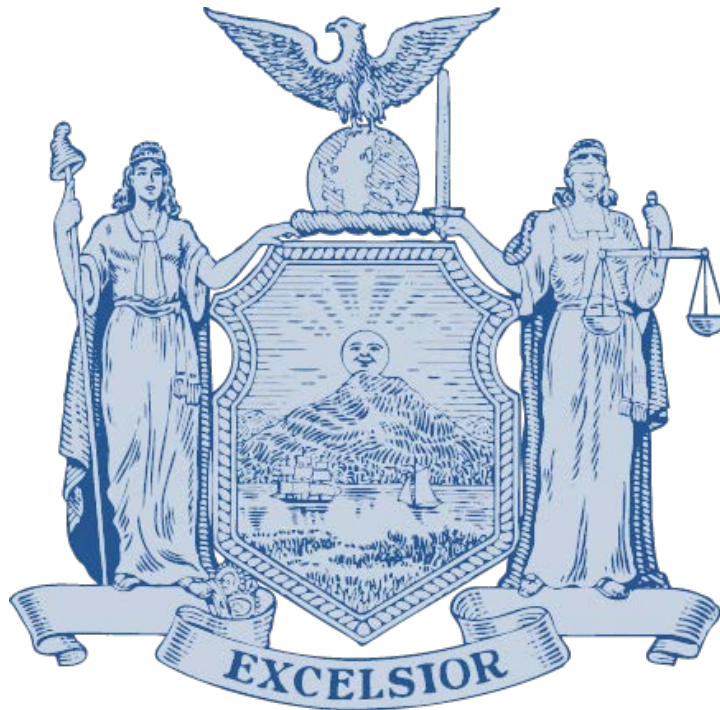


State of New York
Office of the Inspector General



Investigation into the New York State
Department of Environmental Conservation Enforcement
of the New York State Environmental Conservation Law
within the Fishing Industry

September 2015

Catherine Leahy Scott
Inspector General

STAFF FOR THIS INVESTIGATION AND REPORT

SPENCER FREEDMAN
Executive Deputy Inspector General

VAL DOUGLAS
Senior Forensic Accountant

MICHELE HOST
Chief Counsel

ANNE PETERS
Investigator

MICHAEL C. CLARKE
Chief of Staff

ROBERTO SANTANA
Investigator

PHILIP FOGLIA
Special Deputy Inspector General

WILLIAM GLEESON
Investigator

JESSICA SILVER
Deputy Inspector General for Welfare

DONNALYNN GAZZA
Investigator

BERNARD COSENZA
Deputy Inspector General for Investigations

PATRICIA PATTERSON
Investigator

EARAMICHIA N. BROWN
Investigative Counsel

JASMIN JACK
Investigator

KENNETH MICHAELS
Investigative Counsel

AMY T. TRIDGELL
Director of Investigative Reporting
(New York City)
Special Counsel

ROBERT WERNER
Chief Investigator (New York City)

ROBERT ADDOLORATO
Deputy Chief Investigator

STEPHEN DEL GIACCO
Director of Investigative Reporting (Albany)

EXECUTIVE SUMMARY

In May 2012, New York State Assembly Member Fred W. Thiele, Jr., and New York State Senators Kenneth P. Lavallo and Lee Zeldin requested that the New York State Inspector General investigate the administration and enforcement of New York State Environmental and Conservation Law by the New York State Department of Environmental Conservation (DEC) regarding warrantless searches and the disposition of seized property within the fishing industry. The legislators also requested an audit of what was described as a “multi-million dollar fund” that DEC maintains of fines and proceeds from seizures. The three legislators represent districts on the eastern end of Long Island. During the course of this investigation, the Inspector General also received complaints regarding DEC’s practices in managing permits and licenses. In addition, the Inspector General received complaints from commercial fishermen regarding the conduct of DEC environmental conservation officers in and before court proceedings for alleged violations of the New York State Environmental Conservation Law. Specifically, these fishermen alleged that they have been pressured by DEC environmental conservation officers to plead guilty to alleged violations and pay fines or face additional charges.

The request by the legislators that the Inspector General examine DEC’s search and seizure practices stemmed from a criminal case in Long Island in which the defendants/fishermen questioned the warrantless entry onto their personal property by a DEC environmental conservation officer to inspect a self-serve retail seafood stand. The DEC officer seized fish deemed to be illegal and sold them to a fish market. The proceeds of the sale were deposited into a DEC account as required by law. Charges were filed against the fishermen. Subsequently, a trial judge determined that the charges against the fishermen had not been proved beyond a reasonable doubt and dismissed the case, but did not address the warrantless

entry issue. The fishermen later requested the proceeds of the sale of their seized fish. DEC did not return the funds and the fishermen contacted their legislators and lodged a complaint.

The Inspector General's investigation determined that the Environmental Conservation Law specifically empowers environmental conservation officers to conduct warrantless searches and seizures. Accordingly, these environmental conservation officers are acting within the bounds of the law when conducting such searches. As such, the concerns regarding warrantless searches raised by the legislators must be addressed through legislation, a process outside the purview or authority of the Inspector General.¹

Regarding the seizure and sale of fish and crustacea since 2010, this investigation revealed relatively few sales of seized perishable evidence in the two regions where the most marine fishing occurs: in 2010 and 2011, the first region conducted a total of only 13 sales of seized fish and crustacea; the second region, which has a practice of only donating seized perishable evidence, made a total of 20 donations of seized fish and crustacea in 2010 and 2011. No sales of seized fish took place in 2012 and 2013; the two regions made a total of 39 donations of seized fish and crustacea during this period. From January through June 2014, the regions collectively made 15 donations and one sale.

With respect to the concerns raised regarding a DEC fund generated from the seizure and sale of fish and crustacea, the total dollar amount of the 2010-2011 sales of seized evidence was under \$13,000, the bulk of which involved one large seizure and sale of over \$8,300. This amount represents an extremely small percentage of funds deposited into the Marine Resources Account, the account to which the legislators were referring. In addition, among the limited number of seizures and sales of perishable evidence from 2010 to the present, the Inspector

¹Further, to the extent questions have been raised regarding the constitutionality of the statute, such a legal determination is not within the purview or authority of the Inspector General.

General found only two instances where a sale of seized evidence occurred and the case was either dismissed or the defendant prevailed at trial thereby raising the issue of the return of proceeds. In the case that resulted in dismissal of the charge, the defendant did not request the return of the proceeds of the sale of approximately \$150. The one other case that resulted in an acquittal and dismissal of the charges is the case that prompted the legislators to request this investigation. As a result of the Inspector General's investigation, DEC returned the proceeds of the sale of the seized evidence to the defendants who prevailed in that case.²

Notwithstanding the relatively small number of seizures, there is no question that seized property of a defendant who prevails in court should be returned, or the value of the seized property remitted to the defendant if return of the property is infeasible. This investigation determined that DEC lacked any policies and procedures for the return of property following an acquittal or dismissal of the charges. As a direct result of this investigation, DEC issued new evidence control policies in April 2014. Significantly, the new policy places the onus of the return of seized evidence or its value on DEC, not the defendant.

In the course of this investigation, the Inspector General's office visited DEC's Commercial Fisheries and Information Management Unit and observed numerous boxes containing submitted but not inputted vessel trip reports – forms used by fishermen to report fish they have caught as required by DEC regulation. The Inspector General determined that from 2008 through 2011, vessel trip reports were date-stamped, sorted by name, and stored in boxes. On average, DEC receives approximately 10,000-15,000 vessel trip reports in a year. With the exception of horseshoe crab and striped bass data – harvest quotas managed by DEC – no vessel

²As a result of this investigation, DEC reimbursed the value of seized fish to a third fisherman whose case had been previously dismissed in the interest of justice but had not been compensated for his loss.

trip report data was inputted into a database jointly utilized by state, regional, and federal coastal resource agencies along the Atlantic coast to make marine resource management decisions.

The Inspector General determined that, historically, DEC had been awarded grants to hire an outside vendor to input the data. However, in 2009, the contract with the outside vendor expired. Subsequently, DEC applied for and was awarded grants in 2010 and 2011 in the amounts of \$174,814 and \$104,500 respectively. Despite an involved review and approval process to effectuate spending and contracting at DEC, it appears that the spending and contracting associated with these two grants were overlooked. As a result, DEC was unable to complete the contracting processes in both years within the one-year grant periods, and therefore was not able to utilize approximately \$300,000 in grant funds that would have allowed DEC to input its vessel trip report data.

Specifically, following the awarding of the grant in July 2010 in the amount of \$174,816, DEC obtained an additional \$225,000 from the New York State Environmental Protection Fund – a state source of funding for environmental projects – in order to be able to contract for a three-year period with the outside vendor for data entry. DEC records indicate that a necessary approval from the New York State Division of the Budget for permission to spend the grant money was mishandled: it was initially mischaracterized as involving only federal spending and then left to languish for approximately four months without the proper DEC employees being notified as to its status. Moreover, the contracting process was never initiated despite DEC procedures then in effect within DEC's Bureau of Contract and Grant Development. This grant of \$174,816 could not be effectuated because DEC could not perfect the spending and granting process within the one-year allotted time frame of the grant. As a result, DEC lost the right to

spend these grant monies and the vessel trip reports continued to be placed in boxes without being inputted into the required database.

During the 2010 grant process, when DEC realized that the contract with the outside vendor was not going to be accomplished within the one-year grant period, it applied for another grant for 2011, and in July 2011, DEC was awarded a grant in the amount of \$104,500. As with the 2010 grant, DEC obtained additional funding from the Environmental Protection Fund, this time in the amount of \$550,000, to be able to contract with the outside vendor for a three-year period. DEC obtained approval from the Division of Budget for permission to spend this money on time but inexplicably never sought or obtained approval to use the federal grant money. In addition, the Bureau of Contract and Grant Development again reported to the Inspector General that it had no record of ever having received any contract documents for review related to the 2011 grant.

In January 2012, realizing that six months had passed without approved contract documentation, DEC decided to terminate the grant, thereby acknowledging that it would not be able to complete the contracting process within the one-year time frame. DEC then asked the federal agency that administers the grant to attempt to contract with the outside vendor with those monies; nevertheless, this contracting process stalled as well. Once again, vessel trip report data remained in boxes, unprocessed, during this period, resulting in an inability to analyze and use the data and DEC's inability to monitor fishermen's compliance with the regulation to file vessel trip reports.

DEC regulation further states that failure to file vessel trip reports may disqualify the permit holder from receiving future licenses or permits; and conviction for or civil settlement of a violation may result in permit revocation or disqualification from receiving future permits.

Notwithstanding these regulations, the Inspector General determined that DEC has ineffectively monitored vessel trip report compliance and violations as they relate to the permit process, and as a result, reissued permits to fishermen who are delinquent in their submission of vessel trip reports or who have received violations.

With regard to violations, this investigation revealed that the determination as to whether to notify the Marine Permit Office regarding a violation or violations has rested solely within the discretion of the Environmental Conservation Officers of the Division of Law Enforcement. DEC has employed no mechanism whereby violations are also reviewed by the General Counsel or the Marine Permit Office to determine whether a violation or violations warrants revocation of a permit or denial of its reissuance in accordance with DEC regulations.

Furthermore, as noted, with the exception of vessel trip reports of species whose harvest quotas are managed by DEC, vessel trip reports for the years 2008 through 2011 went largely unprocessed. Therefore, DEC was aware only of those permit holders of species whose vessel trip reports had been reviewed manually and cross-checked against the list of permit holders. Notwithstanding, even in 2012 and 2013 when vessel trip reports were processed in their entirety and the information as to which permit holders had submitted their vessel trip reports was searchable in the DEC database and readily available, DEC did not access this information to properly manage vessel trip report compliance across all permits. As a result, DEC has reissued permits to permit holders who were delinquent in their submission of vessel trip reports. And even in instances where DEC has monitored a permit holder's noncompliance and withheld the reissuance of a permit, upon the permit holder's submission of the missing vessel trip reports, DEC reissues the permit absent further repercussion. DEC's practices lack any effective deterrent to delinquency.

With respect to the complaints by commercial fishermen regarding the role of DEC environmental conservation officers in negotiating plea agreements, the investigation revealed that environmental conservation officers often play a significant role in the disposition of cases involving alleged violations of the Environmental Conservation Law and implementing regulations. Some officers testified that they will negotiate plea agreements and fines with defendants directly prior to a judicial hearing. Often the environmental conservation officer negotiating the plea or fine is also the accusing officer.

The Inspector General finds that the practice of allowing environmental conservation officers to negotiate plea agreements and fines with defendants directly may create an appearance of impropriety and coercion. The Inspector General notes that in order to avoid similar ethical concerns, the New York State Police have instituted a policy that prohibits New York State officers from engaging in plea bargaining of violations of the Vehicle and Traffic Law. Accordingly, the Inspector General recommends that DEC implement a policy that prohibits environmental conservation officers from requesting or soliciting a reduction in charges for alleged violations and from seeking a reduction in fines for a violation or offense. Instead of directly negotiating with defendants, the Inspector General recommends that the environmental conservation officers meet with the local prosecutor before court to provide case information and discuss potential plea agreements based on the evidence. Such measures would permit the officers to offer information to the assigned prosecutor as needed, while eliminating any actual or perceived duress that might occur when a defendant is forced to negotiate a plea with the same officer who issued the violation.

As a result of this investigation, DEC advised that it has taken a number of actions to address the deficiencies outlined above. DEC evaluated and revised policies regarding the

seizure and retention of evidence and issued guidance to appropriate staff on the circumstances and conditions for returning seized evidence. DEC implemented new procedures for accountability and tracking to ensure that contracts related to the expenditure of grant funds are executed in a timely manner.

DEC also advised that, using grant funds, it hired staff to enter vessel trip reports into the database. All vessel trip reports for 2008, 2010, 2011, and 2015 have been entered; data entry for 2009 reports will be completed by March of 2016. DEC has promulgated new policy and initiated action to ensure that vessel trip reporting delinquencies are identified and addressed. New procedures have been implemented so that delinquencies in reporting are considered in the permit renewal process. In addition, new procedures have been implemented to facilitate DEC counsel's office review of vessel trip report non-compliance and other violations, and ensure effective enforcement.

In addition, DEC has devised and implemented a new policy regarding plea negotiations consistent with the Inspector General's recommendations.

INTRODUCTION AND BACKGROUND

Department of Environmental Conservation

The New York State Department of Environmental Conservation (DEC) was created in 1970 to combine in a single agency all state programs designed to conserve, improve and protect New York's natural resources and environment, and to prevent, abate, and control water, land and air pollution. DEC has 24 divisions and offices and is further organized into bureaus. DEC's Central Office in Albany is supported by nine regional offices that serve the areas in which they are located. A total of approximately 3,000 DEC staff currently work in the Central Office and regional offices.

Among other areas of environmental conservation, DEC works to ensure the protection of fishing resources as well as a viable and robust fishing industry in New York State. Within DEC's Office of Natural Resources, the Division of Fish, Wildlife and Marine Resources includes five bureaus, one of which, the Bureau of Marine Resources, is "responsible for the management of living marine resources and their habitats within the Marine and Coastal District of New York State."³ The Bureau of Marine Resources, located in East Setauket, accomplishes this management through the Commercial Fisheries and Information Management Unit, which, among other duties, monitors New York State's compliance with fishing quotas, and through the issuance of permits by the Marine Permit Office. In addition, until recently, the Bureau of Marine Resources worked closely with DEC's Marine Enforcement Unit, an independent unit that was located in its offices but reported to a DEC Division of Law Enforcement captain in Region 1.

DEC LAW ENFORCEMENT OF THE MARINE AND COASTAL DISTRICTS

Marine Enforcement Unit

The Marine Enforcement Unit, established in 2005, was staffed with environmental conservation officers charged with the enforcement of state and federal laws and regulations concerning habitat preservation and the commercial and recreational harvesting of fish, shellfish, and crustacea. It was also responsible for patrolling the marine and coastal districts located in DEC Regions 1, 2 and 3. Region 1, encompassing Nassau and Suffolk counties, is the region most involved with the study and regulation of marine and coastal habitats.⁴ In addition to standard training, environmental conservation officers assigned to the Marine Enforcement Unit

³ DEC website (www.dec.ny.gov).

⁴ Region 2 consists of New York City (Bronx, Brooklyn, Queens, Manhattan and Staten Island) and Region 3 encompasses the Lower Hudson Valley (Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster and Westchester Counties).

received training regarding commercial fishery enforcement, recreational fishing enforcement, saltwater wildlife, species identification, the rules governing the harvest of marine animals, the use of marine enforcement equipment, and the operation and maintenance of the marine enforcement fleet. Pertinent to this investigation, an officer from the Marine Enforcement Unit seized and sold the fish at issue in the criminal case that generated the initial complaint to the Inspector General. As a result of this investigation, the Marine Enforcement Unit was reorganized in 2013 following the retirement of its captain and was assigned to Region 1 of the Division of Law Enforcement to reinforce the chain of command.

Division of Law Enforcement

The Division of Law Enforcement (DLE) is part of DEC's Office of Public Protection. Its stated mission is "to protect the environment, natural resources and people of the State of New York through law enforcement, education and public outreach."⁵ The Director of the Division of Law Enforcement is stationed at DEC's Central Office in Albany. Majors supervise the nine regions and each regional office is comprised of environmental conservation officers of various ranks.

Environmental Conservation Officers

The Division of Law Enforcement is comprised of environmental conservation officers, sworn police officers, authorized by New York State Environmental Conservation Law to enforce all state laws, with particular emphasis on enforcing the Environmental Conservation Law. Environmental conservation officers attend a six-month training course at DEC's Training Academy, which includes training on the New York State Penal Law, Vehicle and Traffic Law, and Environmental Conservation Law.

⁵ DEC website (www.dec.ny.gov).

Among other enumerated powers, state law authorizes environmental conservation officers:

To search without search warrant any boat or vehicle of any kind, any box, locker, basket, creel, crate, game bag, package or any container of any nature and the contents of any building other than a dwelling whenever they have cause to believe that any provision of this article or of any law for the protection of fish, shellfish, crustacea, wildlife, game or protected insects has been or is being violated, and to use such force as may be necessary for the purpose of examination and search.⁶

The law also permits environmental conservation officers “To seize as evidence without warrant any fish, shellfish, crustacea, wildlife, game, or parts thereof . . . whenever they have cause to believe it is possessed or transported in violation of law . . .”⁷ Once evidence is seized, environmental conservation officers are required “to retain custody of and provide for the safekeeping of anything seized . . . or deposit it for safekeeping with any police officer, as he deems appropriate, subject to regulations of [DEC] . . . and subject to order of any court having jurisdiction, until determination of any prosecution, civil or criminal, arising from the violation or alleged violation with respect to which they are evidence.”⁸ DEC regulation establishes the Division of Law Enforcement and states that its organization will be dictated by DEC’s policies and procedure manual.

DEC’s Office of Public Protection Manual provides policies and procedures regarding the seizure and disposition of perishable, edible marine fin fish, shellfish and crustacea. Initially, environmental conservation officers must determine whether the person they have stopped possesses the required licenses or permits to fish the particular species. If not, then all of the species is seized. If the person possesses the required licenses or permits, then only the illegal

⁶ NY ECL §71-0907(4)(b).

⁷ NY ECL §71-0907(4)(3).

⁸ NY ECL §71-0907(5).

portion of the catch is seized – “undersized fish, fish outside the open season, fish in excess of the trip/possession limit, etc.” With regard to the disposition of the seized fish, the policies in effect during the period examined in this investigation afforded environmental conservation officers significant discretion:

Members must then determine if the sale of seized marine resources is appropriate and/or practical. If the resource is still alive, every reasonable attempt should be made to document it and return it to the water. Dead species which appear to be contaminated or not fresh should not be considered for sale or donation and efforts must be made to dispose of them through conventional methods. Small seizures may best be handled through donation to appropriate charitable organizations. Larger volumes should always be considered for sale.

Notably, however, the policy did not require environmental conservation officers to consult a supervisor in determining which disposal method to use – a deficiency that contributed to disparate methods of disposal among similar cases.

When environmental conservation officers opt to sell seized evidence – one of the four methods of disposal – the sale proceeds are deposited into DEC’s “Marine Resources Account,” as required and defined by the State Finance Law.⁹ Monies deposited in this account, which includes revenue generated from sales of seized evidence, assessments, license fees, fines and penalties, are to be used by DEC “for the care, management, protection and enlargement of marine fish and shellfish resources.”¹⁰ With regard to the proceeds of sales of seized evidence, the Environmental Conservation Law, upon a final determination that the possession of the evidence seized was in fact unlawful, vests possession of the evidence in DEC on behalf of the state.¹¹ An acquittal or dismissal, however, does not vest possession in DEC, and the owner of the seized evidence is entitled to its return.

⁹ NY SFL §83(2).

¹⁰ NY SFL §83(2)(i).

¹¹ NY ECL §11-0519(1).

WARRANTLESS SEARCHES AND SEIZURES

As noted, members of the New York State Legislature alleged, on behalf of their constituent fishermen, that DEC was engaging in warrantless searches. However, as discussed above, the Environmental Conservation Law specifically empowers environmental conservation officers to conduct warrantless searches and seizures. Accordingly, these environmental conservation officers are acting within the bounds of the law when conducting such searches. As such, the concerns raised by the legislators who brought this issue to the Inspector General's office must be addressed through the legislative process.

And in fact, in April 2012, Assembly Member Thiele proposed legislation that would remove the language "without a warrant" from the aforementioned sections of the Environmental Conservation Law.¹² The bill announced, "This legislation would no longer authorize blanket seizures of fish or fishing gear as all citizens are entitled to some due process of law under the Constitution. Enactment of this legislation would not hinder prosecution of illegal activity, but would insure that the rights of fishermen are protected." This proposed legislation never reached a vote, and therefore, the law continues to allow environmental conservation officers to conduct warrantless searches. Legislation is the means by which to ban warrantless searches and seizures; such a determination is not within the purview or authority of the Inspector General.¹³

The Inspector General reviewed seizures and sales of fish and crustacea since 2010 within Regions 1 and 2 and found relatively few sales of seized perishable evidence: in 2010 and 2011, Region 1 conducted a total of only 13 sales of seized fish and crustacea; Region 2, which has a practice of only donating seized perishable evidence, made a total of 20 donations of seized

¹²Bill No. A9751. The legislation was co-sponsored by former New York State Assembly Member Daniel Losquadro.

¹³To the extent questions have been raised regarding the constitutionality of the statute, such a legal determination is not within the purview or authority of the Inspector General.

fish and crustacea in 2010 and 2011. No sales of seized fish took place in 2012 and 2013: Region 1 made a total of six donations of seized fish and crustacea; Region 2 made a total of 33 donations of seized fish and crustacea. From January through June 2014, Region 1 has made one donation and one sale; Region 2 has made 14 donations.

In addition, the total dollar amount of the 2010-2011 sales in Region 1 was under \$13,000, the bulk of which involved one large seizure and sale of over \$8,300. This amount represents an extremely small percentage of funds deposited into the Marine Resources Account, which, over a five-year period, has held between \$1.5 million and just over \$4 million in revenue.¹⁴ Of greater significance, among the limited number of seizures and sales of perishable evidence from 2010 to the present in Region 1, the Inspector General found only two instances where a sale of seized evidence occurred and the case was either dismissed or the defendant prevailed at trial thereby raising the issue of the return of proceeds. In the case that resulted in dismissal of the charge, the defendant did not request the return of the proceeds of the sale of approximately \$150. The one other case that resulted in an acquittal and dismissal of the charges is the case that caused the legislators to request this investigation.¹⁵ As a result of this investigation, DEC returned the proceeds of the sale of the seized evidence to the defendants who prevailed in that case.¹⁶

DEC Issues New Policies as a Result of this Investigation

Regardless of the infrequency of this issue, seized property of a defendant who prevails in court should be returned. This investigation determined that DEC lacked any policies and

¹⁴ DEC provided the Inspector General a breakdown of the five-fiscal year revenue history of the Marine Resources Account: 2009-2010 – \$2,674,734.54; 2010-2011 – \$4,219,476.99; 2011-2012 – \$3,367,899.31; 2012-2013 – \$2,161,212.70; and 2013-2104 – \$1,452,669.54.

¹⁵ In addition, some of the cases from 2013 and 2014 are still pending.

¹⁶ Another defendant who did not prevail in court but whose plea agreement included language that waived liability successfully argued for the return of the proceeds of the seized fish.

procedures for the return of property following an acquittal or dismissal of the charges. As a result of this investigation, DEC issued new evidence control policies in April 2014 that state in relevant part: “In the event of an acquittal, [DEC] shall make all reasonable efforts to return perishable evidence that could legally be possessed or the fair market value of such perishable evidence if the perishable evidence has been disposed, as soon as possible.” The return of the seized perishable evidence includes not only the proceeds of evidence that was sold but also the fair market value of donated and released seized perishable evidence. Significantly, the new policy places the onus of the return of seized evidence or its value on DEC and not the defendant.

Of note, DEC had difficulty producing the aforementioned data regarding the seizures and sales of perishable evidence to the Inspector General because no master list of seized evidence was maintained. For instance, if seized fish were donated or sold, those seizures were not listed on the evidence log. Rather, only seized and stored items were recorded in the evidence log. By issuance of its new evidence control policies, DEC has taken steps to remedy this problem.

Specifically, the new policies require an Evidence Seizure Tag to be placed on all seized evidence and a detachable receipt given to the person from whom the item was seized; the person is asked to sign the Evidence Seizure Tag. In addition, for any seized perishable evidence that is commercial in nature and has an estimated value of more than \$250, a Chain of Custody Record form must be completed in addition to the Evidence Seizure Tag. Importantly, the new policies require that any seized perishable physical evidence and its disposition be recorded in the Dispatch System Perishable Evidence Log. With this new policy, DEC will be able to more

effectively monitor and evaluate the seizures being conducted by environmental conservation officers.

With regard to the disposal of perishable physical evidence to be used in cases against fishermen, the new policies require the officers, prior to the disposal of perishable physical evidence, to weigh, measure, and photograph the seized items in order to document this physical evidence for purposes of satisfying the requirements of Criminal Procedure Law section 240.20 – the section of the law that requires production of discovery upon request by the defendant. The officers are also required to document the value of the seized items. This amendment to the policies and procedures addresses complaints by fishermen that seized evidence that was disposed of but not properly documented compromised their ability to defend themselves at trial. Indeed, the Inspector General examined a number of cases where documentation of seized evidence was wholly insufficient, a significant problem which these new policies specifically address.

As to the four methods of disposal of perishable physical evidence, the new policies place stricter limits on the discretion of the officers. For instance, the sale of physical evidence must be approved in advance by a supervisor and will only be attempted if the estimated value of the physical evidence exceeds \$250. In fact, a number of the sales of seized evidence examined in this investigation involved amounts well below \$250. In addition, DEC must now provide written notice of the sale to the defendant, consisting of the date of sale, items sold with a description and quantity, and the price received for the items.

THE REQUIREMENT TO COLLECT AND INPUT FISHING DATA

New York State is a member of the Atlantic States Marine Fisheries Commission (ASMFC), which includes 15 Atlantic coastal states working together to coordinate the conservation and management of 25 nearshore fish species. Each state is represented by three commissioners: the director of the state's marine fisheries management agency, a state legislator, and an individual appointed by the state's governor. ASMFC's main policies and objectives include interstate fisheries management, fisheries science, habitat conservation, and law enforcement. ASMFC also works closely with two federal agencies: the National Oceanic and Atmospheric Administration National Marine Fisheries Service (NOAA Fisheries) and the U.S. Fish and Wildlife Service.

In 1995, 23 coastal resource agencies along the Atlantic coast, including ASMFC, NOAA Fisheries and New York State DEC, joined to create the Atlantic Coastal Cooperative Statistics Program (ACCSP) – “a cooperative state-federal program that designs, implements, and conducts marine fisheries statistics data collection programs and integrates those data into a single data management system [to] meet the needs of fishery managers, scientists, and fishermen.”¹⁷ To this end, ACCSP has developed data collection and data management standards for its member agencies. Pertinent to the instant investigation, ACCSP has created model reports for dealers to record fish they have purchased and for fishermen to report fish they have caught. In this way, ACCSP can be assured of consistent data reporting among its members.

For the purposes of resource management decisions like fishing moratoriums and quotas, ACCSP uses the data of marine resources landed, or brought to shore, in each jurisdiction regardless of where they were harvested, or caught. Simply put, quotas are based on dealers'

¹⁷ ACCSP website (www.accsp.org).

purchases and *not* fishermen's catches. However, ACCSP also collects and analyzes the data of state licensed commercial fishermen and party and charter fisheries of New York. According to an October 12, 2011 DEC report discussing, in part, the importance of the collective data:

These data serve as inputs in a variety of areas, including biological analyses and stock assessments, regulatory impact analyses, quota allocations and monitoring, economic profitability profiles, trade and import tariffs decisions, allocation of grant funds among states, identification of ecological interactions among species, and documentation of vessel fishing histories.

State, regional, and federal agencies then use ACCSP's compiled data to make marine resource management decisions. For the most part, DEC does not determine New York State's annual fishing quotas.¹⁸ Rather, quotas are set on the regional and federal levels by ASMFC and NOAA Fisheries respectively. DEC then sets fishing trip limits for certain species in response to the quotas.

In compliance with ACCSP standards and pursuant to the New York Code of Rules and Regulations, holders of commercial fishing licenses upon landing their catch must file with DEC "vessel trip reports" for each commercial fishing trip detailing all fishing activities and all species landed.¹⁹ In addition to their statistical value, vessel trip reports help DEC monitor fishermen's compliance with set trip limits. DEC regulation requires that vessel trip reports be completed and signed, with all required ascertainable information,²⁰ before the vessel arrives at the dock, or lands the catch. Commercial fishermen must then submit their vessel trip reports on a monthly basis; if no fishing took place during a particular month, a "Commercial Not Fishing" form must be filed.

¹⁸ New York State sets its own quotas for horseshoe crabs and striped bass.

¹⁹ 6 NYCRR §40.1(c)(1).

²⁰ 6 NYCRR §40.1(c)(1)(ii) explains, "Information that may be considered unascertainable before arriving at the dock or landing includes dealer name, dealer number, and date sold."

Similarly, holders of marine fish and crustacea dealer and shipper licenses must complete “Purchases From Fishing Vessels and/or Fishermen” reports (“dealer reports”) detailing each purchase of marine food fish, crustacea, horseshoe crabs, and whelks from harvesters.²¹ Dealer reports must be submitted weekly; if no purchases were made during that week, a report must be submitted stating as such.

Vessel trip reports and dealer reports must be submitted to DEC’s Fisheries Management and Coordination Unit (formerly referred to as the “Quota Management Unit”) of the Bureau of Marine Resources, which is responsible for the processing and storage of the reports. The Commercial Fisheries and Information Management Unit must input the data from the dealer and vessel trip reports into their respective ACCSP databases. This investigation revealed, however, that while DEC was for the most part timely with regard to inputting dealer reports into the ACCSP database, for many years DEC has been derelict in its processing and inputting of vessel trip reports. In addition to the ramifications to ACCSP’s data management system, DEC’s neglect may have permitted fishermen to be out of compliance with the vessel trip report filing requirement.

DEC FAILED TO SECURE AVAILABLE FEDERAL GRANT RESOURCES THAT WOULD HAVE FUNDED THE DATA ENTRY OF VESSEL TRIP REPORTS AND ENSURED TIMELY AND ACCURATE RECORD KEEPING

The Inspector General visited DEC’s Fisheries Management and Coordination Unit and observed numerous boxes containing submitted but not inputted vessel trip reports. The Inspector General determined that from 2008 through 2011, vessel trip reports were date-stamped, sorted by name, and stored in boxes. With the exception of horseshoe crabs and striped bass data – harvest quotas managed by DEC for which DEC uses vessel trip report data, and not

²¹ 6 NYCRR §40.1(c)(2).

dealer report data, to determine the quotas – no vessel trip report data were inputted into the ACCSP database. On average, DEC receives approximately 3,000-5,000 dealer reports and 10,000-15,000 vessel trip reports in a year.

In 2012, DEC hired an employee to process the vessel trip report data, and as a result, vessel trip reports from 2012 and 2013 were inputted into the ACCSP database. In addition, effective January 1, 2012, DEC regulation requires dealers to input their reports directly into the ACCSP database,²² a process that should unburden the Fisheries Management and Coordination Unit from inputting the dealer data. Nonetheless, the vessel trip reports submitted to DEC from 2008 to 2011 remained, for the most part, unprocessed.

When the Inspector General questioned the former Unit Leader of the Fisheries Management and Coordination Unit as to why these reports were not entered, she explained that, historically, DEC had been awarded grants from ACCSP to hire an outside vendor to input the data. However, in 2009, the contract with the outside vendor expired and, despite being awarded grants for 2010 and 2011, DEC was unable to complete the contracting process with this outside vendor. As a result, the grant awards for 2010 and 2011 were terminated.

Further investigation revealed that from 2001 through 2007, DEC applied for and was awarded grants from ACCSP for data entry and biological sampling: 2001 - \$195,200; 2002 - \$256,800; 2005 - \$218,900; 2006 -\$193,783; and 2007 - \$113,967. Under each of these grants, DEC contracted with the Cornell University Cooperative Extension Marine Program (CCE) for biological sampling and data collection, processing, and entry. In each of these years, CCE completed significant data entry of both dealer and vessel trip reports. For instance, in 2005, CCE entered data from 11,000 vessel trip reports and 3,900 dealer reports. CCE also has conducted data entry for other fishing agencies. CCE's expertise is not limited to data entry,

²² 6 NYCRR §40.1(c)(2)(ii).

analysis and biological sampling; CCE has participated in fishery quota meetings and training sessions for fishermen in the use of vessel trip reports and has acted as a liaison between the local fishing community and DEC.

With the monies from the 2007 grant, DEC contracted with CCE through March 31, 2009. Accordingly, DEC did not seek grants in 2008 and 2009. Despite this contract, vessel trip report data for 2008 and 2009 was not entered because a new database was being developed by ACCSP that was not ready for data entry of this kind until October 2009. Because of its use for quota management, dealer data was entered. However, once the contract with CCE expired in March 2009, DEC became delinquent in its dealer data entry as well. Following complaints from ACCSP and NOAA Fisheries that DEC's delinquent dealer data entry was affecting quota management, DEC gathered staff from other units and tasked them with entering the backlogged dealer data. While the backlog data was entered, it became apparent to the members of the Commercial Fisheries and Information Management Unit that DEC needed to apply for another ACCSP grant to be able to meet ACCSP data management standards and to remain in compliance with ASMFC interstate fishery management plans. To this end, DEC applied for and was awarded ACCSP grants in 2010 and 2011 in the amounts of \$174,816 and \$104,500 respectively. Significantly, however, DEC was unable to complete the contracting process with CCE within the one-year grant periods and therefore could not use the grant funds.

Within DEC, applying for a grant, preparing to use the award money, and contracting with an outside vendor involves multiple layers of review at every stage of the process and, even when operating without complications, can take months to effectuate. This protracted process can be problematic in situations where, like the grants at issue, the grant periods extend for only one year.

With regard to the grants examined in this report, the processes of obtaining those grants were successfully completed. Therefore, this report examines only the processes within DEC that occur following a grant award: specifically, the processes of gaining approval for the spending and contracting with the outside vendor, without which the grants awards cannot be utilized.

State Spending and Contracting Process

With few exceptions, when a granting agency awards DEC a grant, it does not provide the grant money to DEC immediately; rather, it confirms its obligation to pay the granted amount. Accordingly, DEC Division of Management and Budget must ensure that DEC has appropriation authority in the budget to manage the grant – the authority in the budget to spend the incoming grant award – because appropriation authority and funds are needed to spend money as a state agency. The spending must then be approved by both the New York State Division of Budget and the Office of the State Comptroller. The Division of Management and Budget then provides the grant awardee within DEC access to spend the funds.

Once access to the funds is granted, DEC must submit to the Division of Budget and the Office of State Operations an “Attachment A,” a document in which a state agency presents “compelling” justification for the need for contracts and other expenditures over \$500 and must describe the consequences should the request not be approved.²³ Within DEC, the Attachment A is prepared by the bureau that is awarded the grant. It is then submitted to the director of the division in which the bureau is located. Upon approval by the director, the Attachment A is forwarded to the Division of Management and Budget for review, where it is reviewed by two bureaus within the division: Budget Services to ensure that the requested spending has been

²³ DOB Bulletin B-1184. An Attachment A must be submitted to the Division of the Budget for all state spending over \$500, but this report focuses on its usage in the granting process.

approved within the budget; and Contract and Grant Development in order to assess any contracting issues related to the requested spending. Upon this dual approval, the Attachment A is sent to the assistant commissioner for administration and the executive deputy commissioner and commissioner for their review. The Attachment A then is sent to the Division of the Budget for approval and the Office of State Operations for validation. Upon approval, the Attachment A is made available on a web-based application and can be printed and submitted by agencies with their contracts and other requests to the Office of the State Comptroller, which must approve all state contracts over \$50,000.²⁴ The only deviation from this process occurs if 75 percent or more of the funds to be used to fund a contract or project is from federal funds: if so, the Attachment A is converted into an Attachment B and can be approved within the agency.

The Division of the Budget mandates that “agencies must obtain pre-approval [of the Attachment A] before engaging in any aspect of the contractual process.”²⁵ Notwithstanding this directive, to lend efficiency to the process, the Bureau of Contract and Grant Development reviews contract-related issues in preparation for the approved Attachment A. This review is particularly useful when DEC is attempting to contract with only one vendor, a “sole source contract,” an exception to the state law requirement to engage in competitive bidding.²⁶ DEC must prepare and the State Comptroller must approve a “sole source justification,” to justify the lack of competitive bidding. Therefore, while the Attachment A is pending with DEC executive management and then the Division of the Budget and State Operations, the Bureau of Contract and Grant Development reviews the sole source justification and drafts letters to the State Comptroller in preparation for submission for approval.

²⁴ NY SFL §112.

²⁵ DOB Bulletin B-1184.

²⁶ NY SFL §163(10)(b)(i).

Upon receipt of an approved Attachment A, the DEC employee who prepared the Attachment A request and is seeking the spending approval is notified. That employee then submits the approved Attachment A and any contract documents to the Bureau of Contract and Grant Development. Having already reviewed the contract documents, the bureau reviews for a final time the contract documents and the prepared draft letter to the State Comptroller and then sends the documents to the State Comptroller. According to testimony by the chief of the Bureau of Contract and Grant Development, review of a sole source justification by the State Comptroller takes, on average, four to five weeks. While the sole source justification is being reviewed, the Bureau of Contract and Grant Development will begin drafting the contract in anticipation of State Comptroller approval.

The Contracting Processes for the Grants at Issue

The 2010 Grant

Following the awarding of the grant in July 2010 in the amount of \$174,816, DEC obtained an additional \$225,000 from the New York State Environmental Protection Fund in order to contract with CCE for a three-year period. DEC records indicate that an Attachment A was prepared and submitted on September 7, 2010, and then resubmitted on October 19, 2010. The Attachment A request form delineates the federal grant funding in the amount of \$174,816, and the state funding from the Environmental Protection Fund in the amount of \$225,000. DEC records further reflect that on October 27, 2010, the Attachment A was incorrectly converted to an Attachment B, the form used if 75 percent or more of the funds to be used for a contract or project is derived from federal funds, and approved as such. However, the Fisheries Management and Coordination Unit, which requested the grant, was not notified of the approved Attachment B at that time, contrary to the practices described to the Inspector General.

In fact, on December 23, 2010, the former Quota Management Unit leader who had applied for the grant sent an email inquiry to DEC Fish and Wildlife Services, which oversees grants and contracts within the Division of Fish, Wildlife and Marine Resources, regarding the status of the Attachment A. Despite this communication, the former unit leader was not made aware that an Attachment B had been (improperly) approved until February 11, 2011 almost four months after it had been approved.

Specifically, on February 11, 2011, DEC staff realized that the Attachment A had been incorrectly converted into an Attachment B and discussed the need to draft and submit an Attachment A for the state spending portion of the contract. To that end, the former unit leader stated that on February 15, 2011, she submitted an Attachment A for the state funding portion. No record exists of the new Attachment A request ever having been approved.

As to the sole source justification, the former unit leader was operating under the misimpression that the sole source justification was being reviewed by the Bureau of Contract and Grant Development in preparation for an approved Attachment A. However, following a request by the Inspector General to provide its file on the sole source justification, the Bureau of Contract and Grant Development reported that it had no record of ever receiving the sole source justification for this grant.

The 2011 Grant

During the 2010 grant process, the former unit leader, realizing that the contract with CCE was not going to be accomplished within the one-year grant period, applied for another ACCSP grant for 2011. In July 2011, DEC was awarded a grant in the amount of \$104,500. As with the 2010 grant, DEC obtained additional funding from the Environmental Protection Fund, this time in the amount of \$550,000, to be able to contract with CCE for a three-year period. An

Attachment A was approved on September 30, 2011; however, the Attachment A did not delineate the federal grant funds, and therefore, approval was never obtained to use the federal grant money. In addition, while the Inspector General reviewed emails that included a sole source justification for this grant to contract with CCE, the Bureau of Contract and Grant Development again reported to the Inspector General that it had no record of ever having received the sole source justification.

In January 2012, realizing that six months had passed without an approved sole source justification, DEC decided to terminate the grant because it would not be able to complete the contracting process within the one-year time frame. DEC then asked NOAA, the agency that administers the grant, to attempt to contract with CCE with those monies; nevertheless, this contracting process stalled as well. It must be noted that the Environmental Protection Fund money set aside for this contract, \$550,000, exceeded \$449,816, the aggregate of the 2010 federal and Environmental Protection Fund money that was to be used to contract with CCE. Yet, it does not appear that anyone at DEC considered using only the Environmental Protection Fund money to contract with CCE in 2011. Once again, vessel trip report data remained in boxes, unprocessed, during this period.

As a result of DEC's inability to effectuate approved Attachment As and sole source justifications, contracts with CCE could not be entered into and DEC could not utilize the federal funding it had been awarded for data entry into the ACCSP database. Significantly, vessel trip reports remained in boxes in the offices of the Fisheries Management and Coordination Unit, resulting in ACCSP's inability to analyze and use the data and DEC's inability to monitor fishermen's compliance with the regulation to file vessel trip reports.

The Aftermath of the Contracting Failures

The former unit leader testified that after two failed contracting processes with CCE and not being able to use approximately \$300,000 in ACCSP grant funds, she did not feel she could in good conscience apply for another grant for 2012. As noted earlier in this report, however, in 2012, DEC hired an employee to process the vessel trip report data, and as a result, vessel trip reports from 2012 and 2013 were inputted into the ACCSP database. Vessel trip reports from 2008 through 2011, for the most part, were not inputted.

In 2013, DEC entered into a three-year contract with CCE using only Environmental Protection Fund money in the amount of \$549,266. The period of this contract with CCE began on February 1, 2013, and will conclude on January 31, 2016. This contract tasks CCE with inputting the backlog of vessel trip reports from 2008 through 2011, a process that is ongoing. In addition, DEC is in the process of finalizing a cooperative agreement with ASMFC whereby CCE would be paid by ASMFC to input the data, and DEC, among other benefits, will provide the dealer and vessel trip reports for CCE to conduct its work. This arrangement allows CCE to conduct data entry for DEC and ACCSP and avoids the apparent difficulty of effectuating a contract within the one-year period of ACCSP grants.

DEC DID NOT EFFECTIVELY MONITOR THE REQUIREMENT TO FILE VESSEL TRIP REPORTS OR TRACK VIOLATIONS IN ORDER TO PROPERLY ADMINISTER MARINE PERMITS

In response to complaints regarding inequities within the permitting process, the Inspector General also examined certain areas of the permitting process.

The Marine Permit Office, a unit within the Bureau of Marine Resources, is responsible for the issuance of and the revenue generated from most marine-related licenses and permits.²⁷ Located in East Setauket, the Marine Permit Office is the only marine licensing office in the state, and issues approximately 10,000 licenses and permits annually to commercial and recreational permit holders. Notwithstanding this high volume, during the period relevant to this investigation, the office included only one full-time employee, one seasonal employee and a supervisor who simultaneously was the unit head of the Shellfisheries Section within the Bureau of Marine Resources. The Marine Permit Office uses an independent database system – one that is not integrated with other DEC databases – to issue permits and store permit information. The system, implemented in 2000, is outdated and has limited capabilities, such as storage of only the most recent address of the permit holder.

Marine permits and licenses are conditioned on compliance with certain DEC regulations. For instance, as noted earlier in this report, DEC regulation requires holders of commercial fishing licenses to submit vessel trip reports, or file a “Commercial Not Fishing” form, on a monthly basis. DEC regulation imposes penalties for failure to file vessel trip reports: “Failure to file fishing Vessel Trip Reports . . . as required may disqualify the owner and operator from receiving future licenses or permits . . .”²⁸ In addition, DEC regulation states, “Conviction for or civil settlement of a violation . . . may result in permit revocation or disqualification from receiving future permits.”²⁹

Despite these regulations, the Inspector General determined that DEC has ineffectively monitored vessel trip report compliance and violations, and as a result, permits are being reissued

²⁷ Pursuant to the State Finance Law, revenue generated from permits and licenses is deposited into the Marine Resources Account, as discussed earlier in this report.

²⁸ 6 NYCRR §40.1(c)(6).

²⁹ 6 NYCRR §40.1(b)(3).

to fishermen who are delinquent in their submission of vessel trip reports or who have received violations. In an attempt to monitor adherence to DEC regulations regarding permits, in 2010, the Bureau of Marine Resources developed a “Permit Office – Do Not Issue List,” which was created to make available to the permit office information relevant to permitting that was held in other areas of DEC: information regarding violations from the Division of Law Enforcement, and information about vessel trip reports from the various programs that monitor specific species. Ostensibly, members of the Division and of these programs complete forms that include the name of the permit holder, the type of permit, the number of the permit, the nature of the violation that is outstanding, and the name and contact information of the officer or staff who submitted the form. The name of the permit holder was then added to the Do Not Issue List. When permit holders who have been placed on the Do Not Issue List attempt to renew their permits, the Marine Permit Office was supposed to consult the list and then direct the permit holders to contact the DEC employee who placed them on the list to resolve any outstanding issues. Following resolution of the outstanding issues, the permit holder was reissued the permit.

The Inspector General found, however, that this list has been ineffective in monitoring compliance with permit regulations because it is not a complete and accurate compilation of non-compliant permit holders. With regard to violations, this investigation revealed that the determination as to whether to notify the Marine Permit Office regarding a violation or violations rests solely within the discretion of the Division of Law Enforcement. At the time of the investigation, DEC employed no mechanism whereby violations are also reviewed by the General Counsel or the Marine Permit Office to determine whether a violation or violations warrants revocation of a permit or denial of its reissuance in accordance with DEC regulations.

Furthermore, as noted earlier in this report, with the exception of vessel trip reports of species whose harvest quotas are managed by DEC, vessel trip reports for the years 2008 through 2011 went largely unprocessed. Therefore, the Do Not Issue List included only those permit holders of species whose vessel trip reports had been reviewed manually and cross-checked against the list of permit holders. Notwithstanding, even in 2012 and 2013 when vessel trip reports were processed in their entirety and the information as to which permit holders had submitted their vessel trip reports was searchable in the DEC database and readily available, DEC did not access this information to properly manage vessel trip report compliance across all permits. As a result, DEC has reissued permits to permit holders who were delinquent in their submission of vessel trip reports. And even in instances where DEC has monitored a permit holder's noncompliance and withheld the reissuance of a permit, upon the permit holder's submission of the missing vessel trip reports, DEC reissues the permit absent further repercussion. In fact, during the time period examined in this investigation, DEC would even issue a new permit for a different species to a delinquent permit holder on the Do Not Issue List. These practices lack any effective deterrent to delinquency.

Of note, vessel trip report data is important to the permit office not only to monitor non-compliance but also to track the amount of fishing being conducted by permit holders. A permit holder who did not fish during a calendar year or successive years perhaps should be denied a permit in favor of another person who will. This data is particularly relevant with regard to licenses that have a restricted number that can be issued each year.

DEC PRACTICE OF PERMITTING ENVIRONMENTAL CONSERVATION OFFICERS TO NEGOTIATE PLEA AGREEMENTS AND FINES DIRECTLY WITH ALLEGED VIOLATORS CREATES AN APPEARANCE OF IMPROPRIETY AND IS SUSCEPTIBLE TO ABUSE

The Inspector General also received complaints from commercial fishermen regarding the conduct of DEC environmental conservation officers in and before court proceedings for alleged violations of the New York State Environmental Conservation Law and its implementing regulations.

The DEC is authorized by statute to pursue criminal punishments or fines as well as civil penalties for violations of the Fish and Wildlife Law, or any order, rule or regulation thereunder.³⁰ Criminal prosecutions are pursued through the local district attorney's office, and actions for civil penalties may be pursued by the DEC or, in certain cases, the New York State Attorney General.³¹ Depending upon the type and severity of the violation, the DEC may choose criminal or civil enforcement or both.

During interviews with our investigators, a Lieutenant with the Marine Enforcement Unit testified that in cases where an environmental conservation officer observes a violation, such as keeping a fish that is too short under the regulations, the officer will usually issue a uniform appearance ticket³² to the alleged violator at that time, unless the officer believes that there is a larger pattern of misconduct that requires further investigation.³³ By statute, the uniform appearance ticket is a standard form prescribed by the DEC Commissioner and includes the specific violation alleged and a date by which to respond by mail or appear in court. For more

³⁰ NY ECL §71-0901, *et. seq.*

³¹ NY ECL §71-0401.

³² NY ECL §71-0203.

³³ The Lieutenant testified that the Marine Enforcement Unit addresses administrative violations, including failure to file dealer reports or vessel trip reports, through civil proceedings. Such routine violations may be resolved by a DEC form Order of Consent/Stipulation, wherein the respondent admits to committing the violation, waives the right to a hearing, and agrees to the payment of a civil penalty. This compromise and settlement of a civil penalty is a bar to criminal action for the same violation if satisfied within 30 days of entry. NY ECL §71-0519(5).

serious violations or crimes, the environmental conservation officers draft a criminal summons, complaint or other charging documents. The environmental conservation officers testified that all Environmental Conservation Law violations, misdemeanors, and felony charges are heard in the criminal court for a particular jurisdiction on the same day.

At least three commercial fishermen alleged that DEC environmental conservation officers have pressured them to plead guilty to alleged violations and to negotiate plea agreements and penalties at the courthouse prior to a judicial appearance. One fisherman who had retained an attorney alleged in court filings that when he appeared at court to contest a violation, the environmental conservation officer threatened to charge additional violations unless he agreed to plead guilty to the original charge and pay a fine.³⁴

Investigators interviewed several environmental conservation officers who testified that they are involved in court hearings and proceedings. All of the environmental conservation officers interviewed testified that they are at the courthouse on days when the cases in which they issued the violation are calendared, or will at least arrange for another officer to be present. The environmental conservation officers said that they regularly discuss their cases with the assistant district attorney assigned on that particular day and will make recommendations regarding case disposition. For example, one Lieutenant testified that he attends court conferences and arraignments “to make sure that they go as we need them to go [and to] talk to the [assistant district attorneys] and advise them.” He further stated that he will also clarify

³⁴ Affirmation in Support of Defendant’s Motion to Dismiss, ¶¶ 13-23, *N.Y. v. Hagan*, No. 2012SU041753 (Dist. Ct. County of Suffolk, 1st Dist. 2012). The defendant originally received a ticket on June 6, 2012, for violating 6 NYCRR §44.8(a)(4), possession of horseshoe crabs over the legal limit. Before the initial court hearing on August 28, 2012, defense counsel received a long-form information alleging two violations of 6 NYCRR §44.8(d)(1), for failure to file horseshoe crab harvest reports. The defendant moved to dismiss all charges against him and attached copies of filed harvest reports in support of his motion. Suffolk County District Attorney’s Office agreed to dismiss the charges for failure to file harvest reports under 6 NYCRR §44.8(d)(1), but not the charges under 6 NYCRR §44.8(a)(4), possession of horseshoe crabs over the legal limit. The case record has subsequently been sealed.

complicated sections of the Environmental Conservation Law for the assistant district attorneys and will advise judges as needed.

Some environmental conservation officers testified that they played a more significant role in the disposition of cases, however, and will negotiate pleas agreements and fines with a defendant directly. For example, another Lieutenant testified that on the court dates for DEC cases, he will “conference” the case with a defendant and recommend a fine in exchange for a plea. Once the plea deal is negotiated, he then recommends the agreed-upon fine to the assistant district attorney. Another officer claimed that the assistant district attorneys are very busy and prefer that the DEC officers conference the case directly with the defendants to resolve alleged violations. According to this environmental conservation officer, the assistant district attorneys and judges would prefer that the DEC officers address each defendant as they come to court and inform the defendant regarding the fine in exchange for a plea versus the potential fine if the case proceeds to trial.

The Inspector General finds that the practice of environmental conservation officers negotiating plea agreements and fines with defendants directly may create an appearance of impropriety and coercion. An accused defendant should have the opportunity to discuss and negotiate his or her case with an independent prosecutor, not the accusing officer, particularly when some of the defendants in these matters may not be represented by counsel and may not have the time or resources to litigate the charges lodged against them. Further, given the nature of the relationship between the environmental conservation officers and the fishermen, the defendants likely will have repeated encounters with these officers in the future and may fear retribution if they fail to agree to a plea.

The Inspector General notes that in order to avoid similar ethical problems, New York State Police policy prohibits New York State Police officers from engaging in plea bargaining of violations of the Vehicle and Traffic Law.³⁵ This policy eliminates any actual or perceived favoritism, prejudice or possible corruption that may result from having a motorist plea bargain his or her case directly with the arresting officer.

Accordingly, the Inspector General recommends that DEC implement a policy that prohibits environmental conservation officers from requesting or soliciting a reduction in charges of alleged violations of the Environmental Conservation Law and from seeking a reduction in fines for a violation or offense. Instead of directly negotiating with defendants, the Inspector General recommends that the environmental conservation officers meet with the prosecutor before court to provide case information and to discuss potential plea agreements based upon the evidence. Such measures would permit the officers to provide information to the assigned prosecutor as needed while eliminating any actual or appearance of duress that might occur when a defendant is forced to negotiate a plea with the same officer who issued the violation.

FINDINGS AND RECOMMENDATIONS

The Inspector General investigated the administration and enforcement of New York State Environmental and Conservation Law by the New York State Department of Environmental Conservation regarding warrantless searches and the disposition of seized property within the fishing industry, and the fund into which the proceeds of sales of seized property are deposited; DEC's failure to secure available federal grant resources that would have funded the data entry of vessel trip reports and ensured timely and accurate record keeping; and,

³⁵ New York State Police Regulation 8A13 provides that, "[e]xcept in accord with Instructions concerning the reduction of a driving while intoxicated charge, a [Trooper] shall not request or solicit a reduction in traffic offenses or in any way become involved in reducing such offenses or in seeking reductions in the penalties assessed for such offenses."

DEC's mismanagement of permits and licenses regarding vessel trip report noncompliance and violations.

The Inspector General's investigation determined that the Environmental Conservation Law specifically empowers environmental conservation officers to conduct warrantless searches and seizures. Accordingly, these environmental conservation officers are acting within the bounds of the law when conducting such searches. As such, the concerns regarding warrantless searches raised by the legislators must be addressed through legislation, a process outside the purview or authority of the Inspector General.³⁶

Regarding the seizure and sale of fish and crustacea since 2010, this investigation revealed relatively few sales of seized perishable evidence in the two regions where the most fishing occurs: in 2010 and 2011, the first region conducted a total of only 13 sales of seized fish and crustacea; the second region, which has a practice of only donating seized perishable evidence, made a total of 20 donations of seized fish and crustacea in 2010 and 2011. No sales of seized fish took place in 2012 and 2013; the two regions made a total of 39 donations of seized fish and crustacea during this period. From January through June 2014, the regions collectively made 15 donations and one sale.

With respect to the concerns raised regarding a DEC fund generated from the seizure and sale of fish and crustacea, the total dollar amount of the 2010-2011 sales of seized evidence was under \$13,000, the bulk of which involved one large seizure and sale of over \$8,300. This amount represents an extremely small percentage of funds deposited into the Marine Resources Account, the account to which the legislators were referring. In addition, among the limited number of seizures and sales of perishable evidence from 2010 to the present, the Inspector

³⁶ As noted, to the extent questions have been raised regarding the constitutionality of the statute, such a legal determination is not within the purview or authority of the Inspector General.

General found only two instances where a sale of seized evidence occurred and the case was either dismissed or the defendant prevailed at trial thereby raising the issue of the return of proceeds. In the case that resulted in dismissal of the charge, the defendant did not request the return of the proceeds of the sale of approximately \$150. The one other case that resulted in an acquittal and dismissal of the charges is the case that prompted the legislators to request this investigation. As a result of the Inspector General's investigation, DEC returned the proceeds of the sale of the seized evidence to the defendants who prevailed in that case.

Notwithstanding the relatively small number of seizures, there is no question that seized property of a defendant who prevails in court should be returned, or the value of the seized property remitted to the defendant if return of the property is infeasible. This investigation determined that DEC lacked any policies and procedures for the return of property following an acquittal or dismissal of the charges. As a direct result of this investigation, DEC issued new evidence control policies in April 2014. Significantly, the new policy places the onus of the return of seized evidence or its value on DEC, not the defendant.

In the course of this investigation, the Inspector General's office visited DEC's Fisheries Management and Coordination Unit and observed numerous boxes containing submitted but not inputted vessel trip reports – forms used by fishermen to report fish they have caught as required by DEC regulation. The Inspector General determined that from 2008 through 2011, vessel trip reports were date-stamped, sorted by name, and stored in boxes. On average, DEC receives approximately 10,000-15,000 vessel trip reports in a year. With the exception of horseshoe crab and striped bass data – harvest quotas managed by DEC – no vessel trip report data was inputted into a database jointly utilized by state, regional, and federal coastal resource agencies along the Atlantic coast to make marine resource management decisions.

The Inspector General determined that, historically, DEC had been awarded grants to hire an outside vendor to input the data. However, in 2009, the contract with the outside vendor expired. Accordingly, DEC applied for and was awarded grants in 2010 and 2011 in the amounts of \$174,816 and \$104,500 respectively. Despite an involved review and approval process to effectuate spending and contracting at DEC, it appears that the spending and contracting associated with these two grants were overlooked. As a result, DEC was unable to complete the contracting processes in both years within the one-year grant periods, and therefore was not able to utilize approximately \$300,000 in grant funds that would have allowed DEC to input its vessel trip report data.

Specifically, following the awarding of the grant in July 2010 in the amount of \$174,816, DEC obtained an additional \$225,000 from the New York State Environmental Protection Fund – a state source of funding for environmental projects – in order to be able to contract for a three-year period with the outside vendor for data entry. DEC records indicate that a necessary approval from the New York State Division of Budget for permission to spend the grant money was mishandled: it was initially mischaracterized as involving only federal spending and then left to languish for approximately four months without the proper DEC employees being notified as to its status. Moreover, the contracting process was never initiated despite DEC procedures then in effect within DEC's Bureau of Contract and Grant Development. This grant of \$174,816 could not be effectuated because DEC could not perfect the spending and granting process within the one-year allotted time frame of the grant. As a result, DEC lost the right to spend these grant monies and the vessel trip reports continued to be placed in boxes without being inputted into the required database.

During the 2010 grant process, when DEC realized that the contract with the outside vendor was not going to be accomplished within the one-year grant period, it applied for another grant for 2011, and in July 2011, DEC was awarded a grant in the amount of \$104,500. As with the 2010 grant, DEC obtained additional funding from the Environmental Protection Fund, this time in the amount of \$550,000, to be able to contract with the outside vendor for a three-year period. DEC obtained approval from the Division of Budget for permission to spend this money on time but inexplicably never sought or obtained approval to use the federal grant money. In addition, the Bureau of Contract and Grant Development again reported to the Inspector General that it had no record of ever having received any contract documents for review related to the 2011 grant.

In January 2012, realizing that six months had passed without approved contract documentation, DEC decided to terminate the grant, thereby acknowledging that it would not be able to complete the contracting process within the one-year time frame. DEC then asked the federal agency that administers the grant to attempt to contract with the outside vendor with those monies; nevertheless, this contracting process stalled as well. Once again, vessel trip report data remained in boxes, unprocessed, during this period, resulting in an inability to analyze and use the data and DEC's inability to monitor fishermen's compliance with the vessel trip reporting requirements.

DEC regulation further states that failure to file vessel trip reports may disqualify the permit holder from receiving future licenses or permits; and conviction for or civil settlement of a violation may result in permit revocation or disqualification from receiving future permits. Notwithstanding these regulations, the Inspector General determined that DEC has ineffectively monitored vessel trip report compliance and violations as they relate to the permit process, and as

a result, permits are being reissued to fishermen who are delinquent in their submission of vessel trip reports or who have received violations.

With regard to violations, this investigation revealed that the determination as to whether to notify the Marine Permit Office regarding a violation or violations rests solely within the discretion of the environmental conservation officers of the Division of Law Enforcement. DEC employs no mechanism whereby violations are also reviewed by the General Counsel or the Marine Permit Office to determine whether a violation or violations warrants revocation of a permit or denial of its reissuance in accordance with DEC regulations.

Furthermore, as noted, with the exception of vessel trip reports of species whose harvest quotas are managed by DEC, vessel trip reports for the years 2008 through 2011 went largely unprocessed. Therefore, DEC was aware only of those permit holders of species whose vessel trip reports had been reviewed manually and cross-checked against the list of permit holders. Notwithstanding, even in 2012 and 2013 when vessel trip reports were processed in their entirety and the information as to which permit holders had submitted their vessel trip reports was searchable in the DEC database and readily available, DEC did not access this information to properly manage vessel trip report compliance across all permits. As a result, DEC has reissued permits to permit holders who were delinquent in their submission of vessel trip reports. And even in instances where DEC has monitored a permit holder's noncompliance and withheld the reissuance of a permit, upon the permit holder's submission of the missing vessel trip reports, DEC reissues the permit absent further repercussion. DEC's practices lack any effective deterrent to delinquency.

With respect to the complaints from fishermen regarding the role of DEC environmental conservation officers in negotiating plea agreements, the investigation revealed that

environmental conservation officers often play a significant role in the disposition of cases involving alleged violations of the Environmental Conservation Law and implementing regulations. Some officers testified that they will negotiate plea agreements and fines with defendants directly prior to a judicial hearing. Often the environmental conservation officer negotiating the plea or fine is the accusing officer. The Inspector General finds that the practice of allowing environmental conservation officers to negotiate plea agreements and fines with defendants directly may create an appearance of impropriety and coercion and should be prohibited.

Recommendations

During the pendency of this investigation, the Inspector General informed DEC of her preliminary findings and recommended that DEC immediately initiate corrective action. Specifically, the Inspector General recommended that DEC draft a more robust evidence control policy that adheres to the dictates of the Criminal Procedure Law. DEC responded by issuing new evidence control policies in April 2014. DEC should ensure compliance with these issued policies.

With regard to the contracting failures relating to the 2010 and 2011 ACCSP grants, the Inspector General recommends that DEC conduct a root cause analysis to determine why the spending and contracting processes failed in these two instances. The Inspector General acknowledges that DEC has contracted with CCE to input all backlogged vessel trip report data from 2008 through 2011. DEC should continue to monitor the inputting of its current vessel trip reports to ensure its compliance with data entry into the ACCSP database.

In addition, DEC must properly monitor fishermen's vessel trip reports noncompliance and convictions for or civil settlements of a violation in order to properly administer marine

permits. DEC should develop a method to effectively utilize the entered vessel trip report data to monitor vessel trip report compliance. In addition, DEC should develop a review process of all violations that includes members of the Division of Law Enforcement and the Office of General Counsel. Finally, DEC should develop a compliance program that includes a graduated penalty process that ultimately results in suspension or revocation of a permit in the most egregious cases.

With regard to environmental conservation officers negotiating plea agreements and fines with defendants directly, the Inspector General recommends that DEC implement a policy that prohibits officers from requesting or soliciting a reduction in charges for alleged violations and from seeking a reduction in fines for a violation or offense. Instead of directly negotiating with defendants, the Inspector General recommends that the environmental conservation officers meet with the prosecutor before court to provide case information and discuss potential plea agreements based on the evidence. Such measures would permit the officers to offer information to the assigned prosecutor as needed, while eliminating any actual or perceived duress that might occur when a defendant is forced to negotiate a plea with the same officer who issued the violation.

REMEDIAL ACTION TAKEN BY DEC TO ADDRESS DEFICIENCIES

Evidence Seizure and Retention

Notwithstanding the statutory authority to conduct warrantless seizures, DEC advised that it had reviewed existing policies regarding the seizure and retention of evidence, and on April 14, 2014, issued new comprehensive guidelines regarding the circumstances and conditions for returning seized evidence.

Grant and Contract Process

DEC advised that in fall 2010, the Division of Fish, Wildlife and Marine Resources hired a new chief to manage the Administrative Unit within the Bureau of Fish and Wildlife Services, and that by spring 2011, the Administrative Unit developed and implemented new systems to ensure a greater accountability and tracking of administrative procedures. These new systems included a revised spreadsheet for tracking Attachment A submissions throughout the grant approval process, as well as new databases to track approval of grants and contracts and to document events during the period of the contract.

At the agency level, DEC has expedited the procurement process by allowing applicants to submit procurement documents from the Divisions to Management and Budget Services prior to Attachment A approval.

Data Entry of Vessel Trip Reports

DEC advised that it received a three-year grant from the National Oceanic and Atmospheric Administration to the Atlantic Coastal Cooperative Statistics Program and hired three employees in January 2015 for data entry of vessel trip report information. Four employees currently enter vessel trip reports, and have entered all reports received by DEC in 2015. Presently, all vessel trip reports have been entered with the exception of 2009, which will be entered by March 2016. DEC also evaluated its marine permitting system and as a result is implementing plans to improve the process by simplifying the license structure and by designing and implementing a new marine permitting database to achieve simpler and more timely compliance reviews for renewal, denial, and revocation of licenses.

Monitoring of Vessel Trip Report Compliance and Enforcement

DEC has implemented a new policy entitled “Vessel Trip Report Enforcement Procedure.” The new policy contains three specific directives aimed at improving compliance and enforcement:

1. The Bureau of Marine Resources (BMR) will maintain a comprehensive record of licensees and vessel trip report submissions; take initial steps to notify the licensee of delinquent report(s); and allow the licensee time to submit the delinquent report.

2. Where the licensee fails to submit the report(s), BMR will notify the marine licensing unit of the outstanding violation(s) and refer the matter to the Office of General Counsel (OGC) for civil enforcement.

3. OGC will evaluate cases based on the policy and determine whether to initiate an enforcement action against licensees who fail to submit their vessel trip report(s). Licensees may be subject to a civil penalty of \$250 for each delinquent report. Failure to correct the violation may result in a permit revocation or disqualification from receiving future marine licenses.

DEC also reported that it reviewed the vessel trip report database in November 2014, and found that 40 licensees failed to submit harvest reports for the calendar year 2013. DEC subsequently mailed letters to the 40 licensees, reminding them of their reporting obligations and requesting the missing documentation. The letter also informed the licensees that failure to comply could result in an enforcement action and civil penalty. In response to the mailing, DEC received missing documentation from more than half of the 40 licensees, reducing the number of allegedly non-compliant licensees to 15. DEC’s Office of General Counsel has since reviewed these remaining licensees with BMR staff and is proceeding with administrative enforcement action against licensees who remain in violation.

DEC further advised that once all backlogged information is entered by March 2016, it will develop a new license/permit renewal application that will include notice that all vessel trip reports from the prior calendar year must be submitted in order for the application to be complete. DEC also evaluated its marine permitting system and concluded that the processes could be improved by simplifying the license structure and by designing and implementing a new marine permitting database. DEC will integrate its vessel trip report module to provide greater administrative effectiveness and easier and timely compliance reviews for renewal, denial or revocation of licenses.

DEC discontinued the Do Not Issue List for non-compliant permit holders. The BMR, DLE and OGC now schedule bimonthly meetings, in which they share information relevant to the permitting process.

Review of Violations by the DEC Office of General Counsel

DEC advised that the Marine Permit Office is working with staff in the BMR, DLE and OGC to address enforcement needs as they arise. The new Vessel Trip Report Enforcement Procedure, noted above, requires systematic evaluation of violations and provides staff with specific compliance and enforcement procedures pursuant to Title 6 of the Codes, Rules and Regulations of the State of New York (NYCRR) § 40.1(c) and § 44.4, for failure to submit vessel trip reports. The OGC manages the new policy and relies on the data collected by, and referrals from, the BMR. The policy contains a graduated penalty assessment matrix, including permit revocation and disqualification from receiving future marine licenses. Furthermore, the policy specifies that OGC staff will review the licensee's record of compliance with regional staff, including DLE, to ensure that there are no outstanding enforcement issues that require coordinated enforcement. DEC is actively pursuing systematic enforcement for all vessel trip

report violations once they are all input into an electronic data management system, and may expand the policy to address other types of marine resource violations once an electronic system is in place.

In order to facilitate communication between DLE and BMR, the Regional Major of DLE (who is responsible for DEC Regions 1, 2 and 3) is now located in the same office as the BMR.

Negotiations of Plea Agreements and Fines by DEC Officers

DEC has devised and implemented a new policy regarding plea negotiations consistent with the Inspector General's recommendations.