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Dr. Jane Lubchenco
Under Secretary of Commerce
for Oceans and Atmosphere
Administrator, National Oceanic and Atmospheric Administration
United States Department of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Dear Dr. Lubchenco:

Thank you very much for taking the time to meet with a delegation of United States Attorneys regarding the NOAA fisheries enforcement program. The Department of Justice shares your commitment to good stewardship of our wildlife and natural resources. We also share your commitment to an effective enforcement program that treats fishermen fairly, while at the same time holding violators accountable – both to protect our resources and to level the playing field so that violators do not profit at the expense of law-abiding fishermen.

We especially appreciate the opportunity to share our insights about the importance of the criminal program to effective enforcement. We believe that a full appreciation of any challenges in the NOAA fisheries enforcement program – and its effectiveness – requires context which has been lacking from much of the public discourse we have seen. We hope to help restore context with the observations below.

- To begin with, a close read of the Inspector General's reports makes clear that the issues that prompted the interest in reform are regional in nature, centered in New England – and there is no evidence in the reports of a nationwide enforcement problem. Indeed, of the 27 complaints addressed in detail in the IG's September 2010 report, 26 involved the New England fishery. The regional nature of the challenges was also apparent at the NOAA enforcement summit, which included representatives of the Department of Justice: fishing industry representatives from other regions did not appear to share the concerns voiced by some in New England.
- The Inspector General's reports also make clear that any challenges appear in only a tiny fraction of the overall work of the fisheries enforcement program. The Inspector General

identified nine confirmed complaints and an additional 19 complaints appropriate for further review. These complaints spanned a 12 year time period. During this time, NOAA fisheries enforcement investigated tens of thousands of cases and undertook thousands of enforcement actions – issuing about 3700 Notices of Violation since January 1, 2000. In other words, the exhaustive work of the Inspector General, who solicited input from the interested regulated industry – most of whom are extremely sophisticated and many of whom are represented by counsel – identified confirmed complaints in less than 1/4 of one percent of the cases investigated by NOAA. We applaud NOAA’s swift and broad efforts to make changes to address the challenges reflected in the complaints and other findings of the Inspector General, but also feel that it is important to underscore the context and extent of the challenges as identified by the Inspector General.

- None of the evidence of enforcement issues cited by the Inspector General relates to criminal enforcement. We know of no evidence to suggest that any of the challenges identified exist in the criminal enforcement program. For example, one of the most sweeping concerns is the broad discretion afforded NOAA attorneys in imposing penalties. In the criminal setting, federal district judges impose the penalties, guided by statutory factors, the Sentencing Guidelines, and legal precedent.
- While there was no evidence presented suggesting problems with criminal enforcement, the January 2010 report recommended that NOAA consider whether it should “continue to approach fisheries enforcement from a criminal-investigative standpoint,” or look for “another approach.” The report further suggested possible workforce changes to de-emphasize criminal enforcement. As we discussed at length, we agree with you that criminal enforcement plays a key role in fulfilling NOAA’s mission, and in ensuring the effectiveness of the civil enforcement. We are concerned that the conflating of the civil and criminal programs may result from a failure to appreciate the distinct role NOAA Special Agents play in federal criminal enforcement. NOAA Special Agents are highly trained *criminal* federal law enforcement officers who conduct long-term and often extremely complex criminal investigations. These agents prepare cases for *federal criminal indictment* – in prosecutions which often send incorrigible criminals to prison for lengthy sentences. The uniformed officers in the fisheries program play a vitally important role in enforcement, but it is a very different role from that played by Special Agents. Any recommendation or observation as to staffing or caseload among agents and uniformed officers should be based on a careful understanding of the distinct role these two types of officers play. And we respectfully disagree with any suggestion that challenges in the civil enforcement program, predominantly in one region of the country, necessitate an overhaul of a tremendously successful nationwide criminal enforcement program.¹

¹ Neither the United States Attorney community nor the prosecutors at the Environmental Crimes Section were made aware of the IG investigation; nor were we consulted

- We also think some of the specific criticism of penalty practices lacked context. For example, we simply do not agree that a system which rewards early payment of penalty by reduction in fine inherently implicates due process rights. We believe this is properly understood as a simple decision by a party to resolve a dispute early in order to avoid the risk and cost of a hearing – which happens commonly in civil enforcement and private civil litigation. Likewise, federal criminal law does precisely the same thing: courts in the United States have for decades provided reduced sentences to defendants who accept responsibility and plead guilty before trial. In the federal criminal cases, defendants who plead guilty forfeit a great deal more than a hearing before an ALJ – they forfeit their 5th Amendment right to remain silent, their 6th amendment right to trial by jury, their rights to subpoena witnesses, cross examine witnesses against them, to an appeal, and to a presumption of innocence, to name just a few. And certainly more is at stake in the federal criminal context – where a defendant’s decision to plead guilty can (and usually does) result in imprisonment. Courts have long approved reduced sentences for defendants who forfeit these rights in order to reward acceptance of responsibility and save the limited government and judicial resources. *See, e.g., Brady v. United States*, 397 U.S. 742, 752 (1970) (recognizing conserving government and judicial resources as a basis for reduced sentence). The United States Sentencing Commission has codified this arrangement, providing defendants who plead guilty in advance of trial a 3 level reduction in their sentencing guidelines. U.S.S.G. § 3E1.1. The Sentencing Guidelines also, quite appropriately, reward defendants who cooperate and provide information about other criminals. U.S.S.G. § 5K1.1. We believe that an understanding of this backdrop would have helped inform the criticism of penalty practices intended to reward early and pre-hearing disposition of enforcement actions.

- Any discussion of changes in the Asset Forfeiture Fund should be informed by examination of such programs in other enforcement settings. The Department of Justice has a very successful asset forfeiture program which seizes and successfully manages assets worth approximately one billion dollars each year. These programs are common in law enforcement, and help leverage limited resources to make sure we can identify, charge and prosecute criminals. NOAA Asset Forfeiture Funds have in the past been used to great success as “buy money” in undercover investigations, for agent travel on investigations, and to purchase essential investigative equipment. Adequate controls for handling of seized money are essential – but imposition of adequate controls can and should be undertaken without undercutting proper use of seized assets in furtherance of civil and criminal investigations.

by the Inspector General in preparation of the report; we thus did not have an opportunity to offer context on these criminal and penalty issues, where we believe our experience might have been most helpful.

While we readily recognize the limited role of criminal prosecutions in the overall enforcement program, it remains an essential tool for achieving compliance. For example, it is our experience that a small number of prosecutions targeting historic areas of regulatory noncompliance generally result in widespread compliance throughout the affected industry. This form of deterrent has proven effective in a broad range of program priorities – from false labeling of seafood products to illegal coral importation, just to name a few. Several recent prosecutions in our districts and nationwide led to the convictions of companies and individuals substituting species to defraud consumers and gain a competitive advantage. The success of these prosecutions, thanks in large part to the investigative efforts of NOAA criminal agents, was applauded by law-abiding companies who rely on aggressive enforcement efforts to establish and maintain competitive markets.

NOAA criminal investigators are also active and critical participants in environmental crimes task forces and working groups throughout our districts. Task forces and working groups play an essential role in detecting and addressing environmental offenses. There are limited federal law enforcement resources available to respond to alleged violations and develop proactive strategies to gain compliance. The collaborative efforts of task force members, including state and local law enforcement, allow us to effectively leverage these limited resources to accomplish everyone's goals. We believe NOAA should recognize, encourage, and build on these efforts.

Finally, it is our collective experience that NOAA criminal investigators have fostered excellent working relationships with their state and tribal counterparts. United by a common purpose of protecting fisheries and other marine resources, these investigators have worked together to more efficiently conduct investigations and assess the appropriate forum for enforcement. The ongoing analysis of NOAA's enforcement work force should recognize the continuing need to support and further these relationships.

Thank you once again for taking time out of your day to meet with the Justice Department delegation. We appreciate your focus, resolve and commitment to excellent enforcement efforts. NOAA has been a valued partner in our shared efforts to protect our nation's treasured marine resources. We hope our observations are helpful, and very much look forward to working with you in the future.

Sincerely,



MICHAEL W. COTTER
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Chair, AGAC Environmental Issues
Working Group