

**TESTIMONY OF
ERIC C. SCHWAAB
ASSISTANT ADMINISTRATOR FOR FISHERIES
NATIONAL MARINE FISHERIES SERVICE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE**

ON

**HOW IS NOAA MANAGING FUNDS TO PROTECT THE DOMESTIC FISHING
INDUSTRY?**

**BEFORE THE
SUBCOMMITTEE ON FEDERAL FINANCIAL MANAGEMENT
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS
U.S. SENATE**

BOSTON, MA

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Thank you Mr. Chairman and members of the Subcommittee for the opportunity to testify today on the National Oceanic and Atmospheric Administration's (NOAA) actions to improve its enforcement program and how NOAA is managing funds to support the domestic fishing industry. My name is Eric Schwaab, and I am NOAA's Assistant Administrator for Fisheries and Director of the National Marine Fisheries Service (NOAA's Fisheries Service or NMFS).

The fishing industry is an important part of the Nation's culture and economy. Gloucester is America's oldest seaport and New Bedford and other towns along the Massachusetts and New England coasts have fishing industries that have supported families, businesses and communities for hundreds of years. Making sure that there are enough fish to continue those fishing industries is part of NOAA's job. Another part of NOAA's job is to make sure that fishermen have a level playing field to make sure that their businesses aren't compromised by others who choose to violate the rules and the resource isn't compromised by illegal fishing. I meet regularly with fishermen and I hear from all of them that they want that level playing field and regulations that are easy to understand and fairly enforced. They also want to know that if others break the rules, they will be caught.

I. Improvements Made in NOAA's enforcement program

In June 2009, after hearing concerns from fishermen, businesses and elected officials, Dr. Lubchenco asked the Department of Commerce Inspector General to conduct a national review of NOAA's enforcement program. Based on that review and other findings, Secretary of Commerce Gary Locke and Dr. Lubchenco instituted sweeping changes in NOAA's enforcement program, including:

- New enforcement leadership at headquarters and in the New England regional office.

- Transfer of authority to issue charges and settle cases from the field staff to supervisors in headquarters.
- A new, more transparent penalty policy that ensures consistency in charging decisions nationwide and provides greater clarity for fishermen and businesses.
- Revised regulations that now place the burden on NOAA, rather than a fishermen or business, to justify its proposed penalty and permit sanctions in hearings before Administrative Law Judges.
- A new Asset Forfeiture Fund (AFF or Fund) Use Policy that greatly restricts the Fund's uses to ensure that there is no conflict of interest, real or perceived, with its use.

In addition, after requests from fishermen and elected officials, the Department of Commerce hired a Special Master to review past cases. On May 17, 2011, the Secretary of Commerce announced the remittance of \$650,000 in penalties to 11 fishermen and businesses in cases reviewed by the Special Master. The Special Master currently is reviewing additional cases to address any other past issues.

We conducted an initial review of our current workforce and enforcement needs to determine the most effective balance of special agents and enforcement officers. Based on this review, we are reshaping our enforcement workforce by increasing the number of enforcement officers to emphasize compliance, problem solving, and communication. This action will increase our dockside presence and enhance our enforcement partnerships with the states. We are beginning this effort in New England with eight new enforcement officers being hired in the near term and we plan to expand our efforts nationally in the coming year.

We held a national enforcement summit to hear from our constituents – the fishing industry, environmental community, federal agencies, and other stakeholders – on needed improvements. Compliance through better communication was a theme at the summit and we are acting on it. We are stressing compliance assistance as a balance to our deterrence efforts – we must work better with our stakeholders to ensure everyone understands how to comply with our regulations. Earlier this year, we hired a former commercial fisherman here in New England to serve as our first formal compliance liaison in the country. He will work directly with the fishing industry in a non-enforcement capacity to improve communications and ensure all can comply with needed conservation measures. As we implement new regulations, compliance workshops such as ones held recently along the east and west coasts will help ensure the fishing industry is well versed in any new requirements.

This Administration conducted a top-to-bottom review of NOAA's enforcement program and instituted sweeping reforms to ensure the program is fair and effective. Clarifying policies, establishing new procedures, focusing on compliance, and ensuring strict programmatic oversight will allow our enforcement program employees to effectively enforce our laws with the trust of our stakeholders and without the appearance of a conflict of interest associated with funding. I strongly support our enforcement personnel and their mission – without them, we cannot ensure a level playing field for all fishermen or a future that includes truly sustainable fisheries. Attached to my testimony is a detailed timeline of the enforcement reforms.

The remainder of my testimony will focus on the financial oversight aspects of our enforcement program and the questions asked in the hearing invitation letter.

II. Improvements to NOAA's Management of the Asset Forfeiture Fund

The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) authorizes the Secretary of Commerce to pay certain enforcement-related expenses from fines, penalties, and proceeds from sale of property forfeitures. These fines, penalties, and proceeds can come from violations associated with the Magnuson-Stevens Act or other marine resource laws and are deposited into NOAA enforcement accounts referred to as the Asset Forfeiture Fund (AFF). As authorized by section 311(e)(1) of the Magnuson-Stevens Act, there is broad statutory authority for the Fund's use. In the past, NOAA used these funds for expenditures such as storage costs of seized fish or property, rewards, and expenses directly related to investigations and civil or criminal enforcement proceedings. Such expenditures included: vehicles, vessels, training, and travel, among others. NOAA never used the AFF for employee salaries, benefits, or cash awards.

In July 2010, the OIG issued its "*Review of NOAA Fisheries Enforcement Asset Forfeiture Fund*" based on a report by the public accounting and auditing firm KPMG. In this review, the OIG made 13 recommendations to improve oversight of the AFF. NOAA developed a comprehensive corrective action plan in response to the review. Among other items, the corrective action plan included developing a formal interpretation of the statutory language, establishing a formal policy on the authorized and unauthorized uses, and auditing the AFF by an independent certified public accounting (CPA) firm. Each of these three key items has now been completed.

1. The current balance of the asset forfeiture fund

Since the issuance of the OIG's July 2010 report, NOAA has made significant improvements in the AFF's financial management.

For FY 2011, NOAA developed an annual operating budget for the AFF, and NOAA's Chief Financial Officer (CFO) must approve modifications to that budget. Each month NMFS's Office of Management and Budget, Office of Law Enforcement (OLE) and General Counsel for Enforcement and Litigation (GCEL) conduct a review to ensure that all expenses of \$1,000 or more receive approval and collections received have been properly recorded. NOAA also identified and accounted for the AFF in its FY 2012 annual budget request.

Another key element of NOAA's corrective action plan was the commitment to conduct an independent financial audit of the AFF. The first step in that process was the completion of an independent review and confirmation of the AFF overall balance at \$8.7 million as of March 31, 2010. The confirmation of the AFF fund balance, which an independent CPA firm completed in August 2010, provided additional confidence in our accounting of the AFF and serves as the beginning balance on the audited financial statements for 2011 and beyond.

The next step in that process was the independent financial audit of the AFF financial statements as of March 31, 2011. The audit's purpose is to determine if the Fund's internal controls,

processes, guidelines and policies are adequate and effective and its financial records are in adherence with generally accepted accounting principles. I am pleased to announce that the AFF received an unqualified (“clean”) opinion on its financial statements as of March 31, 2011 by an independent CPA firm. In issuing their clean opinion on the financial statements, the auditors confirmed the AFF overall balance at \$7.5 million as of March 31, 2011. The auditors are further providing reasonable assurance that the statements are free from material misstatement, and present fairly the assets, liabilities, net position, and balance of the AFF.

As of June 1, 2011, the AFF’s overall balance was \$6.2 million. Outstanding obligations to the fund of \$2.3 million leave a remaining balance of \$3.9 million available for new obligations.

2. The Fund was used for Appropriate Purposes

Although the OIG did not identify any specific “misuse” of the AFF in the January 2010 or the July 2010 reports, it did recommend more accountability to minimize errors and opportunities for abuse. NOAA also recognized that some of the expenditures are more appropriate to fund from the program’s base appropriations.

As noted above, the Magnuson-Stevens Act authorizes the Secretary of Commerce to pay certain enforcement-related expenses from fines, penalties, and proceeds from sale of property forfeitures collected for violations of the Magnuson-Stevens Act or other marine resource laws. As part of the corrective action plan, NOAA committed to developing a formal interpretation of the statutory language. The *“Legal Opinion Regarding Collection and Use of Fines, Penalties, and Forfeiture Proceeds Pursuant to Section 311(e)(1) of the Magnuson-Stevens Fishery Conservation and Management*, released by DOC and NOAA General Counsels in February 2011, indicated that the statutorily allowed uses of the AFF are broad and there were no instances of specific misuse of the AFF. The Inspector General also reached the same conclusion.

However, NOAA took immediate action in response to concerns relative to the AFF raised in the January 2010 OIG report. Beginning in February 2010, the NOAA Comptroller began reviewing and approving all new obligations of \$1,000 or more to the AFF. These transactions were reviewed to ensure the appropriate use of the AFF and to gain assurance that documentation supported the obligation of funds. The approval of an obligation indicates that the Fund’s use is appropriate and that sufficient supporting documentation is being maintained.

After ten months of routine monitoring (February 2010 to December 2010) of the AFF by the NOAA Comptroller, there was no evidence of misuse. Thus, the NOAA Chief Financial Officer (CFO) determined in December 2010 that the NMFS Office of Management and Budget was the appropriate office within NOAA to approve AFF obligations of \$1,000 or more. Transferring the approval process to NMFS enabled the annual budget planning and execution to be handled in a more streamlined manner and consistently with the review of NMFS and GCEL appropriated funding.

Effective February 1, 2011, the transition of management and oversight of the AFF to the NMFS’ Office of Management and Budget took place. The existing threshold of \$1,000 or more for obligations requiring approval remains. The NOAA CFO’s Office now routinely conducts

reviews of the AFF obligation approval process, and samples expenditure transactions of \$1,000 or more to ensure the Fund is used appropriately.

The OIG raised concerns with policies for the AFF's use and several groups of expenditures. In response to these concerns, in March 2011, NOAA finalized a new policy to control future AFF expenditures. This is discussed in more detail in the next section of the testimony.

The OIG also recommended NOAA establish formal policies for vehicle acquisition, management, and allocation. In response, OLE implemented new vehicle management procedures. The office has reduced the number of vehicles by 30. At present, 145 cars are used by enforcement personnel across OLE's 60 locations nationwide, 12 are allocated as motor pool or common use vehicles (at 8 locations), 13 are used for special purposes (e.g., for towing vessels or undercover operations), and 13 are being held pending decisions relative to 36 currently vacant enforcement positions. The OLE also modified previous "home-to-work" authorization policies requiring specific justification for employees to bring government vehicles home. Application of the new policy reduced previous "home to work" authorization for employees in the Silver Spring, Maryland headquarters office.

The OIG also raised some concerns with purchase card expenditures from the AFF. In all cases, items purchased with purchase cards were for business related purposes, and the OIG did not note any inappropriate items purchased or any abuse of the purchase cards. However, the OIG noted a number of instances of lack of proper approval, inadequate documentation, or incorrect interpretation of use of the cards. OLE reduced the number of purchase cardholders to the minimum number required to support normal operations and retain capability to respond to emergencies. OLE implemented a policy through which no more than two staff currently have purchase cards at any one of OLE's 60 field offices unless its location and work assignments require additional staff to have cards. As a result of this new policy, NOAA reduced the number of cards by 38 percent (70 cards), and only 110 OLE employees currently hold purchase cards. Additionally, employees who had not followed appropriate policies received additional training to ensure all appropriate processes are complied with in the future.

Given concerns about potential past inappropriate use of the AFF, NOAA contracted with the same CPA firm, separately from the audit described above, to perform additional procedures to test AFF transactions more susceptible to fraud, waste, and/or abuse. The CPA firm is directly testing purchase card transactions, travel vouchers, and other disbursements ranging from \$150 to \$3,000 for the fiscal years 2005 through 2010. These transactions are being tested to obtain sufficient and appropriate evidence to ensure proper authorization, documentation, and appropriate use in accordance with applicable laws, regulations, and policies existed for those transactions when processed. The agreed-upon procedures were designed to address concerns raised by the OIG in these areas while avoiding duplication of the previous efforts of the OIG. This special transaction review is scheduled to be issued July 15, 2011. Should this review find any misuse of the AFF, the agency will take appropriate action.

3. NOAA's ability to retain enforcement proceeds is not an incentive for overzealous enforcement

We do not believe that use of the AFF is an incentive for overzealous enforcement. In fact, the AFF's balance has decreased by over 40% since fiscal year 2007 as a result of relatively stable

annual spending and reduced collection of fines, penalties, and proceeds from the sale of forfeited property. The use of proceeds from fines, penalties and the sale of property forfeited as a result of illegal acts is a well established practice within Federal, State, and local governments. The imposition of fines and penalties and the forfeiture of property is controlled and governed by legal processes developed to ensure due process. However, NOAA recognizes that strict oversight of the AFF is an essential component of ensuring the public's trust in our enforcement program. Therefore, following the OIG reports, NOAA developed a new, comprehensive policy to guide its AFF expenditures. In September 2010, NOAA released the policy for public comment while NOAA offices were instructed to operate under the proposed policy until further notice.

NOAA issued a final AFF policy on March 16, 2011. The final policy prohibits half of the AFF's historical uses, including the purchase of vehicles and vessels. While the legal opinion on the AFF states that section 311(e)(1) could be read as authorizing purchase or lease of vehicles or boats for investigative or enforcement purposes, NOAA's new AFF policy prohibits the use of the AFF for the purchase or lease of any vehicles or boats to address any appearances of impropriety. With regard to travel, the new AFF policy reduces the amount and scope of allowed travel significantly. The new policy prohibits travel to and attendance at general conferences or seminars – domestic or international. Also prohibited is travel not directly related to a specific investigation. Travel directly related to specific investigations and enforcement proceedings such as to hearings or depositions are allowed. Attendance at international and domestic bi- or multi-lateral meetings and negotiations to discuss enforcement issues is allowed as these activities are critical to meeting NOAA's international obligations and directly support domestic fishermen by helping create a level international playing field. The policy also expands AFF use for NOAA's compliance assistance, collaboration and outreach activities. Overall, the policy provides guidance on the prohibited and approved uses of the AFF that are consistent with, but narrower than, those authorized under applicable legal authorities and ensures there is not even the appearance of a conflict of interest with the use of the AFF.

NOAA believes, as did Congress in establishing the AFF and specifying the authorized uses, that it is appropriate to use the proceeds of NOAA's enforcement program to offset in part the costs of administering that program. Those who violate the Nation's fishery laws should help offset the cost of protecting our marine resources in lieu of those costs being borne by taxpayers. Further, the availability of these funds for enforcement reduces the requirement for additional appropriations and expands NOAA's ability to respond to violations of the laws it is charged with enforcing.

4. How NOAA Fisheries is handling money to assist New England fishermen transition to a new catch share fishery management system

Amendment 16 to the Northeast Multispecies Fishery Management Plan brought the New England groundfish fishery into compliance with the 2006 Magnuson-Stevens Act by setting annual catch limits at levels to end overfishing and rebuild stocks by the required deadlines. Amendment 16, which began on May 1, 2010, also put new rules in place to allow fishermen to organize into "sectors" (a type of catch share program) that are allocated a share of the annual quota for each species of fish. The sector management approach, which was developed by the New England Fishery Management Council with significant public input over a 3 year period, is showing signs of success. For many years, the New England groundfish fishery has been under

performing both ecologically and economically with not enough fish to support good fishing jobs. Under the sector approach, which provides fishermen with greater flexibility about where and when to fish, despite lower catch limits fishermen overall are making more money than in recent years. In 2011, catch levels have gone up for 12 groundfish stocks as part of the rebuilding process.

During this transition to sector management in fiscal years (FY) 2009 and 2010, a total of over \$47 million was invested for the New England groundfish fishery to offset start-up costs of groundfish sectors, to conduct at-sea research with the industry focused on developing more selective gear for this fishery, and to develop permit banks that will provide additional fishing opportunities to small-scale participants in the groundfish fishery. See attached table that outlines how this funding has been allocated.

The funding can be separated into three general categories—direct industry support, innovation, and agency costs.

To support the industry during this transition period, funding has been provided through grants and cooperative agreements to, among other things, hire sector managers, conduct the legally required environmental analyses, hire dock-side and at-sea monitors, and hold workshops and training on catch accounting and data protocols. These funds have assisted the fishing industry as it adjusts to this new management system and the lower catch limits required by the Magnuson-Stevens Act. NOAA currently pays for the required 30 percent at-sea monitoring coverage. This monitoring helps ensure accurate catch accounting and allows NOAA to make regulatory changes as quota is used up. As the fishery rebuilds and becomes more profitable, many of these costs will be assumed by the industry. NOAA has also allocated a total of \$6 million for state permit banks in Maine, New Hampshire, Massachusetts and Rhode Island which will provide additional fishing opportunities to small-scale participants in the groundfish fishery by providing access to quota at a discounted rate.

Funding has also been used for innovations to improve overall groundfish management performance. This includes electronic reporting and monitoring systems for fishing vessels. Agency staff has worked with industry and independent developers to build several electronic reporting applications for use on board fishing vessels. NMFS anticipates that this system will be available to interested fishermen this summer. Electronic reporting by fishing vessels will substantially improve the timeliness of fishing reports and the quality of the data being provided. Funding has also been provided for grants for cooperative research with the fishing industry to develop more selective gear and fishing methods. The intent of this research is to reduce the bycatch of the more vulnerable stocks, often referred to as “choke species,” while enabling the fishing industry to fully utilize quotas for healthy groundfish stocks, such as haddock.

Finally, funding has been used to improve our internal agency systems. Funding has improved fishery dependent data collection systems, quality control on historic catch data, and quota accounting. Funds have also been used for economic and social science data collection and analysis to ensure a better understanding of the impact of the sector program on participants so improvements can be made if necessary. The agency has also embarked on a new way of engaging with and serving the industry. Funds have supported dozens of meetings between

NMFS and industry, as well as printed materials supporting an understanding of, and compliance with, the new management system.

III. Conclusion

Fishermen—commercial and recreational—are the lifeblood of so many of our coastal communities. And America's fishermen, these small businessmen, support vital jobs in our coastal communities. An effective enforcement program ultimately protects the business interests of fishermen as well as the marine environment. I believe the reforms this Administration has made to NOAA's enforcement programs are creating a more effective and transparent enforcement program and will help us rebuild the trust of the fishing community and other stakeholders.

Thank you Mr. Chairman. I would be happy to answer any questions you may have.