



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
CHIEF ADMINISTRATIVE OFFICER

June 11, 2010

MEMORANDUM FOR: Todd J. Zinser
Inspector General

FROM: 
William F. Broglie
NOAA Chief Administrative Officer

SUBJECT: OIG Investigation #PPC-SP-10-0260-P, Re: Destruction of
OLE Documents During an Ongoing OIG Review
(Your Memorandum Dated April 2, 2010)

NOAA appreciates the opportunity to respond to the subject Office of Inspector General investigation memorandum. Our attached response provides detailed information on actions to address the findings and recommendations in the memorandum.

Attachment



NOAA ACTION PLAN

Memorandum Title: OIG Investigation #PPC-SP-10-0260-P, Re: Destruction of OLE Documents During an Ongoing OIG Review (April 2, 2010)

Investigation Number: OIG Investigation #PPC-SP-10-0260-P

Entity Investigated: National Marine Fisheries Service (NMFS), Office of Law Enforcement (OLE)

OIG Recommendation #1: Federal law enforcement officers are held to a high standard of conduct. OLE's own disciplinary policy, issued by Director Jones in 2008, states that "because law enforcement employees occupy positions of special trust and responsibility, they must maintain the highest standards of conduct." In our view, the Under Secretary should not have to remind NOAA's senior law enforcement officials of the need to cooperate with OIG and other investigations, and retain all relevant documents and follow records disposition requirements. As OLE's and NOAA's top law enforcement officer, the Director is most accountable for the regulation and policy non-compliance shown by these findings, along with the adverse appearance implicated. Accordingly, we recommend that you consider appropriate administrative action for redacted

Action Planned or Taken: On April 8, 2010, the Assistant Administrator for Fisheries, Eric Schwaab, announced personnel changes in the NOAA Fisheries Office of Law Enforcement (OLE). Effective immediately, the Assistant Administrator reassigned the Director, Office of Sustainable Fisheries, Alan Risenhoover, to serve as the interim Director of OLE. Appropriate further administrative action is now being taken.

Implementation Date: April 8, 2010

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OIG Recommendation #2: Significantly, the only person we spoke to within OLE headquarters who thought to check the rules and regulations on record disposition, prior to the shredding, was a GS-7 equivalent support staff employee. Based on this and our other findings, we recommend that NOAA reinforce with its management and overall workforce the importance of adhering to records retention/destruction requirements.

Action Planned or Taken: a) On April 8, 2010, the NOAA Administrator, Dr. Lubchenco, sent an email to all NOAA employees reminding them of their duties with respect to the preservation and retention of agency records, particularly in the course of litigation, formal reviews, investigations and audits conducted by various oversight organizations, and their duty to cooperate fully in such reviews and investigations to ensure the continued integrity of NOAA's programs and the people and organizations that manage these programs. The NOAA Administrator further requested that each NOAA manager reinforce in appropriate forums the importance of compliance with these record preservation requirements and providing full cooperation with formal oversight reviews conducted by the Office of the Inspector General and the Government Accountability Office, and noted her intention to issue an annual reminder of these record retention requirements to all NOAA staff, to emphasize the importance of compliance with these requirements.¹

¹ The NOAA Administrator's email reads as follows:

Each of us plays an important role in the preservation of records that support our mission in accordance with Federal law and regulations. Pursuant to 44 U.S.C. 3301, a "record" includes

"all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them."

Under Federal law, all agency records must be preserved and may not be destroyed unless authorized by an agency's records retention schedule or the Government-wide General Records Schedules. Records include records in a variety of hard-copy and electronic media such as paper, disks, CDs, DVDs, photographs, e-mail, videotapes, and audiotapes.

NOAA has an established policy for the management of records that we create and receive in fulfilling our individual roles in support of NOAA's missions. The NOAA Administrative Order 205-1 outlines the purpose, scope, roles, and responsibilities in managing our records under the law. Compliance with approved records schedules is mandatory. If you are not sure how long a record must be retained, do not discard it until you have

b) In response to Dr. Lubchenco's April 8 email, NOAA Fisheries developed and is implementing a three-part training strategy to educate NOAA Fisheries leadership, supervisors/managers, and approximately 2000 to 3000 NOAA Fisheries employees on record management. As of May 4, 2010, NOAA Fisheries had provided a briefing on Records Management for its Office, Center, and Regional Directors. Additionally, NOAA Fisheries is requiring all supervisors to complete a training class on Records Management over the next two months (no later than July 25, 2010). The third part also underway will be a one-day in-depth training session on Records Management offered for all employees. This class will be coordinated with the National Archives and Records Administration.

Target Implementation Date:

- a) April 8, 2010 -- Completed
- b) July 25, 2010

verified its disposition date by reviewing the records retention schedule, or by contacting the NOAA Records Officer, Pat Erdenberger, patricia.erdenberger@noaa.gov or 301-713-3540 x213, or the Records Liaison Officer for your line or staff office (see attached list). I intend to ensure that an annual reminder of these record retention requirements is issued to all NOAA staff, to emphasize the importance of compliance with these requirements.

Compliance with these records retention requirements is even more critical in the course of litigation, formal reviews, investigations and audits conducted by various oversight organizations – such as the Department of Commerce's Office of Inspector General (OIG) and the Government Accountability Office (GAO). Full cooperation during these reviews and investigations is essential to ensure the continued integrity of our programs and the people and organizations that manage these programs.

I am asking that each NOAA manager reinforce in appropriate forums (staff meetings, orientations for new employees, etc.) the importance of compliance with these record preservation requirements and providing full cooperation with formal oversight reviews conducted by OIG and GAO. It is my expectation that we will each do our part to ensure these requirements and expectations are met.

NOAA ACTION PLAN

Memorandum Title: OIG Investigation #PPC-SP-10-0260-P, Re: Destruction of OLE Documents During an Ongoing OIG Review (April 2, 2010)

Investigation Number: OIG Investigation #PPC-SP-10-0260-P

Entity Investigated: National Marine Fisheries Service (NMFS), Office of Law Enforcement (OLE)

OIG Recommendation #3: Because our findings show non-compliance with a government-wide records disposition regulation promulgated by the National Archives and Records Administration (NARA), we recommend that you determine whether notification to NARA is required, and make such notification as appropriate.

Action Planned or Taken: After conducting a thorough review, the NOAA Records Officer, Ms. Pat Erdenberger, in a memo dated May 26, 2010, concluded that no destruction of agency records before their scheduled retention took place and therefore NOAA is not required to notify NARA.

First, Ms. Erdenberger determined that all but one set of the documents destroyed were not agency records within the meaning of the Federal Records Act.

Second, of the one set of documents that were agency records, Ms. Erdenberger, determined that these records were limited to OLE's housekeeping copies of Travel Orders and Travel Vouchers covering the years up to and including 2007, and these records were destroyed using the appropriate record schedule disposition authority.²

² The May 26 memo (two footnotes omitted) reads as follows:

MEMORANDUM FOR: Lois Schiffer, NOAA General Counsel
Mary Beth Ward, NOAA Deputy General Counsel

FROM: Pat Erdenberger, NOAA Records Officer

SUBJECT: Response to OIG Recommendation #3 regarding
Office of Law Enforcement Headquarters Records

You asked that I conduct a records inspection to determine whether or not incidents of document destruction occurred within the Office of Law Enforcement Headquarters that would warrant notification of the National Archives and Records Administration as required in certain circumstances in 44 USC Chapter 31 §3106 and 36 CFR §1230.

The OIG Recommendation #3 reads:

Because our findings show non-compliance with a government-wide records disposition regulation promulgated by the National Archives and Records Administration (NARA), we recommend that you determine whether notification to NARA is required, and make such notification as appropriate.

I am certain that no notification of NARA is required, since no destruction of records before their scheduled retention took place during the November 20, 2009 incident. The bulk of materials destroyed were primarily of

Implementation Date: May 26, 2010

several classes of non-record material. Those were limited to the personal papers of two individuals (one set consisted of personal copies of records related to his duties as an officer in the US Army Reserve, the other set were reference materials brought from a previous job five years ago), overstock copies of training materials by a management analyst, outdated information and reference materials from the communications staff person, and the type of reference materials typically found in all unit director's offices throughout NOAA.

Only one series of Federal records were destroyed in the shredding incident. Those were limited to the unit's housekeeping copies of Travel Orders and Vouchers covering the years up to and including 2007. These records were destroyed using the appropriate record schedule disposition authority. The person responsible for these records requested and received a copy of the appropriate NOAA Disposition Schedule one month prior to the shredding. All currently held travel records for the years 2008 and 2009 are in locked file cabinets in the unit's file room. The official record set, the audit set of these documents are held by the Chief Financial Officer's unit in Germantown, MD.

The determination that no illegal disposition took place was based upon a systematic inspection of the records management practices of the office, a careful onsite inspection of the OLE office Federal records and reference materials, the series of records relevant to the mission of the OLE headquarters office found in the NOAA Records Disposition Schedule for National Marine Fisheries Service, the list of files provided in the OIG Report and interviews with all staff who control and manage the official records of the unit. Specific interviews were conducted with all staff providing materials for the shredding except former Director Dale Jones. In Mr. Jones' absence, Alan Risenhoover provided access to all the file cabinets referenced in the OIG Report and a file by file inspection took place.

My determination is also based on my experience and knowledge gained in eight years service in the National Marine Fisheries Service (NMFS) on the West Coast and five years service as a Senior Records Analyst with the National Archives and Records Administration. I am completely familiar with the records management practices in NMFS and through my work in NARA conducted inspections of records in dozens of Federal agencies.

If needed to support this determination, I can provide a detailed account of the inspection as well as all reference materials used. Given the short timeline, I have chosen to get this to you without a bundle of appended materials. What is attached is most relevant. The NOAA Disposition Schedule Series 1513 which shows the official records to be found in the Office of Law Enforcement Headquarters and NOAA Chapter 200 Disposition Schedule which relates to all NOAA offices. All the appropriate records found in the schedule were located in the control of various individuals throughout the office.

Currently the OLE office has been engaged in an effort to attend NARA Training sessions provided in SSMC3. Six members of the OLE staff attended last month and included the two deputies. Several supervisors from that office have also participated in the mandatory records management training of supervisors in NMFS. These webinars, for groups of 25, will continue into June until all 400 NMFS supervisors have participated. Eventually this year all NMFS staff will have participated in NARA training nationwide to prepare them for the record inventory and file plan tasks ahead.

Please let me know if you require additional information.

cc: Judith Means, OGC; Elise Packard, OGC

NOAA ACTION PLAN

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Investigation Number: OIG Investigation #PPC-SP-10-0260-P

Entity Investigated: National Marine Fisheries Service (NMFS), Office of Law Enforcement (OLE)

OIG Recommendation #4: Given litigation involving OLE enforcement matters was pending at the time of the shredding, we recommend that you determine whether these findings present any issues in relation to any current discovery order or any active litigation hold on NOAA records, and address them as appropriate.

Action Planned or Taken: As described in the report, the Office of the Inspector General (OIG) determined that on November 20, 2009, a mobile destruction company shredded documents received from Director Jones and five other Office of Law Enforcement (OLE) headquarters employees. The OIG determined that Director Jones contributed a majority of the documents shredded. Based on review of information concerning these files as well as the status of cases pending as of November 20, 2009, we have concluded that the findings in the Inspector General's report do "not present any issues in relation to any current discovery order or any active litigation hold on NOAA records."

First, the report included as Attachment 7 a list of Director Jones's files that were shredded. The NOAA General Counsel's Office (NOAA GC) and NOAA Fisheries have reviewed the list, and note that it contains a series of mostly subject matter files, and not files related to specific cases.

Second, as stated in response to Recommendation #3, NOAA GC referred the Inspector General's Report to the NOAA Records Officer, Ms. Pat Erdenberger, who determined that the documents shredded during the November 20, 2009, incident did not constitute agency records destroyed before their scheduled retention.

Third, documents relevant to enforcement matters are generally maintained and held in regional offices of NOAA GC and OLE, and not in OLE headquarters.

Based on these factors, we have no reason to believe the files kept at OLE headquarters and destroyed on November 20, 2009, were records relevant to specific enforcement cases. In addition, to assure that the destruction of these files did not affect pending litigation, we have undertaken a case-by-case review of specific NOAA enforcement cases pending as of November 20, 2009, ("pending cases") as described below.

a) Administrative and Civil Cases. NOAA GC has reviewed enforcement-related cases (both administrative and civil judicial) pending as of November 20, 2009, and determined that the findings in the Inspector General's report "do not present any issues in relation to any current discovery order or any active litigation hold on NOAA records."

Procedure. In conducting this review, NOAA GC first identified (i) all federal court civil enforcement-related cases pending on November 20, 2009, and (ii) all administrative enforcement-related cases brought by NOAA, pending before an Administrative Law Judge as of November 20, 2009, and in which a hearing had been requested. NOAA GC then examined each of those cases as described below.

- Pending Administrative Enforcement Cases as of November 20, 2009 –
 - NOAA initiates an administrative enforcement action with the issuance of a Notice of Violation and Assessment or a Notice of Permit Sanction. If the respondent requests a hearing, the parties exchange a written Preliminary Position on Issues and Procedures, which includes a list of all potential exhibits. 15 C.F.R. 904.240(a). This exchange “normally obviate[s] the need for further discovery.” Id. Consequently, the Administrative Law Judge presiding over the action “may allow additional discovery only upon a showing of relevance, need, and reasonable scope of the evidence sought.” 15 C.F.R. 904.240(b). Even where discovery is allowed, the relevant documents are generally maintained in the regional offices of NOAA GC and OLE, and not in OLE headquarters.
 - If the Administrative Law Judge hearing a case rules in favor of NOAA, the respondent may appeal that decision to the NOAA Administrator. In reviewing such appeals, the NOAA Administrator “will not consider new or additional evidence that is not a part of the record before the [Administrative Law Judge].” 15 C.F.R. 904.273(d)(7).
 - If discovery is not allowed in an administrative case, then NOAA does not provide documents and the document destruction that was the subject of this Inspector General’s Report could not affect that case.
 - NOAA GC identified only three administrative enforcement actions pending before an Administrative Law Judge as of November 20, 2009, in which discovery was allowed: *F/V Blue Fin*, SE# 040289 (a shark finning case from the Southeast region), *Peter Pan Seafoods*, AK# 041011 (a case involving crab processing from the Alaska region), and *Gloucester Fish Exchange, Inc.*, NE# 0602918 (a case involving a seafood auction house in the Northeast region).
 - In *F/V Blue Fin*, on March 2, 2009, the Administrative Law Judge authorized the respondent to conduct additional discovery seeking any evidence in NOAA’s possession regarding shark/fin carcass ratios, as well as information concerning NOAA’s calculation of the assessed penalty. The agency furnished the requested discovery prior to November 2009. No additional discovery has been authorized since then, and no litigation hold has been ordered in this case.
 - In *Peter Pan Seafoods*, on October 7, 2009, the Administrative Law Judge authorized the respondent to seek the production of documents concerning NOAA’s calculation of the assessed penalty and has authorized the respondent to conduct additional discovery since that date as well. Documents relevant to the

case are maintained in regional offices of NOAA GC and OLE, and OLE headquarters would not likely have documents relevant to the specific inquiry in this case; and the listing of subject matter files in Attachment 7 to the Inspector General's Report does not contain anything that appears to be related to this case. No litigation hold has been ordered in this case.

- In *Gloucester Fish Exchange, Inc.*, on August 24, 2009, the Administrative Law Judge issued an order authorizing discovery in this case, and on September 9, 2009, modified that order to limit discovery to the following categories only: documents concerning prior settlements involving the respondent; documents related to a letter dated April 28, 1999, from Richard C. Livingston (formerly the Special Agent in Charge for OLE's Northeast Division); emails since 2004 concerning the respondent from six special agents in the OLE Northeast Division; documents related to violations committed by the boats named in the case; and notes taken by special agents in the OLE Northeast Division of interviews with personnel on those boats. Documents relevant to the case are maintained in regional offices of NOAA GC and OLE. Given the very specific discovery that was authorized here, OLE headquarters would not likely have documents relevant to the specific inquiry in this case. The listing of subject matter files in Attachment 7 to the Inspector General's Report does not contain anything that appears to be related to this case. No litigation hold had been ordered in this case (which settled on March 1, 2010).
- Pending Federal Court Cases Challenging NOAA Enforcement Actions as of November 20, 2009 –
 - In federal court cases where a respondent in an enforcement action seeks review of an administrative ruling or otherwise challenges a NOAA enforcement action, the cases are brought under the Administrative Procedure Act and the court bases its review on the documents produced by the parties in contested cases heard by an Administrative Law Judge. As noted above, documents relevant to these cases are generally located in the regional offices of NOAA GC and OLE, and not in OLE headquarters. Importantly, federal judges permit discovery in these record review cases only in very limited circumstances.
 - NOAA GC identified four federal court cases challenging NOAA enforcement actions pending as of November 20, 2009. These cases are: *Duckworth v. United States*, Civ. No. 09-1387 (D. Mass.) (filed March 17, 2009); *Gloucester Fish Exchange, Inc. v. Locke*, Civ. No. 09-10694 (D. Mass.) (filed April 30, 2009); *Van Salisbury v. United States*, Civ. No. 09-1586 (3d Cir.) (filed in district court on November 20, 2007); and *Gonzales v. United States Department of Commerce*, Civ. No. 06-0105 (S.D. Tex.) (filed June 30, 2006).
 - In all four cases, the record before the Administrative Law Judge was developed and closed prior to November 2009. No federal court discovery was allowed in these cases, and no litigation hold had been ordered in these cases. Moreover, the listing of subject matter files in Attachment 7 to the Inspector General's Report

describes nothing that appears to be related to these specific cases. Thus, the November 20, 2009, destruction of documents would not have affected these cases.

- In addition, NOAA GC identified three federal court civil asset forfeiture cases pending as of November 20, 2009, each of which involved challenges to fish seizures: *United States v. \$152,594 in United States Currency in lieu of approximately 22,927 pounds of Atlantic Sea Scallops*, Civ. No. 09-CV-11503 (D. Mass.) (filed Sept. 10, 2009); *United States v. Approximately 360,804 Pounds of Fish*, Civ. No. 06-4675 (N.D. Cal.) (filed August 1, 2006); and *Virginia Star Seafood Corp. v. Gonzales*, Civ. No. 06-4202 (N.D. Cal.) (filed July 7, 2006). No discovery had been sought from NOAA in these cases, nor litigation holds ordered. We also note that documents relevant to this enforcement case would generally be located in the regional offices of NOAA GC and OLE, and not in OLE headquarters, and that the listing of subject matter files in Attachment 7 to the Inspector General's Report does not contain anything that appears to be related to these cases.

b) Potential and pending criminal cases. NOAA Fisheries and NOAA GC have reviewed matters referred by OLE to the Justice Department, states and tribal authorities for possible criminal prosecution and pending as of November 20, 2009, and determined that the findings in the Inspector General's report do not present any issues in relation to any current discovery order or any active litigation hold on NOAA records. We note that criminal cases are handled by the U.S. Department of Justice, or law enforcement officials in state and tribal agencies. NOAA's law enforcement officers generally provide information directly to the Assistant U.S. Attorneys or other prosecuting officials.

In conducting this review, NOAA Fisheries first identified all matters referred by it to the Justice Department, state or tribal authorities for possible criminal prosecution and pending as of November 20, 2009.

- Pending Matters Referred for Possible Criminal Prosecution as of November 20, 2009
 - In matters involving potential criminal prosecution, the OLE agents in the NOAA Fisheries regions investigate these matters, prepare the files for referral, and maintain documents relevant to the matter, and so documents relevant to such matters would be located in the regional offices of OLE, and not in OLE headquarters. There are no relevant court orders or any active litigation holds applicable to the matters referred for possible criminal prosecution as of November 20, 2009. Moreover, the listing of subject matter files in Attachment 7 to the Inspector General's Report does not contain anything that appears to be related to these specific cases.
- Pending Charged Matters as of November 20, 2009
 - Again, the OLE agents in the NOAA Fisheries regions investigate these matters, prepare the files for referral, and maintain documents relevant to the matter, and so documents relevant to such matters would be located in regional offices of

OLE, and not in OLE headquarters. Other relevant documents would be in the Justice Department, state or tribal authority files, not NOAA files. Further, while discovery may be allowed in these cases, there are no current discovery orders or active litigation holds in the pending, charged matters as of November 20, 2009. Moreover, the listing of subject matter files in Attachment 7 to the Inspector General's Report does not contain anything that appears to be related to these specific cases.

Implementation Date:

- a) June 8, 2010
- b) June 8, 2010