





February 28, 2011

**MEMORANDUM FOR:** Jane Lubchenco, Ph.D.  
Under Secretary of Commerce  
for Oceans and Atmosphere

**FROM:** Cameron F. Kerry, General Counsel   
Lois Schiffer, NOAA General Counsel 

**SUBJECT:** Legal Opinion Regarding Collection and Use of Fines, Penalties,  
and Forfeiture Proceeds Pursuant to Section 311(e)(1) of the  
Magnuson-Stevens Fishery Conservation and Management Act

Section 311(e)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”) authorizes the Secretary of Commerce (“Secretary”) to pay certain enforcement-related expenses from fines, penalties, and proceeds from sale of property forfeitures collected for violations of the Magnuson-Stevens Act or any other marine resource law.<sup>1</sup> Pursuant to this authority, the National Oceanic and Atmospheric Administration (“NOAA”) has collected and subsequently used funds from such fines, penalties, and forfeiture proceeds to pay for certain enforcement-related expenses. This opinion addresses the collection and use of fines, penalties, and forfeiture proceeds pursuant to section 311(e)(1) of the Magnuson-Stevens Act. Its purpose is to identify permissible uses of these funds.

Various entities (including NOAA) have, from time to time, referred to accounts containing proceeds collected pursuant to section 311(e)(1) of the Magnuson-Stevens Act as either the “NOAA Fisheries Civil Monetary Penalty Fund” or the “Asset Forfeiture Fund.”<sup>2</sup> To avoid confusion, this memorandum simply refers to such proceeds as “funds collected pursuant to section 311(e)(1).”

To identify permissible uses of such funds, we first outline the criteria necessary for section 311(e)(1) to apply. For the most part, section 311(e)(1) alone governs the disposition of enforcement proceeds that NOAA collects. However, several statutes contain provisions specifying either that NOAA transfer proceeds to another entity or that the Secretary use proceeds for a specific purpose other than what is outlined in section 311(e)(1). Because these statutes were promulgated through the enactment of several amendments at various times over twenty years, we examine both the legislative history, which reflects Congressional intent to broaden the use of such funds for enforcement as well as the applicable rules of statutory

<sup>1</sup> Magnuson-Stevens Fishery Conservation and Management Act, § 311(e)(1), 16 U.S.C. § 1861(e)(1).

<sup>2</sup> Neither title is dictated by the Magnuson-Stevens Act.

construction. We examine these statutes to identify what fines, penalties, and forfeiture proceeds are subject to section 311(e)(1), and finally we address legally permissible uses of these funds.

## **I. SECTION 311(e)(1) OF THE MAGNUSON-STEVENSONS ACT.**

Section 311(e)(1) of the Magnuson-Stevens Act provides:

*Notwithstanding any other provision of law, the Secretary or the Secretary of the Treasury may pay from sums received as fines, penalties, and forfeitures of property for violations of any provision of this Act or any other marine resource law enforced by the Secretary, including the Lacey Act Amendments of 1981 (16 U.S.C. 3371 et. seq.):*

- (A) the reasonable and necessary costs incurred in providing temporary storage, care, and maintenance of seized fish or other property pending disposition of any civil or criminal proceeding alleging a violation of any provision of this chapter or any other marine resource law enforced by the Secretary with respect to that fish or other property;*
- (B) a reward of not less than 20 percent of the penalty collected or \$20,000, whichever is the lesser amount, to any person who furnishes information which leads to an arrest, conviction, civil penalty assessment, or forfeiture of property for any violation of any provision of this chapter or any other fishery resource law enforced by the Secretary;*
- (C) any expenses directly related to investigations and civil or criminal enforcement proceedings, including any necessary expenses for equipment, training, travel, witnesses, and contracting services directly related to such investigations or proceedings;*
- (D) any valid liens or mortgages against any property that has been forfeited;*
- (E) claims of parties in interest to property disposed of under section 1612(b) of Title 19, as made applicable by section 1860(c) of this title or by any other marine resource law enforced by the Secretary, to seizures made by the Secretary, in amounts determined by the Secretary to be applicable to such claims at the time of seizure; and*
- (F) reimbursement to any Federal or State agency, including the Coast Guard, for services performed, or personnel, equipment, or facilities utilized, under any agreement with the Secretary entered into pursuant to subsection (a) of this section, or any similar agreement authorized by law.<sup>3</sup>*

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<sup>3</sup> 16 U.S.C. § 1861(e)(1).

## II. ENFORCEMENT PROCEEDS SUBJECT TO SECTION 311(e)(1).

### (a) Generally Applicable Rule.

Section 311(e)(1) authorizes the Secretary to use for specified enforcement purposes any fines, penalties, and forfeiture proceeds collected for violations of the Magnuson-Stevens Act or any other “marine resource law” enforced by the Secretary.<sup>4</sup> Such proceeds include funds collected by NOAA through civil administrative enforcement proceedings as well as funds collected by the Department of Justice through civil seizures or criminal prosecutions.<sup>5</sup>

For enforcement proceeds to be governed by section 311(e)(1), *two criteria* must be satisfied:

*1) The enforcement proceeds must have been collected in response to a violation of either the Magnuson-Stevens Act or another “marine resource law.”*

Section 311(e)(1) does not define what constitutes a “marine resource law.” On its face, the term “resource” is not limited to “living” resources (e.g., fish, marine mammals), as referenced elsewhere in the Magnuson-Stevens Act.<sup>6</sup> Rather, it also encompasses non-living marine resources, such as shipwrecks and other historical sites. Moreover, there is no indication that the term “resource” should be limited to statutes dedicated to conservation and management, as opposed to other resource-based purposes such as mineral<sup>7</sup> or energy<sup>8</sup> development. Indeed, the original enactment of this provision in 1990 and its subsequent expansion in 1996 support a broad interpretation of the phrase, considering that through this provision Congress sought to expand significantly the universe of enforcement proceeds available for use by the Secretary.<sup>9</sup> Thus, the phrase “marine resource law” should be read to include all statutes enforced by NOAA relating in whole or in part to regulation of any marine resource – regardless of the resource protected or the purpose of the particular statute. Most statutes enforced by NOAA fall within this meaning of “marine resource law.”<sup>10</sup>

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<sup>4</sup> 16 U.S.C. § 1861(e)(1).

<sup>5</sup> Section 311(e)(1) specifically authorizes the use of monies received as “penalties,” which are assessed in response to civil violations, 16 U.S.C. § 1858(a), and “fines,” which are imposed in response to criminal violations, *id.* § 1859(b). *Id.* § 1861(e)(1).

<sup>6</sup> For example, the driftnet fishing restrictions of the Magnuson-Stevens Act apply to “living marine resources.” 16 U.S.C. § 1826(h).

<sup>7</sup> Deep Seabed Hard Mineral Resources Act, 30 U.S.C. §§ 1401–1473.

<sup>8</sup> Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. §§ 9101–9168.

<sup>9</sup> Pub. L. No. 104-297, sec. 115(b), § 311(e)(1), 110 Stat. 3559, 3599.

<sup>10</sup> Notable exceptions include the Land Remote Sensing Policy Act of 1992 (15 U.S.C. §§ 5601–5672) and the Weather Modification Reporting Act (15 U.S.C. §§ 330–330e).

2) ***There must not be another authority that exclusively controls use of the enforcement proceeds.***

For the most part, statutes enforced by NOAA are silent concerning the disposition of enforcement proceeds, and thus section 311(e)(1) governs the proceeds' disposition. A few statutes, however, contain provisions specifying either (a) that NOAA transfer enforcement proceeds to another entity for their use; or (b) that the Secretary use the proceeds for specific purposes other than for the broad uses outlined in section 311(e)(1). To determine whether enforcement proceeds subject to the latter statutes may be used pursuant to section 311(e)(1), below we briefly introduce and analyze four such statutes.

**(b) Potential Exceptions to the Generally Applicable Rule.**

Because the relevant statutes are not part of a single enactment, but have been added by process of accretion through amendments at different times, this analysis requires reference to applicable rules of statutory construction. In general, the later-enacted statute takes precedence over an earlier one, but the repeal or amendment of earlier statutes by implication is disfavored and will not be presumed unless the intention of the legislature to repeal is clear and manifest.<sup>11</sup> As recently noted by the Supreme Court, repeal or amendment of an earlier statute will not be implied unless: (a) the later statute *expressly* contradicts the original one, or (b) such a construction is *absolutely necessary* for the words of the later statute to have any meaning at all.<sup>12</sup> Thus, where there are two statutes on the same subject, effect should be given to both if possible.<sup>13</sup> With these rules of statutory construction as a guide, we turn to the statutes in question.

1) **South Pacific Tuna Act (“Tuna Act”) and the National Marine Sanctuaries Act (“Sanctuaries Act”).**

The Tuna Act implements the United States' obligations under the 1987 “Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United of America,” and implementing agreements. Section 973o of the Tuna Act provides that an amount equivalent to any fine, penalty, or other amount collected for violations of the Tuna Act shall be paid by the United States to the official designated by the Pacific Island Parties to act on their behalf under the Treaty.<sup>14</sup>

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<sup>11</sup> *National Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-63 (2007); *Watt v. Alaska*, 451 U.S. 259, 266 (1981); *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503, 506 (1936).

<sup>12</sup> *National Assoc. of Home Builders*, 551 U.S. at 663.

<sup>13</sup> *Watt*, 451 U.S. at 267.

<sup>14</sup> 16 U.S.C. § 973o. Although this provision does not refer explicitly to forfeiture proceeds, the term “other amounts” is sufficiently broad to include such proceeds.

The Sanctuaries Act, as amended in 1992, provides generally that civil penalties and forfeiture proceeds collected for violations of the Sanctuaries Act shall be used by the Secretary in the following order of priority: (a) to manage and improve the national marine sanctuary in which the violation occurred; (b) to pay any reward to any person furnishing information that led to the penalty or forfeiture; and (c) to manage and improve any other national marine sanctuary.<sup>15</sup>

Applying the principals of statutory construction noted above, section 311(e)(1) may be read to authorize – but not require – use under its provisions of enforcement proceeds collected for violations of the Tuna Act and the Sanctuaries Act. In both instances, while section 311(e)(1) authorizes the use of enforcement proceeds for certain purposes, the Tuna Act and Sanctuaries Act may appear to prohibit such use by stating, without qualification, that certain enforcement proceeds “shall” be used for the more specific purposes identified in each Act. However, the provisions of the Tuna Act were enacted prior to the re-enactment and expansion of section 311(e) in 1990, authorizing “notwithstanding any other provision of law” the use of enforcement proceeds to address violations of any “fishery resource law.” The cited provisions of the Sanctuaries Act were similarly enacted prior to the further expansion of section 311(e) in 1996 to authorize use of enforcement proceeds also “notwithstanding any other provision of law,” this time to encompass violations of any “marine resource law.” Inclusion of the phrase “notwithstanding any other provision of law” in section 311(e) indicates Congress’ intent to have the provisions of section 311(e)(1) serve as a grant of authority, notwithstanding other potentially conflicting requirements previously established. In past cases that have considered the legal effect of this phrase, courts have indicated it is difficult to imagine a clearer statement of intent to supersede all other laws.<sup>16</sup> Because the provisions of section 311(e)(1) apply to enforcement proceeds collected for violations of the Tuna Act and Sanctuaries Act, these proceeds may be included as proceeds subject to section 311(e)(1).

Nevertheless, while the specified enforcement proceeds from violations of the Tuna Act and Sanctuaries Act may be used consistent with section 311(e)(1), use in this manner is not mandatory. Rather, section 311(e) simply provides that the Secretary “may” use such proceeds for these purposes. Given the permissive nature of this provision, the Secretary is free to limit use of the specified enforcement proceeds consistent with the provisions of the Tuna Act and Sanctuaries Act giving rise to their collection.

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<sup>15</sup> 16 U.S.C. § 1437(f)(1)(C); *see also* 16 U.S.C. § 1437(f)(1)(B) (prior to use for the purposes under (C), (B) requires forfeiture proceeds to be first used to pay for costs of maintaining the forfeited property, e.g., storage costs). This provision was enacted in 1992 as part of the Oceans Act of 1992, Pub. L. No. 102-587, sec. 2107(c), § 1437(e), 106 Stat. 5039, 5044. It should also be noted that 16 U.S.C. § 1437(f)(1)(B) and (C) govern use of “[c]ivil penalties” and forfeiture proceeds only; they are silent as to the disposition of criminal fines that may be imposed for violations of that Act. Because the Act is silent as to criminal fines, disposition of such fines is governed by Section 311(e)(1) of the Magnuson-Stevens Act, 16 U.S.C. § 1861(e)(1).

<sup>16</sup> *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993).

## 2) Magnuson-Stevens Act – Northeast Multispecies Fishery Management Plan.

Enacted as part of the NOAA Authorization Act of 1992,<sup>17</sup> section 311(f)(4) of the Magnuson-Stevens Act addresses use of fines and penalties collected from enforcement of the Northeast Multispecies Fishery Management Plan (“Plan”).<sup>18</sup> Section 311(f)(4) states that certain enforcement proceeds “shall” be used to enforce the Plan, but also states that such use is to be undertaken “pursuant to this section,” which refers to Section 311 as a whole.<sup>19</sup> Section 311 in turn includes the authority on the use of these and other enforcement proceeds in section 311(e)(1), and the provision that specifies this authority operates “notwithstanding any other provision of law.”<sup>20</sup>

As with the Tuna and Sanctuaries Acts, the issue is whether fines and penalties for violations of the Plan must be used exclusively to enforce the Plan under section 311(f)(4) or may be used pursuant to the broader authority of section 311(e). Because section 311(f)(4) was enacted *after* the provisions of section 311(e)(1), the use of the “notwithstanding” phrase in 311(e)(1) in this instance is not alone dispositive (as it was with the Tuna and Sanctuaries Acts), and more extensive analysis is required.

An examination of the language of the statute itself indicates that section 311(f)(4) and its use of the term “shall” can be harmonized with section 311(e)(1). Typically, the word “shall” has been interpreted as “the language of command.”<sup>21</sup> Indeed, the Supreme Court has stated that “the mandatory ‘shall’ . . . normally creates an obligation impervious to judicial discretion.”<sup>22</sup> In addition, the rule of construction that the specific modifies the general<sup>23</sup> might be cited to suggest that section 311(f)(4) be read as a limitation on use of proceeds from enforcement of the Northeast Plan, if one read the provision in isolation.

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<sup>17</sup> National Oceanic and Atmospheric Administration Authorization Act of 1992, Pub. L. No. 102-567, 106 Stat. 4270 (1992).

<sup>18</sup> 16 U.S.C. § 1861(f)(4). It should be noted that section 311(f)(4) governs use of “fines and penalties” for violations of the Northeast Multispecies Fishery Management Plan only; it is silent as to the disposition of forfeiture proceeds collected for violations of that Plan. Because section 311(f)(4) is silent as to forfeiture proceeds, disposition of such proceeds is governed by section 311(e)(1) of the Magnuson-Stevens Act, 16 U.S.C. § 1861(e)(1).

<sup>19</sup> 16 U.S.C. § 1861(f)(4); *see also* National Oceanic and Atmospheric Administration Authorization Act of 1992 (Act), Pub. L. No. 102-567, § 901. The Act amended “[s]ection 311” of the Magnuson Act by “adding the following new subsection” 311(f)(4) to be exercised pursuant to “this section”; the latter reference to “this section” thus plainly refers to Section 311 as a whole, and not just subsection 311(f). Pub. L. No. 102-567, § 901 (emphasis added).

<sup>20</sup> 16 U.S.C. § 1861(e)(1).

<sup>21</sup> *Anderson v. Yungkau*, 329 U. S. 482, 485 (1947).

<sup>22</sup> *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

<sup>23</sup> *Crawford Fitting, Inc. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987); *Morton v. Mancari*, 417 U.S. 535, 550 (1974).

However, even though the term “shall” generally denotes a mandatory duty, “[t]he question whether ‘shall’ commands or merely authorizes [government action] is determined by the objectives of the statute.”<sup>24</sup> Analysis of the objectives of Section 311(f)(4) in the context of other statutory language and legislative history suggests it is not a limiting provision. The reference in section 311(f)(4) to use of proceeds pursuant to Section 311 (including 311(e)) indicates that the more specific section is not intended to modify the latter, more general one. In turn, this reference encompasses the directive in section 311(e)(1) that this subsection applies “notwithstanding any other provision of law.” Accordingly, the better reading of section 311(f)(4) is as a grant of authority to use enforcement proceeds for the broader purposes of enforcing the Plan,<sup>25</sup> but not as a requirement that NOAA do so. Otherwise, Section 311(f)(4) would amount to partial repeal of the “notwithstanding any other provision of law” language in Section 311(e)(1) and would have the effect of making surplusage of the reference to Section 311 as a whole.

Examination of the legislative history adding section 311(f)(4) to the Magnuson-Stevens Act in 1992 supports this analysis. While the legislative history generally describes section 311(f)(4) as requiring use of proceeds to enforce the Plan, the only reference found in the legislative history addressing the interplay between 311(e) and (f) is a single sentence in a Senate Report on S. 2849 (titled the “Groundfish Restoration Act” and containing the same language later added as section 311(f)(4) in the NOAA Authorization Act of 1992). This report’s discussion of the proposed section 311(f)(4) states that: “[w]hile the Secretary currently has the authority to keep collections for certain activities, this provision would *broaden his authority to spend collections*.” S. Rep. No. 102-412, at 10 (1992) (emphasis added). Thus, while the general objective of adding section 311(f) was to “help[] the hard-pressed New England fishing industry in its effort to rebuild depleted groundfish stocks,”<sup>26</sup> the brief but specific legislative history on the interplay of sections 311(e)(1) and (f)(4) indicates that Section 311(f)(4) was intended to “broaden” the Secretary’s authority to use enforcement proceeds. This supports the conclusion that 311(f) authorizes, but does not mandate, the use of proceeds for enforcement of the Northeast Plan.

Accordingly, the better reading of section 311(f)(4) is as a grant of authority to use enforcement proceeds for the broader purposes of enforcing the Plan, but not as a requirement that NOAA do so. Thus, as with the Tuna and Sanctuaries Acts, the Secretary may choose to use the proceeds from enforcement of the Plan pursuant to either section 311(e)(1) or section

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<sup>24</sup> *Sierra Club v. Whitman*, 268 F.3d 898, 904 (9th Cir. 2001); *see also* B. Garner, *Dictionary of Modern Legal Usage* 939 (2d ed. 1995) (“[C]ourts in virtually every English-speaking jurisdiction have held—by necessity—that shall means may in some contexts, and vice versa.”).

<sup>25</sup> Section 311(f) authorizes the use of certain fines and penalties to “enforce” the Northeast Multispecies Fishery Management Plan. Unlike section 311(e)(1), section 311(f) does not identify categories of eligible expenses, permitting a broader interpretation of those expenses eligible for payment, e.g., compliance assistance, collaboration and outreach activities, provided they reasonably relate to enforcement of the Plan.

<sup>26</sup> 138 Cong. Rec. S17411, S17427 (Oct. 7, 1992) (Statement of Sen. Kerry).

311(f)(4). The Secretary further has discretion under section 311(f)(4) to adopt regulatory and accounting measures to facilitate his exercise of that authority.

### **3) Magnuson-Stevens Act – Western Pacific Insular Islands.**

Under section 204(e)(8) of the Magnuson-Stevens Act as originally enacted in 1996, fines, penalties and forfeiture proceeds collected for violations of the Act occurring within the exclusive economic zone off American Samoa, Guam, or the Northern Mariana Islands, after payment of direct costs of the enforcement action to all entities involved in such action, shall be deposited into the Treasury of the Pacific Insular Area adjacent to the exclusive economic zone in which the violation occurred.<sup>27</sup> In 2007, Congress amended section 204(e)(8) to add that fines and penalties collected by the Secretary for violations by foreign vessels occurring within the exclusive economic zones off Midway Atoll, Johnston Atoll, Kingman Reef, Palmyra Atoll, Jarvis, Howland, Baker, and Wake Islands shall be deposited into the Western Pacific Sustainable Fisheries Fund.<sup>28</sup>

Section 311(e)(1) does not govern the use of enforcement proceeds identified above that are received from violations of the Magnuson-Stevens Act occurring within the exclusive economic zone surrounding certain Western Pacific insular areas. Rather, disposition of such enforcement proceeds is governed by section 204(e)(8) of the Magnuson-Stevens Act. Section 204(e)(8) was enacted in 1996 and amended in 2007 as part of the Sustainable Fisheries Act of 1996 – both of which occurred subsequent to the 1990 amendments to section 311(e)(1) that otherwise would have governed these proceeds. Moreover – unlike section 311(f)(4) – the directive in section 204(e)(8) that certain enforcement proceeds “shall” be disposed of in a particular way is not qualified by reference to section 311; and there is no legislative history to support a reading of section 204(e)(8) as a grant of authority only. Given these considerations, the most reasonable reading is that a direct conflict exists between sections 311(e)(1) and 204(e)(8), and thus the later and more specific provision – section 204(e)(8) – controls.

### **III. LEGALLY PERMISSIBLE USES OF PROCEEDS COLLECTED PURSUANT TO SECTION 311(e)(1).**

We address below (a) fiscal law requirements applicable to use of funds collected pursuant to section 311(e)(1), and (b) the scope of section 311(e)(1) in governing expenses that are “directly related” to investigations or enforcement proceedings.

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<sup>27</sup> 16 U.S.C. § 1824(e)(8) (originally enacted in 1996 and amended in 2007). As noted above, 16 U.S.C. § 1824(e)(8) directs disposition of such enforcement proceeds “after payment of direct costs of the enforcement action to all entities involved in such action;” it is silent as to the disposition of the amount equal to such direct costs. Because the section is silent on this point, the amount equal to direct costs paid for with funds subject to section 311(e)(1) of the Magnuson-Stevens Act, 16 U.S.C. § 1861(e)(1), may be transferred to and used under the account established to receive enforcement proceeds.

<sup>28</sup> 16 U.S.C. § 1824(e)(8) (originally enacted in 1996 and amended in 2007). It should be noted that 16 U.S.C. § 1824(e)(8) directs disposition of “fines and penalties” for violations by foreign fishing vessels in the exclusive economic zones of Midway Atoll and the other listed Pacific Insular areas only; it is silent as to the disposition of forfeiture proceeds collected for such violations. Because the section is silent, the disposition of forfeiture proceeds for such violations is governed by section 311(e)(1) of the Magnuson-Stevens Act, 16 U.S.C. § 1861(e)(1).



**a) Fiscal Law Requirements Affecting Section 311(e)(1) Expenditures.**

As a threshold matter of fiscal law, the authority under section 311(e)(1) to use enforcement proceeds for the purposes specified constitutes a permanent appropriation.<sup>29</sup> The use of such funds is subject to certain restrictions.<sup>30</sup> In particular, the use of “permanent appropriations” must satisfy the “purpose statute” and the related principle known as the “necessary expense rule.”

Under the purpose statute, 31 U.S.C. § 1301(a), an appropriation may be applied only to the purposes for which the appropriation is made, except as otherwise provided for by law. An agency has reasonable discretion in determining how to carry out the purposes of an appropriation, subject to any specific limitations set forth in the appropriation act that makes the funds available. However, the expenditure’s relationship to an authorized purpose or function must not be so attenuated as to take it beyond the agency’s legitimate range of discretion.<sup>31</sup> Here, the use of funds collected pursuant to section 311(e)(1) must further the statute’s purpose.<sup>32</sup>

Under the “necessary expense rule,” the expenditure must be “necessarily incident” to accomplishing the appropriation’s purpose, but each item of expenditure need not be specifically authorized in an appropriation. The expenditure is “necessarily incident” when the following conditions are met: a) the expenditure bears a logical relationship to the appropriation sought to be charged; b) the expenditure is not prohibited by law; and c) the expenditure is not otherwise provided for under another appropriation or statutory funding scheme.

Applying the first part of the test, the expenditure must bear a logical relationship to one of the specific purposes set forth at section 311(e)(1). In the context of an appropriation for law enforcement functions, the Comptroller General recognizes that some expenditures may be necessary to accomplish these functions that would not be considered necessary or appropriate

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<sup>29</sup> *E.g.*, Tobacco Inspectors, Department of Agriculture - Payment of Employee's Share of Health Insurance from Tobacco User Fee Fund, 63 Comp. Gen. 285 (1984); *see also* Saint Lawrence Seaway Development Corporation - Status of Funds as "Appropriated," Decision of the Comptroller General B-193573 ([www.gao.gov](http://www.gao.gov)), 1979 WL 11668 (Dec. 19, 1979), which states that GAO has long regarded a statute that authorizes the credit of collections to a particular fund and which makes the fund available for specified expenditures as constituting a permanent appropriation. While section 311(e) does not specifically establish a fund for deposit of collections, the GAO decision further states “it is not essential for Congress to create expressly a fund in the authorizing statute. Such a fund is, in effect, created when Congress authorizes the expenditure” of the collections. *Id. at 6*; *see also* Permanent Appropriation of Mobile Home Inspection Fees, 59 Comp. Gen. 215 (1980) (finding that a statute that clearly makes receipts available for obligation or expenditure without further Congressional action may be construed as authorizing the establishment of a special fund as a necessary implementation procedure).

<sup>30</sup> *See* GAO Redbook at 2-18: *E.g.*, 63 Comp. Gen. 31 (1983), *aff'd* upon reconsideration, B-210657, May 25, 1984; 35 Comp. Gen. 615 (1956).

<sup>31</sup> *E.g.*, Implementation of Army Safety Program, Decision of the Comptroller General B-223608 ([www.gao.gov](http://www.gao.gov)), 1988 U.S. Comp. Gen. LEXIS 1582 (Dec. 19, 1988).

<sup>32</sup> *See* 16 U.S.C. § 1801(b) for the broad purposes of the Magnuson-Stevens Act.

for activities unrelated to law enforcement.<sup>33</sup> This latitude gives NOAA some discretion in determining what expenditures are necessary for the purposes of section 311(e)(1).

Under the second part of the test, the expenditure must not be specifically prohibited by law. Here, some important limitations attach. Under 31 U.S.C. § 1343(b)(2), “[a]n appropriation may be expended to buy or lease passenger motor vehicles only. . . as specifically provided by law.” Similarly, under 31 U.S.C. § 1343(d), “[a]n appropriation . . . is available to buy, maintain, or operate an aircraft only if the appropriation specifically authorizes the purchase, maintenance, or operation.”<sup>34</sup> The present version of 31 U.S.C. § 1343 has its roots in federal law dating back to 1914, and has been interpreted by the Comptroller General as requiring that an agency have specific authority to buy or lease a passenger motor vehicle, or to purchase, maintain, or operate an aircraft. Such authority cannot be implied from broad grants of discretionary authority, or the authority to purchase necessary supplies and equipment.<sup>35</sup> Thus, standing alone, the authority in section 311(e)(1)(C) to use enforcement proceeds to pay for “any necessary expenses for equipment” is not specific enough authority to satisfy section 1343.

Although a closer question, the broad language “notwithstanding any other provision of law” also should not be relied on as a basis for finding 31 U.S.C. § 1343 inapplicable to the use of enforcement proceeds. As noted above, the Supreme Court has stated that it is difficult to imagine a clearer statement of intent than “notwithstanding any other provision of law” to supersede all other laws where they are conflicting.<sup>36</sup> The Comptroller General addressed the application of such language to appropriations in a 2002 decision, finding that where the “notwithstanding” language applied to an agency’s performance of certain tasks, and where the

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<sup>33</sup> *E.g.*, Decision of the Comptroller General B-204486 ([www.gao.gov](http://www.gao.gov)), 1982 WL 28364 (Jan. 19, 1982) (FBI’s purchase of insurance was necessary to lend credibility to undercover business operation); *see also* 29 Comp. Gen. 419 (1950).

<sup>34</sup> Section 1343 does not apply to trucks not constructed and designed for use to transport passengers (e.g., a pick-up truck), 16 Comp. Gen. 320 (1936), or to motor boats or other watercraft, 26 Comp. Dec. 904 (1920); *see also* GAO-08-978SP Appropriations Law – Vol. III, at 12-197 - 12-198.

<sup>35</sup> *See* discussion in the GAO Redbook (3rd Ed., Vol. III), at 12-200: “The authority required by 31 U.S.C. § 1343(b) must be specific. It cannot be implied from broad grants of discretionary authority. 13 Comp. Gen. 226, 1934 WL 828 (1934). The authority to purchase necessary supplies and equipment is not enough. 26 Comp. Dec. 904, 905 (1920)[[www.heinonline.org](http://www.heinonline.org)].” Another example is Decision of the Comptroller General B-67175 ([www.gao.gov](http://www.gao.gov)) (Jul. 16, 1947), which found the Seafood Inspection Service could not rely on authority to use packers’ fees “as may be necessary to provide, equip, and maintain an adequate and efficient inspection service” for the purchase of vehicles in the absence of specific authority for vehicles, even though the agency considered the vehicles necessary for use by “supervising personnel in visiting the plants to which inspectors are assigned, in transporting samples of sea food suspected of being contaminated from the plants to the laboratory for examination; and for other transportation requirements which arise in connection with the sea food inspection service.”

<sup>36</sup> *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993); *see also* *Castro v. Secretary of Homeland Security*, 472 F.3d 1334 (11th Cir. 2006) (“notwithstanding” language in Aviation and Transportation Security Act rendered inapplicable a provision of the Rehabilitation Act that directly conflicted with Aviation Act’s requirement to hire security screeners who met certain physical standards); *District of Columbia Federation of Civic Ass’ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971)(provision directing bridge construction “notwithstanding any other provision of law” did not render inapplicable statute protecting historic sites).

other laws in question did not impair the agency’s ability to perform those tasks, there was no conflict; thus, the other laws still applied even in light of the “notwithstanding” language.<sup>37</sup>

If read broadly as unfettered authority to use enforcement proceeds for the stated purposes, section 311(e)(1) would conflict with section 1343, as well as many other laws pertaining to government procurement, and section 311(e)(1) would thus control. While a plausible reading, particularly given the utility of vehicles to law enforcement patrols and investigations on the docks and other waterside locations (e.g., processing facilities), the better reading is that the purpose of section 311(e)(1) is to serve as an exception to the application of the Miscellaneous Receipts Act, 31 U.S.C. 3302, which directs all funds from any source received by the federal government be deposited in the Treasury, or other laws that might direct alternative uses of these proceeds as described above. Application of the stricter requirements of 31 U.S.C. § 1343 regarding the purchase or lease of passenger vehicles to proceeds subject to section 311(e)(1) does not present a conflict and thus applies to use of 311(e)(1) enforcement proceeds.

Under the third part of the “necessary expense” test, the expenditure must not be otherwise provided for under another appropriation or statutory funding scheme. Under the doctrine of the “election of appropriations,” where two appropriations are available for the same purpose, the agency may elect which one to charge for the expenditure in question, but must continue to use the same appropriation for that purpose.<sup>38</sup> To use both for the same purpose, there must be a clear showing that one appropriation is intended to supplement or increase the other. In this instance, the legislative history accompanying enactment of section 311(e)(1) provides the necessary support to use enforcement proceeds subject to that provision to supplement NOAA’s annual appropriations. As discussed below, Congress enacted section 311(e)(1) in response to historic funding shortfalls, making additional funds available to address the high costs of enforcement.<sup>39</sup>

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<sup>37</sup> E.g., Decision of the Comptroller General B- 290125.2, B- 290125.3 ([www.gao.gov](http://www.gao.gov)), 2003 CPD P 16, 2002 WL 31941487 (Dec. 18, 2002) (provision concerning agency procurement that contained “notwithstanding” language was limited to the three specific tasks listed in that provision and thus was not inconsistent with and did not override other laws providing for GAO jurisdiction, the Competition in Contracting Act, or the Federal Acquisition Regulations).

<sup>38</sup> See Decision of the Comptroller General B-272191 ([www.gao.gov](http://www.gao.gov)), 97-2 CPD P 141, 1997 WL 702260 (Nov. 4, 1997). The agency may make a new election at the beginning of a fiscal year, provided Congress is aware of the intent to make the change.

<sup>39</sup> H.R. Rep. No. 101-393, at 31 (1989) (“Given the limited amount of money appropriated for enforcement purposes and the high cost of enforcing fisheries resource laws, the Committee believes it appropriate that money received from fines, penalties, and property forfeitures should be made available for law enforcement.”)

**b) Expenses “Directly Related” To “Investigations” Or “Enforcement Proceedings” Under Section 311(e)(1)(C).**

Given the principal usage of funds collected pursuant to section 311(e)(1), specific consideration is warranted as to those expenses authorized under section 311(e)(1)(C). Section 311(e)(1)(C) (emphasis added) states that the Secretary may use enforcement proceeds for:

*[A]ny expenses **directly related** to investigations and civil or criminal enforcement proceedings, including any necessary expenses for equipment, training, travel, witnesses, and contracting services **directly related** to such investigations or proceedings;*

Examination of the intent and objectives of Congress here provides support for a broad reading of section 311(e)(1)(C). Enactment of section 311(e)(1) evidenced a desire on the part of Congress to expand the availability and use of enforcement proceeds. Prior to 1990, fines, penalties, and forfeiture proceeds could be used only to pay for rewards and storage costs associated with seizures in a specific investigation or proceeding. With the 1990 amendments, however, Congress expanded both the ways enforcement proceeds could be spent as well as the number of statutes subject to this authority. In explaining this expanded authority, the House Report accompanying the legislation stated the following:

*This section expands the uses which can be made of fines, penalties, or forfeitures of property resulting from violations of the MFCMA or any other fishery resource law enforced by the Secretary. Given the limited amount of money appropriated for enforcement purposes and the high cost of enforcing fisheries resource laws, the Committee believes it appropriate that money received from fines, penalties, and property forfeitures should be made available for law enforcement. At the same time, the Committee does not intend that this expansion of existing law be used as an excuse by any enforcement agency to seek forfeitures of property simply as a way of enhancing its budget. Like other enforcement tools, the authorities provided by this section should be used wisely.<sup>40</sup>*

Likewise, the Senate Report accompanying the 1996 amendment of section 311(e)(1) stated the following:

*Section 116 of the reported bill would make a number of changes to section 311 of the Magnuson Act on enforcement. . . . Subsection (b) would amend section 311(e)(1) of the Magnuson Act to expand the laws under which sums received as fines, penalties and forfeitures can be used to pay for enforcement costs and expenses, including costs such as costs for storing seized property, investigation costs, and reimbursements to Federal and State agencies for services performed. Under current law, the Secretary is authorized to use only sums received under the Magnuson Act and other fishery resource*

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<sup>40</sup> H.R. Rep. No. 101-393 (1989).

*laws for such purposes. This change would authorize use of sums received under the Magnuson Act and all other marine resource laws.*<sup>41</sup>

The language of section 311(e)(1)(C) is consistent with this expressed intent to broaden use of section 311(e)(1) funds to pay for certain expenses beyond those associated with a specific investigation or enforcement proceeding, particularly when examined in context with related provisions.<sup>42</sup> Section 311(e)(1)(C), which authorizes the payment of expenses associated with “investigations” and “proceedings,” contrasts with the language of section 311(e)(1) that authorizes the payment of expenses associated with a specific investigation or proceeding (storage costs, rewards, liens, or other claims), suggesting that Congress sought to authorize the payment of expenses that go beyond those incurred during any specific investigation or prosecution. This inference is reinforced by inclusion of certain kinds of expenses (e.g., equipment and training) that are rarely connected with a single investigation or prosecution. In this respect, section 311(e)(1)(C) is more akin to section 311(e)(1)(F), which broadly authorizes the use of enforcement proceeds to reimburse any federal or state agency “for services performed, or personnel, equipment, or facilities utilized, under any agreement with the Secretary entered into pursuant to subsection (a) of this section, or any similar agreement authorized by law.”

The statutory language requiring that expenses be “directly related” to such “investigations and proceedings” also supports a broader reading of section 311(e)(1)(C).<sup>43</sup> Courts that previously have considered use of the phrase “directly related” in other contexts have regarded it as inherently vague and difficult to define. While use of the phrase places some outer boundaries on expenses authorized under this provision, precisely determining that boundary requires an examination that goes beyond the statutory language to the objectives of Congress in enacting the provision.<sup>44</sup> As noted above, through the enactment of several amendments over the

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<sup>41</sup> S. Rep. No. 104-276 (1996).

<sup>42</sup> *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (statutes must be read as a whole); *Shell Oil Co. v. Iowa Dep’t of Revenue*, 488 U.S. 19, 26 (1988) (the meaning of particular statutory language depends upon its context).

<sup>43</sup> In attempting to discern the meaning of this phrase, other asset forfeiture funds using the same terminology were examined. Pursuant to 28 U.S.C. § 524(c)(1), the Department of Justice maintains a fund known as the “Department of Justice Assets Forfeiture Fund” that is available to the Attorney General for various enforcement purposes. Payments authorized from this Fund include: a) awards for information or assistance directly related to violations of the criminal drug laws, 28 U.S.C. § 524(c)(1)(B); and b) certain equipment directly related to seizure or forfeiture. 28 U.S.C. § 524(c)(1)(F)(ii). Similarly, the Department of Treasury maintains a fund known as the “Department of Treasury Forfeiture Fund,” established pursuant to 31 U.S.C. § 9703(a). Payments from this Fund include “payment made pursuant to the guidelines promulgated by the Secretary, if such payment is necessary and directly related to seizure and forfeiture program expenses.” 31 U.S.C. § 9703(a)(1)(J). Neither statute, nor implementing regulations or guidelines, define the phrase “directly related.”

<sup>44</sup> *Shell Petroleum, Inc. v. United States*, 47 Fed. Cl. 812, 817 (2000). In a tax-related issue that in part turned on the meaning of the phrase “directly related,” the Court of Federal Claims observed, “The parties have asked the Court, therefore, to interpret the term ‘directly related.’ Obviously, the term itself is vague, and Congress does not define it. Courts in general have had a difficult time defining terms similar to “directly related” in other statutes.” Id. In the context of interpreting the phrase “relate to” under a federal retirement statute, the Supreme Court stated that Congressional intent should be examined: “We simply must go beyond the unhelpful text and the frustrating

last twenty years, Congress has expressed intent to expand the availability and use of enforcement proceeds.

A broad interpretation also is consistent with the remedial goals and objectives of the Magnuson-Stevens Act.<sup>45</sup> A central purpose of the Magnuson-Stevens Act is to “conserve and manage” fishery resources found off the coasts of the United States.<sup>46</sup> “Conservation and management” is defined to include those rules, regulations, methods, and other measures required to rebuild, restore, or maintain any fishery resource and the marine environment.<sup>47</sup> Under the statute, enforcement is an important tool to rebuild, restore, and maintain these resources. In 1990 and again in 1996, Congress sought to expand the use of funds available for law enforcement to remedy past funding shortfalls and high enforcement costs.

#### **IV. APPLICATION: LEGALLY PERMISSIBLE AND IMPERMISSIBLE USES OF FUNDS COLLECTED PURSUANT TO SECTION 311(e)(1).**

The list that follows identifies legally permissible and impermissible uses of funds collected pursuant to section 311(e)(1) based on the above analysis. The purpose of this list is to provide guidance as to the legally permissible uses of such proceeds; it does not purport to be an exhaustive list of each and every potential expense “directly related” to investigations and proceedings. Rather, this listing attempts to provide guidance on major categories of potential expenses and costs. As to future expenses that are not identified on this list, whether use of funds collected pursuant to section 311(e)(1) is appropriate should be guided by both: a) the analysis set forth above; and b) how closely the expense relates to those categories of authorized and unauthorized expenses listed below.

Subject to these qualifications, the list below sets forth legally permissible uses of funds collected pursuant to section 311(e)(1):

- The reasonable and necessary costs incurred in providing temporary storage, care, and maintenance of seized fish or other property pending disposition of any civil or criminal

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difficulty of defining its key term, and look instead to the objectives of the . . . statute as a guide.” *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995).

Likewise, the Comptroller General has not provided clear guidance on this issue. *See, e.g.*, B-317423, March 9, 2009 (“expenses directly related to” Army’s antiterrorism simulation training may include the purchase of food for participants); *see also* 71 Comp. Gen. 224 (1992)(expenses directly related to filling a customer order may include a portion of agency operating expenses); *but see* 5 Comp. Gen. 680 (1926) (salaries of employees who collected and prepared wastepaper for sale were not directly related to the sale).

<sup>45</sup> *A.M.L. Intern, Inc. v. Daley*, 107 F. Supp. 2d 90, 100 (D. Mass. 2000) (describing broad, remedial nature of the Magnuson Act); *Uniroyal Chemical Co., Inc. v. Deltech Corp.*, 160 F.3d 238, 242 (5th Cir. 1998) (remedial statute to be read broadly to avoid frustrating Congress’ intent).

<sup>46</sup> 16 U.S.C. § 1801(b)(1).

<sup>47</sup> 16 U.S.C. § 1802(5)(A).

proceeding alleging a violation of any provision of this chapter or any other marine resource law enforced by the Secretary with respect to that fish or other property.

- A reward of not less than 20 percent of the penalty collected or \$20,000, whichever is the lesser amount, to any person who furnishes information which leads to an arrest, conviction, civil penalty assessment, or forfeiture of property for any violation of any provision of this chapter or any other fishery resource law enforced by the Secretary.
- Any expenses directly related to investigations and civil or criminal enforcement proceedings, including any necessary expenses for equipment, training, travel, witnesses, and contracting services directly related to such investigations or proceedings. Included within this category are the following:
  - Expenses and costs incurred in and connected to the conduct of a particular investigation or enforcement proceeding.
  - Expenses and costs that are not specifically incurred in or connected to the conduct of any particular investigation or enforcement proceeding, but have a sufficiently close nexus by supporting or concerning the conduct of investigations and proceedings collectively. Examples include:
    - Lease or purchase of boats or other watercraft, provided they are used exclusively for investigative and enforcement purposes.
    - Contracts for services used in support of investigation and enforcement of violations, including:
      - Review of past enforcement actions in the aggregate (e.g. hiring a third party to review past investigations and enforcement proceedings conducted by NOAA).
      - The services of Administrative Law Judges presiding over administrative enforcement proceedings.
      - Contractors necessary to provide litigation and collections support, including costs related to audits to ensure proper collection and use of enforcement proceeds.
    - Specialized equipment used in support of investigations and enforcement proceedings (e.g., cameras; video recorders; navigational plotting equipment; forensic equipment; protective gear; firearms and ammunition).
    - Training programs related to skills, knowledge and abilities used in investigating and enforcement of violations (e.g., qualification and annual in-service training; field training for officers; firearms training; NOAA Office of General Counsel-wide attorney training conferences; legal conferences involving other agencies,

including the Department of Justice, to discuss the investigation and prosecution of environmental cases; continuing legal education courses on environmental and litigation-related subjects; training of federal, state and international enforcement partners).

- Travel by supervisory personnel to review, discuss and guide regional investigative and enforcement operations.
  - Data management systems used to track investigations and prosecutions (including the Enforcement Information and Management System and any replacement system).
  - Legal and trade reference materials on subjects related to investigation and enforcement proceedings.
  - Copiers, printers, computers and cell phones for use in connection with work supporting investigation and enforcement proceedings.
  - Attendance at domestic and international meetings directly related to enforcement issues, activities, or priorities (e.g., Fishery Management Council meetings; inter-state fisheries commission meetings; sanctuary advisory council meetings; regional fishery management organization meetings; meetings relating to the International Monitoring, Compliance, and Surveillance Network; stakeholder and community outreach meetings; inter-agency enforcement conferences; or other meetings to discuss enforcement issues, activities or priorities).
  - Contracts related to support of organizations that foster cooperation, coordination, information collection or exchange among members in support of investigations and enforcement proceedings (including the International Monitoring, Compliance, and Surveillance Network).
- Any valid liens or mortgages against any property that has been forfeited.
  - Claims of parties in interest to property disposed of under section 1612(b) of Title 19, as made applicable by section 1860(c) of this title or by any other marine resource law enforced by the Secretary, to seizures made by the Secretary, in amounts determined by the Secretary to be applicable to such claims at the time of seizure.
  - Reimbursement to any Federal or State agency, including the Coast Guard, for services performed, or personnel, equipment, or facilities utilized, under any agreement with the Secretary entered into pursuant to subsection (a) of this section, or any similar agreement authorized by law. Such agreements may be used to fund compliance assistance, collaboration and outreach activities by those Federal or State agencies.