during our investigation of case #13 on this chart, which was an unconfirmed allegation. As a result we do not believe this case merits further review; however, we do believe it raises an issue we have previously reported out on regarding training and knowledge of agents with respect to their inspection and search authorities.</p>	<p style="text-align: center;">1</p>	

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24	<p><i>We found inconclusive an allegation that a GCEL attorney in the Northeast Region inappropriately attempted to leverage settlement of a case. (The incident occurred in July 2009.)</i></p> <p>According to a fisherman a GCEL attorney threatened his counsel with professional ethics violations regarding the handling of his case. According to an email from the GCEL attorney to the defense attorney, the defense attorney was not fulfilling a professional obligation to properly inform his client of a settlement offer. According to the fisherman in question, he told his attorney that he was not guilty and would not settle the case. The GCEL attorney indicated intent to file a motion against the defense attorney alleging violations of American Bar Association (ABA) rules regarding conflicts of interest. The GCEL attorney believed that the fisherman in question was interested in settling his case and conveyed this information to the defense attorney. The GCEL attorney further indicated the belief that offers of settlement were not being relayed to the attorney’s client. The defense attorney recalled that he communicated to GCEL his client’s unwillingness to settle the case, at least in part, because of the pending OIG Review. He further advised that his clients are always advised of offers of settlement as they are received and that this case was no different. The OIG is not in a position to judge the GCEL attorney’s obligation to report what she believed could be ABA rule violations by a defense attorney, nor can we judge if the threat of these types of charges might be an attempt to inappropriately force settlement of a case. This case is also referenced as one of the yellowtail flounder cases in example #4 to this chart, which is a confirmed allegation, and as such is appropriate for further review.</p>	1	✓

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COMPLAINT CATEGORIES:		Complaint Category	Appropriate for Further Review
<ol style="list-style-type: none"> 1. Broad and powerful enforcement authorities have led to overzealous or abusive conduct. 2. Regulatory enforcement processes are arbitrary, untimely, and lack transparency. 3. Unduly complicated, unclear, and confusing fishing regulations. <p style="color: white; margin-top: 10px;">*Denotes the 11 complaints identified in OIG’s January 2010 report.</p>			
25	<p><i>We found inconclusive a complaint by a fisherman that he was confused about codfish landing limits due to conflicting state and federal laws, and that as a result, he was unfairly charged \$1,300 for unlawfully landing codfish overages even though he believed he was in compliance. (The NOVA was issued in March 2008.)</i> The fisherman advised that he attempted to contact NOAA for clarification regarding a seeming conflict between state and federal laws, and that no information was ever provided to him. The regulations governing this type of scenario state that if you have a valid federal fishery permit you are bound by more restrictive federal possession limits, regardless of where you fish. We do not question that his concerns are genuine and the fisherman acted in good faith effort to obtain clarification regarding the regulations. However, we do find this particular regulation is relatively clear. This is the type of scenario where both NOAA and the fisherman would have benefited from an ombudsman.</p>	3	
26	<p><i>A fisherman claimed that GCEL threatened to increase his fine from \$10,000 to \$110,000 if he took the case to an ALJ hearing. (The NOVA was issued in August 2002.)</i> The GCEL attorney assigned to this case denied making a specific threat for an increased fine but acknowledged that his standard practice is to tell fishermen that the ALJ is limited to the highest fine he can assess by the statutory maximum, not by the amount assessed in the NOVA. As outlined in case #9 to this chart, a confirmed complaint, this type of representation by GCEL during negotiations to settle a case is consistent with other complaints we received and with standard language found in GCEL settlement documents.</p>	2	✓

APPENDIX A

COMPLAINT CATEGORIES:		Complaint Category	Appropriate for Further Review
<ol style="list-style-type: none"> 1. Broad and powerful enforcement authorities have led to overzealous or abusive conduct. 2. Regulatory enforcement processes are arbitrary, untimely, and lack transparency. 3. Unduly complicated, unclear, and confusing fishing regulations. <p style="color: white; margin-top: 10px;">*Denotes the 11 complaints identified in OIG’s January 2010 report.</p>			
27	<p><i>A fisherman complained that when he asked GCEL for an extension to pay his fine, he was told that if an extension was granted the fine would increase to \$685,000. (The NOVA was issued in December 1997.)</i> According to the fisherman he was issued a NOVA for \$483,000. When he approached GCEL to request an extension of time by which to pay the fine, he was told one would be granted but that the fine would then rise to \$685,000. The fisherman indicated he could not pay a \$685,000 fine. Ultimately, he settled the case for \$15,000 plus a permanent revocation of a dealer permit and a ten year sanction against a second permit. The GCEL attorney who handled this case stated that the primary factor in accepting a reduced monetary amount was the fisherman’s “financial inability to pay the assessed penalties.” The GCEL attorney also denied making a specific threat regarding an increase in the fine if a time extension was granted. Further, that if a settlement figure is agreed upon and a payment plan is involved, agency policy requires NOAA to charge interest.</p>	2	✓

Appendix B

U.S. Department of Commerce – Office of Inspector General

Methodology for Examination of Selected Fisheries Enforcement Complaints (as Referenced in Accompanying Report)

During the course of our *Review of NOAA Fisheries Enforcement Programs and Operations*, we spoke with 131 fishermen, dealers, and various other industry representatives who believed they were treated unfairly or were subject to overzealous enforcement by NOAA enforcement officials. Some individuals had multiple complaints. The majority of the complainants were located in NOAA Fisheries' Northeast region (approximately 76 percent), while the remainder were from the Southeast (17.5 percent), Northwest (4.5 percent), and Alaska (1.5 percent) regions.

The complaints we received fell into three general categories:

- Broad and powerful enforcement authorities have led to overzealous or abusive conduct. For example, allegations were raised as to whether OLE could reasonably articulate the basis for exercising certain law enforcement authorities.
- Regulatory enforcement processes are arbitrary, untimely, and lack transparency. For example, allegations that first-time offenders being assessed civil penalties at the high end of the penalty range and GCEL attorneys being unable to articulate the rationale.
- Unduly complicated, unclear, and confusing fishing regulations. For example, allegations of rigid interpretation and enforcement of the term “engaged in fishing” contributes to industry’s negative perception that NOAA only exercises its regulatory discretion to its own benefit.

Our January 2010 report referenced 11 specific complaints we found to be illustrative of the overall types of complaints we received in the course of our review. We committed to get to the bottom of these and thus included them in our follow-on detailed examination. We also considered all other complaints we received during our review (through December 2009). In putting all complaints through a methodology for further examination, we established a set of criteria and also exercised a level of discretion and judgment for selection. This ultimately resulted in our selection of 16 additional complaints, for a total sample of 27.

Our specific criteria for inclusion were:

1. All 11 complaints cited in our January 2010 report.
2. Complainant waived confidentiality.
3. Complaints had not been adjudicated in U.S. District Court.
4. Age of complaint: All but two of the 27 complaints selected were under ten years old. The two over ten years old (11 and 12 years, respectively) were included because they met the below criteria for seriousness.

Appendix B

We also applied a set of additional discretionary factors in order to identify those complaints that appeared to be the most egregious examples of unfair or abusive exercise of authority by OLE and/or GCEL. These were:

5. Seriousness of the alleged unfair/abusive conduct, specifically focusing on complaints alleging abuse of law enforcement authority.
6. Those complaints involving alleged arbitrary charges and adjudication by GCEL.
7. The vast majority of complaints we received involved complexity of regulations. As such, we selected a few that were the clearest and most representative examples.

Our review team consisted of OIG staff from across several disciplines and areas of expertise, including program evaluation, criminal investigation, forensic audit, and risk analysis. Each complaint was presented to the OIG review team and a consensus was reached as to which complaints were selected. The OIG review team routinely met to discuss the complaints, issues and concerns that were received and raised throughout the course of the review to determine if any patterns in OLE's and GCEL's enforcement activities could be identified.

Internally, our work included examining the complaints and the corresponding enforcement case files from both OLE and GCEL and pertinent statutes and regulations. We then interviewed the OLE agents and GCEL attorneys who were assigned and worked these cases. We also interviewed the supervisors of these individuals, including those in both the regional office and headquarters. Externally, we interviewed defense attorneys and witnesses, when appropriate. In some cases, the age of the case impacted the amount of information that was available and prevented us from making a determination as to the validity of the allegations.

In addition, while we did not review all of the 14 individual cases relating to complaints received involving the Yellow Tail Flounder Letter of Authorization, we did review NOAA's overall enforcement and subsequent assessments of fines and penalties associated with these violations. This included interviews with the Regional Administrator for NMFS Northeast Region, program managers in the Sustainable Fisheries Division, and staff in the Fishery Statistics Office responsible for administering the Yellow Tail Flounder Letter of Authorization endorsement.

In the course of reviewing complaints from those in the fishing industry, we faced considerable challenges and limitations, including the complexity of regulations and industry compliance with the regulations; age of cases; witness fear of retaliation for cooperating with OIG and a general unwillingness to waive confidentiality based on that same fear; poor recordkeeping by NOAA and poor data quality; and divergent, unreconciled accounts of events. Despite these challenges and limitations, we ultimately identified 27 specific cases that were conducive to further examination.