

REVIEW OF NOAA FISHERIES ENFORCEMENT PROGRAMS AND OPERATIONS

The Enforcement Consultants (EC) reviewed the document *NOAA Fisheries Enforcement Programs and Operations* and appreciates the opportunity to provide related comment. As you know, your EC is structured in a way to ensure that all enforcement entities with a stake in Council business have an opportunity to be a part of the process and comment on issues before you. Our formal committee comments are generally the result of a team approach. However, given that National Oceanic Atmospheric Administration's Office of Law Enforcement (NOAA OLE) is the subject of the Office of the Inspector General (OIG) investigation referenced in the above report, NOAA OLE recused themselves in this matter.

The OIG of the U.S. Department of Commerce recently released investigative findings detailing their evaluation of NOAA OLE. This review was conducted in response to commercial fishing industry complaints. With one exception, the complaints were confined to the East Coast, and though they have not been fully investigated or determined to have merit, recommendations were made from the OIG that could drastically change the NOAA OLE work force composition and direction. The OIG conclusions and perspective became the subject of much discussion during recent Congressional hearings.

Acting OLE Director Alan Risenhoover has provided excerpts of the OIG report to the Council in a document titled "Review of NOAA Fisheries Enforcement Programs and Operations". One of the OIG conclusions in the document ignores West Coast partnerships, our protection achievements and history of success, which is the genesis of our concern. None of the members of the EC or their agencies were contacted by the OIG, demonstrating a lack of interest in understanding how we approach fisheries enforcement in Pacific Fishery Management Council (PFMC) waters.

"In short, we found systemic nationwide issues adversely affecting NOAA's ability to effectively carry out its mission of regulating the industry"

OFFICE OF INSPECTOR GENERAL REPORT – general findings

Based on our understanding, not all regional fisheries management Councils are created equal in terms of providing a fishery management and protection system assuring enforcement agencies are engaged at all levels. The NOAA OLE Northwest and Southwest divisions participate with the United States Coast Guard (USCG) and state resource enforcement agencies on the PFMC Enforcement Consultants committee (EC). The design of the PFMC and committed participation by all member agencies has resulted in regulatory and process improvements, more enforceable regulations, flexibility for industry and better communication between regulators and the regulated community. In our opinion, the PFMC structure should serve as a model for the rest of the nation.

The EC's primary focus is to advise the Council on proposed regulatory action. The EC also collaborates on operational issues and takes advantage of time during Council meetings to conduct planning in areas of federal fishery protection priorities. A number of enforcement plans have been put into action. The resulting joint field operations provide benefits, such as the ability to more effectively leverage limited

patrol resources, determine compliance, identify regulatory deficiencies, and bridge jurisdictional gaps. Recent examples include:

PARTNERSHIP PATROLS

1. **Airport and border emphasis patrols:** To ensure proper catch accounting State Officers and Federal Agents collaborated to inspect commercial shipments.



2. Coastal Commercial / Sport Salmon Patrol



3. Tri-state Market Emphasis: State Officers and NOAA Agents traveled to partner states in order to track down illegal operators. The team did not allow borders to stand in the way of enforcement, tracing product marketed out-of-state back to origin.



4. Shore-side Whiting and By-catch Accounting



6. Coastal Halibut Patrol



5. ESA Salmon Protection

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

It is evident to the EC that the OIG failed to examine the role of the USCG and the States on the West Coast in fisheries enforcement and made negligent and uninformed assumptions about the proper work force structure of NOAA OLE. The relevance of West Coast State enforcement entities have in protecting the nation's fisheries needs to be understood. The three West Coast States and NOAA OLE have a 27 year working relationship since the signing of a Cooperative Enforcement Agreement (CEA) in November of 1983. This relationship has evolved to provide additional law enforcement presence to help secure our country's borders; and more adequately manage, protect, and conserve our nation's marine resources.

The Magnuson -Stevens Fishery Conservation and Management Act (MSFCMA) authorized NOAA to enter into Joint Enforcement Agreements (JEAs) with participating states marine enforcement agencies. JEAs provided funding and authority to the states to enforce federal fishery management regulations. In addition, the West Coast States adopt federal regulations by incorporating them by reference in state law. NOAA OLE and the States of California, Washington and Oregon have worked together for decades to resolve natural resource protection issues and can point to a number of significant successes in enforcement of the Lacey Act, the Endangered Species Act, the MSFCMA and North Pacific Halibut Act.

There is a significant patrol function being accomplished by JEA partners and the USCG, and this should be strengthened. Through the JEA, the West Coast States alone have the potential to leverage over 600 community based uniformed patrol personnel and detectives for federal fishery regulation enforcement that may otherwise be outside of current fiscal constraints of NOAA OLE. While not all these officers are dedicated to enforcing federal fishery regulations, all have the ability and authority to address federal violations when observed or during targeted federal fishery patrols. The USCG also has the ability to act as a force multiplier by supplementing state assets with an additional several hundred at-sea enforcement officers.

“Approximately 98 percent of enforcement caseload has been regulatory / civil and only about 2 percent criminal cases”.

Time and effort associated with criminal and civil cases that begin as joint investigations of federal law and are ultimately prosecuted in a state court did not appear to be a part of the analysis. During the 2007-2009 JEA period (an actual time equivalent of about 24 months), West Coast State activity associated with enforcing federal laws resulted in 136,092 contacts; 15,694 arrests / citations / warnings. The West Coast States adopt federal fisheries regulations under state law, and many of the above referenced violations are prosecuted in state criminal court as encouraged by the JEA.

NOAA OLE is responsible for enforcing federal Acts with a mix of civil and criminal provisions. Because of the civil responsibility, some have suggested that instead of hiring agents with criminal investigative ability, uniformed NOAA inspectors with civil authority only, similar to United States Fish and Wildlife Service inspectors may be a reform option. Our experience is that having a criminal investigative background provides an important skill set, regardless of whether you are investigating a criminal or civil case. Although civil violations can involve huge sums or illegal product and profit, many violations of federal civil law have potential to rise to both a federal and state criminal level. As an example, one of West Coast's most notorious

poachers responsible for a \$2 million dollar resource theft is currently serving a 14 year state prison sentence. The violator had a history of federal and state violations, requiring extensive collaboration between State Officers and NOAA OLE investigators to address them. Our experience is that there is clear value in having NOAA OLE investigators pursue high profile and complex cases. That value, along with NOAA's involvement and interactions with JEA partners in joint criminal investigations, was not fully considered in the OIG report.

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

OFFICE OF INSPECTOR GENERAL REPORT – general findings

This OIG recommendation should be aimed at NOAA General Counsel for Enforcement and Litigation (GCEL), regardless, this assumption does not consider the importance of the West Coast approach and JEA partnerships. State Officers and NOAA Agents have a wider range of tools to address violations of federal fisheries regulations than recognized by the OIG. The West Coast States adopt most of the federal fisheries laws and pursue them as state crimes, which have a higher burden of proof and provide greater protection for citizen rights. JEA's encourage the federal –state partnership to consider both state and federal systems when evaluating how to address different levels of violations. NOAA OLE was not credited with using the state tools and venues to address violations of federal law.

Whether the civil penalty assessment process is arbitrary and unfair has been rigorously debated. Any evaluation should be done on a case by case basis, where all the elements of the investigation are considered before concluding that the action taken was not appropriate. We do agree that violations should have clear punishments with ranges that make sense, and that the system has strong due process.

The EC understands the importance of operators and/or vessel owners receiving timely notification of enforcement actions. The inability to be timely may be related to in-depth or complex investigations requiring more time to conclude. Having said that, timely prosecution is the expectation and right of every US citizen. Failure to provide this erodes compliance in the long term.

SUMMARY

Our experience on the West Coast demonstrates that the processes associated with PFMC and JEAs maximizes the effectiveness of law enforcement efforts by defining Pacific Coast and the nations marine fisheries priorities, supporting comprehensive cooperative planning efforts, and enable inter-jurisdictional fisheries enforcement operations. However, all programs have room for improvement.

The EC believes that the Council can continue to help improve upon our collective responsibility to protect the nations living marine resources by communicating to upper NOAA management the following:

- The PFMC structure should be used as a model for other regions, ensuring enforcement partners from NOAA OLE, USCG, and State Officers are properly engaged in the regulatory process.
- Instead of placing limited authority Federal uniformed officers or inspectors in the field, recognize general authority state officers are already present and engaged in community based resource protection. State enforcement agencies already have the infrastructure in place, as well as trained and equipped personnel to meet needs. Special Agents can be viewed as the corresponding “detective force”, with it’s state and USCG partners.
- The JEA pool of 15 to 17 million dollars available nationwide for all Coastal States has remained static since JEA program inception and should be increased. Additional and consistent funding of trained state officers would enhance uniformed presence within fishing communities.
- GCEL personnel involved in case prosecutions should be integrated into the Council process.
- Continue to consider regulatory improvements as suggested in Enforcement Considerations for Regional Fishery Management Councils found on Pg 20,21,22 of the *Review of NOAA Fisheries Enforcement Programs and Operations* report when making fisheries management decisions.

PFMC
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