

Testimony of
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U.S. DEPARTMENT OF COMMERCE

before a field hearing of the

**Subcommittee on Federal Financial Management, Government Information,
Federal Services, and International Security
United States Senate**

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***How Is NOAA Managing Funds to Protect the Domestic
Fishing Industry?***

Chairman Carper, Ranking Member Brown, and Members of the Subcommittee:

We appreciate the opportunity to testify on the actions NOAA is taking to better manage funds to protect the domestic fishing industry. My testimony today will focus on NOAA's use of an asset forfeiture fund (AFF) authorized by the Magnuson-Stevens Fishery Conservation and Management Act (MSA) to pay for investigation or enforcement activities related to the fishing industry. I will discuss our history of work related to the AFF and NOAA's enforcement activities, describe NOAA's efforts to correct these issues, explain our latest work, and offer further suggestions for strengthening NOAA's management of the AFF.

BACKGROUND ON FISHERIES ENFORCEMENT AND THE AFF

NOAA's Office for Law Enforcement (OLE) and the General Counsel for Enforcement and Litigation (GCEL) play a pivotal role in the enforcement of fishing regulations. In August 2009, when we performed our first review, OLE's headquarters and six divisions staffed almost 150 criminal investigators and 15 enforcement officers. The office's work is primarily civil and administrative in nature, focusing on the protection of the nation's fisheries and enforcing compliance with regulations. However, OLE also has authority to enforce over 37 statutes, including criminal provisions in certain statutes, as well as numerous treaties related to the conservation and protection of marine resources. GCEL is also a key part of fishery enforcement; its staff of approximately 17 attorneys, managers, and support personnel processes civil penalty cases, permit sanctions, and administrative forfeitures.

At the time of our January 2010 report, 65 percent of OLE's cases were related to the MSA. The MSA gives NOAA the authority to retain and use proceeds from the civil and criminal penalties imposed and collected as part of its enforcement actions. Most violations of the act, such as exceeding catch limits, result in civil fines and penalties alone. NOAA is also permitted to use proceeds from assets (such as fish or vessels) that have been forfeited for violations of the MSA. These fines and other proceeds are deposited into the AFF. The fund primarily consists of monetary proceeds from MSA enforcement actions, but also includes proceeds from enforcement of select other marine resource laws, including provisions of the Lacey Act and the Endangered Species Act. The MSA provides that the agency may use these monies for, among other things, "any expenses directly related to investigations and civil or criminal enforcement proceedings, including any necessary expenses for equipment, training, travel, witnesses, and contracting services directly related to such investigations or proceedings."¹

OIG's REVIEWS

Our examination of the AFF was part of a larger review of NOAA enforcement operations requested by Undersecretary Lubchenco in June 2009. With respect to the AFF, we investigated concerns raised by members of Congress and the fishing industry that in some cases NOAA was imposing excessive fines on members of the fishing industry—to such an extent that the fines seemed to constitute a form of bounty—because of the agency's ability to levy fines and penalties and then keep the proceeds to augment its budgets. Our work and the work of our contractor KPMG in examining the AFF revealed a significant lack of accountability and transparency—to the fishing industry, to the public, and even within NOAA itself.

In documenting our review of NOAA's enforcement program, we issued reports in January, July, and September 2010, and both the Secretary of Commerce and Dr. Lubchenco have taken action to correct the problems with the AFF and with NOAA's fishing enforcement practices in general. In response to our work, NOAA has proposed or implemented many corrective actions, particularly in the areas of enforcement leadership and management; policy, processes, and regulations; workforce structure and balance; and communications and outreach to the fishing industry. In my view, these actions represent real progress. While there is still more work to be done to implement the many reforms directed by the Secretary and Undersecretary, there is a commitment at the highest levels of the Department and NOAA to see these reforms through to the end. As noted below, we are equally committed to follow up and audit NOAA's implementation of our recommendations.

EXAMINATION OF THE AFF

Our initial report in January 2010 included our early findings regarding the fund, but we were limited in our ability to conduct a thorough review by several factors. First, despite OLE reporting a balance of \$8.4 million for the AFF as of December 31, 2009, officials could not substantiate this figure; it was nearly impossible to isolate the monies comprising the AFF from

¹ As authorized by section 311(e)(1) of the MSA.

other funds used by NOAA. Additionally, while the AFF's balance is included in the Department's overall annual financial statements, due to its relatively small size a separate audit of the fund—which might have illuminated some of the AFF's issues—had never been completed.

Due to the fact that the fund had not been audited, my concern that the AFF lacked sufficient internal controls, and the fact that we could not readily determine how NOAA had utilized the AFF, my office contracted an outside firm, KPMG, to perform a forensic review of the AFF. KPMG's main tasks were designed to give us a clearer understanding of AFF operations and internal controls. The firm's findings, which are detailed in our July 2010 report, reflected a marked lack of organizational attention to this important function:

- At that time, no single unit or individual within NOAA had a detailed understanding of the AFF and how it functioned. Moreover, it appeared that there had been no prior attempts made to define the fund and its uses. As a result, KPMG received multiple—sometimes conflicting—definitions of the fund.
- Decentralized operations resulting in inconsistent practices may have contributed to the confusion: OLE's regions and headquarters, along with GCEL headquarters, had different requirements for AFF-related document retention and preservation. Consequently, the same types of documentation were often not present from one division or region to another, and it was difficult to determine what constituted a “complete” set of supporting documentation. KPMG found that 62 percent of 604 transactions it selected for further analysis (i.e., document review) did not have required supporting documentation, and 27 percent did not have required approvals.
- KPMG's review also disclosed serious deficiencies in the fund's management processes and internal controls. For example, at that time nearly every OLE special agent and enforcement officer was issued a purchase card regardless of the individual's need for one. This practice was inconsistent with federal policies for managing purchase cards. KPMG also found evidence of attempts to circumvent single-purchase limits and competitive procurement procedures.

While KPMG performed its review, we focused on several high-risk AFF expenditure areas:

- We investigated OLE's acquisition and use of vehicles and vessels, finding that OLE used the AFF to purchase vehicles and vessels despite the fact that its policy at the time only explicitly authorized use of the fund to lease vehicles. For example, according to OLE, 200 vehicles were purchased—at a cost of about \$4.6 million—predominantly with AFF monies. Additionally, the number of vehicles exceeded the number of OLE enforcement personnel on staff at the time by about 30.
- We assessed international travel practices by OLE and GCEL employees and discovered that neither office had policy guidance for using the AFF for travel not directly related to investigations or enforcement proceedings. Between January 2005 and June 2009, OLE and GCEL charged over \$580,000 to the AFF for international travel. However, based on our review of NOAA travel records, only about 17 percent of this travel was directly

related to specific investigations or enforcement proceedings; the remaining 83 percent went for training or attending meetings and workshops.

- We examined OLE's Special Operations Fund (SOF), which pays for the office's covert and undercover activities and operations, and determined that the SOF had similar problems that were identified with the AFF, including insufficient training for special agents on SOF policies and procedures, particularly for conducting and documenting special operations, and inconsistent methods for recording, approving, and supporting SOF deposits and expenditures.

Our findings are detailed in our July 2010 report. Since we issued that report, the Department and NOAA have worked to improve AFF practices.

NOAA'S CURRENT REFORM EFFORTS

In all, our findings have led to 28 recommendations to NOAA for improving the transparency and accountability of its enforcement programs and operations, including the AFF. According to NOAA, to date 17 of our recommendations have been implemented, with 11 yet to be finalized. However, only time will tell whether NOAA's reforms have been institutionalized. We are currently completing audit work to validate NOAA's assessments of the status of these recommendations.

Our 13 AFF-related recommendations suggested ways to improve NOAA's management of the fund, such as clearly defining the AFF, improving processes and controls, and centralizing expenditures (as explained in appendix A). In response, NOAA developed a corrective action plan that, if implemented correctly, should address our recommendations. NOAA has also made the following improvements based on the findings in our various reports on fisheries enforcement programs and operations:

- ***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. In addition, the senior GCEL attorney in the Northeast was reassigned away from enforcement duties to the Office of General Counsel for Natural Resources.
- ***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; 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; increasing management oversight of the AFF; and requiring justification and approval 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. It is our understanding that NOAA is close to completing its workforce analysis.
- **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. As a result of our work, OLE has established a liaison with the fishing communities in the Northeast region. The office also contracted with an outside firm to conduct a regional assessment and review of the fishery management process in New England, which has included recommendations for NOAA to improve collaboration as well as simplify governance and communication.
- **Special Master's Review.** In line with a recommendation in our September 2010 report, the Secretary promptly appointed a Special Master to conduct an independent evaluation of cases we identified as being problematic. In May 2011, after reviewing the Special Master's April report, the Secretary announced that \$649,527 in penalties would be remitted to 11 individuals or businesses after it was concluded that the NOAA enforcement program had in some instances "overstepped the bounds of propriety and fairness." Currently, the Special Master is examining approximately 80 additional complaints that were received during the application period; those that meet the criteria set forth by the Secretary will receive further analysis and evaluation.

OUR LATEST WORK

We are following up on our past work with a deeper examination of the AFF based on NOAA's action plan. With the understanding that some of NOAA's corrective actions—while technically completed—may still be untested, we will carry out the following reviews and investigations:

- We are currently examining the adequacy of NOAA's definition of AFF assets, including the completeness and accuracy of its funding sources. We are also determining whether NOAA has appropriately defined allowable uses of fund assets and developed controls over collections and disbursements. We began our review in March 2011 and expect to release the results of our work this fall.
- NOAA contracted with an outside accounting firm to audit the AFF's financial statements and certain OLE and GCEL micropurchase transactions occurring between FY 2005 and FY 2010. The micropurchase transaction audit is expected to cover purchase requests and credit card transactions that do not meet NOAA's \$1,000 threshold for

additional senior-level approval. As part of our review of NOAA's definition of the AFF, we are gaining an understanding of the contractor's audit approach to establish whether the approach was designed to provide reliance on the AFF cash balance as of March 31, 2011, and whether the firm is able to give an opinion on the statements.

- We are presently investigating the acquisition and use of a vessel purchased with AFF monies in OLE's Northwest Division; certain travel expenses charged to the AFF, including foreign travel; and the use of the AFF for contract services provided by a financial analyst and an associate.

Finally, we are also analyzing NOAA's progress in implementing the corrective actions planned in response to our January 2010 report. Our analysis will include a determination of whether NOAA is (a) implementing policies and procedures that increase the accountability and transparency of GCEL and OLE operations, (b) progressing on its workforce analysis, (c) establishing an outreach strategy that will improve communications with Fishery Management Councils and fisheries stakeholders, and (d) improving GCEL and OLE management information systems.

FURTHER ACTIONS TO IMPROVE THE AFF

NOAA issued its revised policy regarding prohibited and approved uses of the AFF in March 2011. The policy, which is available on the agency's website, acknowledges that NOAA continues to interpret the MSA to provide broad statutory authority for use of the AFF. NOAA states that its policy restricts uses of AFF monies short of what it believes is authorized by law as a means to guard against negative perceptions of its use of AFF proceeds; for example, the policy specifically prohibits the use of the AFF for any vehicle or vessel purchases or leases.

NOAA's new policy provides further guidance for travel and training expenses; however, ambiguities may still exist. For example, the policy further discusses which travel expenses are prohibited, but the MSA could be read as having a stricter standard. It would be helpful to further clarify how each of the approved travel expenses meets the MSA standard, particularly those expenses for international meetings and negotiations. Additionally, while the NOAA policy lists approved training expenses, it is not clear how some of these expenses meet the MSA requirement that expenses be "directly related" to investigations and enforcement proceedings. It is also unclear whether some of the approved training expenses include associated travel expenses or just the cost of the training course. A stronger definition of these expenses may be warranted.

The use of AFFs in the federal government is not widespread, but several federal agencies do have such funds in place to offset expenses associated with criminal investigations. These funds can be derived from civil judicial, administrative, or criminal forfeitures. In function and operation, NOAA's AFF is something of a misnomer; the fund predominantly represents civil penalties, and would be better termed as such.

We conducted a general review of the policies and procedures of two major agencies—the Departments of Justice (DOJ) and Treasury—that use asset forfeiture funds as part of their law enforcement efforts. Our review of these policies and procedures, coupled with the recommendations in our July 2010 report, identified several best practices for managing such a fund:

- That the fund be maintained as a distinct entity with expert guidance on policy, operations, financial management, and law. A separate accounting of fund assets establishes an auditable control environment that will reduce the chance for misappropriation and abuse. It also requires a well-defined financial management structure for deposited and expended funds, bringing critical transparency to the AFF.
- That the fund be included in budget appropriations providing technical analyses of fund assets, as well as information on long-term status and estimated availability of NOAA's AFF resources.
- That standardized policies and procedures be established for vehicle and purchase card use and adherence to the policies be monitored through centralized reviews and approvals of AFF transactions and activities in these areas.
- That annual reports on the AFF, including audited financial statements and a strategic plan on investigative initiatives, be completed and made available via the agency's website.

It is clear that the AFF has been poorly managed in the past. However, if NOAA continues to show its commitment to improving the fund by implementing a rigorous process for operating it, putting robust management and strong internal controls in place, actively monitoring policies and procedures on a routine basis, and ensuring that these measures allow for transparency and accountability, Congress can have confidence that the AFF will be a valuable tool for enforcing fishing laws and regulations and ensuring equitable treatment for the many hard-working members of the industry who operate by the rules.

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In conclusion, Mr. Chairman, NOAA is working to ensure that the AFF is meeting its requirements and that the agency is effectively and fairly enforcing fishing laws. But proactive monitoring and investigation are still needed in order to prevent error and abuse and protect those who earn their living from America's marine territories.

This concludes my prepared statement, and I will be pleased to respond to any questions you or other subcommittee members may have.

**Appendix A: Recommendations from July 2010 OIG Report, NOAA's Corrective Actions,
and Status of Reform Efforts**

Recommendation from July 2010 Report	NOAA's Proposed Corrective Action	Status as of April 18, 2011, as Reported by NOAA
Precisely define the AFF and comprehensively audit it, initially and annually. A comprehensive audit should entail detailed transaction testing and additional data mining.	Develop AFF definition, contract for independent confirmation of balance and audit of AFF financial statements, and implement routine monitoring and oversight procedures.	Partially complete. Audit in progress.
Communicate the results of initial and annual audits of the AFF to NOAA and Department of Commerce senior leadership, as well as outside stakeholders (Congress, Office of Management and Budget, etc.).	Notify senior leadership and outside stakeholders of audit results.	Incomplete. Audit report due mid-June 2011.
Specifically identify and account for the AFF in NOAA's annual budget submissions.	Include AFF budget information in congressional justification and NOAA budget summary.	Complete.
Modify OLE's and GCEL's processes for budgeting and spending AFF proceeds to be comparable to other agencies with similar asset forfeiture funds; and benchmark the asset forfeiture fund programs of the Treasury and Justice Departments for applicable best practices.	Determine the budget and spending processes at Justice and Treasury, develop internal budget process based on best practices, enter AFF budget operating plan into Commerce systems, and produce monthly reports.	Complete.
Document a formal interpretation of the statutory language in the Magnuson-Stevens Act as to authorized uses of the AFF; and establish and update formal policy for OLE and GCEL to clearly prescribe both authorized and unauthorized expenditures of AFF monies.	Prepare legal memorandum on applicable MSA provisions and develop formal policy on authorized/unauthorized uses of the fund and splitting costs between AFF and appropriated funds.	Complete.
Take steps to greater centralize AFF approval processes for expenditures.	Formalize the new expenditure approval process through a centralized office.	Complete.

Recommendation from July 2010 Report	NOAA's Proposed Corrective Action	Status as of April 18, 2011, as Reported by NOAA
Ensure that approved AFF expenditure transactions have required electronic/hard-copy supporting documentation (a recurring KPMG finding).	Review and communicate document retention policies, and implement procedures to ensure compliance.	Complete.
Develop improved processes to (a) clearly identify and track AFF monies received and expended, and (b) ensure that AFF funds are not commingled.	Design and deploy an approach for recording, tracking, and reporting all AFF financial transactions through a single fund code.	Complete.
Implement more stringent internal reviews for split purchase card transactions (i.e., those involving the same credit card holder, date, vendor, and the same or different amounts) and duplicate purchase transactions.	Review KPMG data set, provide split purchase findings to management for action, and educate cardholders and approving officials of credit card guidelines and responsibilities.	Complete.
Determine the cost-effectiveness of General Services Administration-leased vs. purchased vehicles; establish formal policy for vehicle acquisition and management, based on operational need; and apply appropriate disposition procedures for excess vehicles.	Develop guidance on leasing vs. purchasing vehicles, update existing policies, and identify/address excess vehicle inventory.	Complete.
Establish formal policy for which OLE personnel should be authorized use of daily take-home vehicles; and review and determine the number of "pool" vehicles per locale based on justified need.	Revise policy on authorized use of government vehicles, implement procedures to ensure compliance, and determine appropriate vehicle inventory level.	Complete.
Review and set policy for which OLE personnel should be authorized use of purchase cards, based on operational need. Presently, nearly every OLE special agent and enforcement officer is issued a purchase card. This is not consistent with current government-wide policy for internal controls to limit the risk of misuse of purchase cards.	Review the number of purchase cardholders and activity levels, and reduce to appropriate level.	Complete.

Recommendation from July 2010 Report	NOAA's Proposed Corrective Action	Status as of April 18, 2011, as Reported by NOAA
<p>Determine whether NOAA's inability to adequately track AFF expenditures constitutes a violation of any federal financial management law or standard. MSA requires that fines and penalties imposed for violations of the Northeast Multispecies Fishery Management Plan are to be specifically used to enforce that plan, but NOAA has not tracked the use of these funds. The then-Director was unfamiliar with this requirement when we initially addressed it with him.</p>	<p>Prepare legal memorandum that addresses whether NOAA's use of AFF, subsequent to January 1, 2005, gave rise to violations of laws/standards.</p>	<p>Partially complete. Review fund activity in progress.</p>

Source: OIG summary of NOAA's corrective action plan, updated April 18, 2011