

Enforcement Summit Remarks

NOAA General Counsel, Lois Schiffer

You have now heard from Dr. Lubchenco and Cam Kerry about how important enforcement is to NOAA's mission of protecting our nation's marine resources and coastal communities, and from Eric Schwaab about enforcement and compliance at NOAA and how the Office of Law Enforcement works. Before we turn to the most important part of the program—hearing from each of you about your ideas for making NOAA's enforcement program effective—I want to spend a few minutes underscoring the value of fair and effective enforcement; outlining the role of the General Counsel's Office and its Enforcement and Litigation component; and describing a few cases that provide context for why NOAA's work in this area is so essential.

By way of personal background, I have spent many years working on enforcement of our nation's environmental laws to achieve the important goal of protecting our environment and the people and communities that depend on them for ourselves, our children and our grandchildren. As we work together here to build a program, it is useful to remember why we enforce our nation's laws.

People who work in this area sometimes talk about two models of enforcement—the deterrence model, and the cooperation model. Deterrence is preventing or discouraging someone from acting—someone will decide that acting against the law will result in punishment, and so s/he doesn't do it. The cooperation model is the basis for compliance assistance—helping someone to comply with the law through information, advice, other “carrots.” Rather than models, I think of cooperation and deterrence as tools: an effective enforcement program

generally has some combination of these tools. You have heard from Dr. Lubchenco and from Eric Schwaab about important steps NOAA is taking to provide compliance assistance, and I look forward to hearing at the tables about additional ideas. But it is also important to remember that the tool of deterrence has a role if we are to keep our sanctuaries safe from boats destroying the coral; to protect the threatened and endangered whales; and to carry out the laws designed to assure that our fisheries are sustainable. Why?

Most of us file now our tax forms on or before April 15th. If I came to you and said it would be very nice if you did that, and I'll fill out the form and show you how to do it, but nothing bad will happen to you if you don't do it, you might file anyway the first year. I could say that if you don't do it again I'll publish an announcement and you'll be shamed. That might get you to do it a second year. But if nothing bad happens to you, pretty soon you would wake up and say "I'm not going to file." In fact, deterrent enforcement is a critical element in any effective regulatory enforcement program. Without it, presently non-complying people will have a self-interested reason to continue to violate environmental standards.

NOAA's Office of General Counsel works closely with the Office of Law Enforcement. We provide guidance about the laws that Eric outlined. When the agents in that Office refer cases to us, we evaluate the referrals to determine whether they warrant a warning, a civil Notice of Violation, or potential evaluation as a criminal matter by referral to an Assistant US Attorney. We have only 16 lawyers, assigned in Silver Spring and in NOAA's regions across the country, and the role they serve is important. Since March, my Deputy General Counsel Mary Beth Ward and I have reviewed each proposed NOVA, including the charges and the penalties, and have after consultation with the recommending attorney determined what goes forward. Our goal is to assure that our lawyers across the country are using the same criteria for charging and setting

penalties and that the results are based on the same principles. Also, as we committed to the Inspector General, we are in the process of developing a draft penalty policy that we will make available for public comment, and a Manual that will guide the work of our lawyers.

Our lawyers also handle settlements of cases—those too we are reviewing to assure consistency—and hearings before Administrative Law Judges if an alleged violator asks for one. To be complete, I note that if an alleged violator does not like the outcome of the ALJ hearing, and asks for review by the Administrator or a Court, a separate group of lawyers in our Oceans component briefs that matter. We have to be very careful to assure we are making the best use of our limited lawyer resources to get effective deterrence.

Three case examples tell the story of why a strong, effective, and fair compliance program is essential to even-handed application of the environmental laws and to fair and honest competition.

- NOAA has investigated a series of cases where fishermen tried to substitute one kind of seafood for another—for example, Vietnamese Basa sold as “grouper” or “cod” depending on the part of the country; or aquacultured imported shrimp sold as “U.S. Wild Caught shrimp. Investigating and enforcing against those who act so unfairly protects American fishermen playing by the rules as well as U.S. consumers.
- A second example: The Marine Mammal Protection Act requires that nations seeking to export yellow-fin tuna caught with purse seines to the United States must possess NMFS certification that their fleet employs dolphin take-reduction measures—to protect dolphins. Starkist tried to import 1240 cases of yellow fin tuna that had been landed in the Eastern pacific by Panamanian vessels—the US currently embargoes tuna from Panama because that country’s purse seine fleets are not certified as “dolphin-safe.”

Inspectors found out; we resolved the enforcement action by getting Starkist to donate the tuna to aid Haitian earthquake survivors. Of course, fisherman who use dolphin-safe approaches also benefited from leveling the playing field.

- Finally, several years ago NOAA brought a case where divers took underwater cultural resources from the Channel Islands National Park and Marine Sanctuary, and had a system for notifying divers when the patrols came. The \$100,000 penalty was upheld against challenge before the Administrator, the District Court, and the Court of Appeals.

These actions should help assure that you and your children can see similar resources.

I like to talk about Seventh Generation decision-making. This Native American concept encourages us to think about the effect of our actions today on our children and grandchildren and their descendents seven generations out. It encourages us to act in a way that protects our resources consistent with sustainable communities. It is a good way to think about what we are doing at this Summit.

So the work all of us are undertaking here today is important because it will lead toward a strong, effective and fair enforcement program at NOAA. Our goal is to protect our resources and communities depending on them for many generations out. We welcome your help in that important work.