

**Response to Public Comments**  
**on**  
**NOAA's Policy for Use of the Asset Forfeiture Fund (AFF)**

**March 16, 2011**

NOAA received written input on the proposed AFF policy from a total of eight individuals or groups. A summary of the 16 different comments included in those eight responses along with NOAA's response to each individual comment received is presented below. Note: Several individuals made substantively the same comment and therefore elements of those comments have been combined below.

**General Comments**

**Comment 1:** Several of those commenting indicated that the prohibited and approved uses of funds contained in the draft policy were appropriate.

*Response:* NOAA agrees with the comments and has made clarifications to improve implementation of the final AFF policy.

**Comment 2:** The AFF policy should include a legal definition of the AFF that is supported in detail by a list of all approved uses.

*Response:* The final AFF policy specifically defines the AFF and identifies approved uses pursuant to the provisions of the Magnuson-Stevens Act § 311(e)(1) (Payment of Storage, Care, and Other Costs) and § 311(f)(4) (Northeast Multispecies). The final AFF policy does not address certain proceeds collected and disbursed pursuant to 16 U.S.C. § 973o (South Pacific Tuna Act), 16 U.S.C. § 1437(f)(1)(C) (National Marine Sanctuaries Act), and 16 U.S.C. § 1824(e)(8) (governing the Western Pacific Insular Areas). Proceeds collected under these other provisions are segregated from the AFF and subject to the specific uses detailed in those statutory provisions.

**Comment 3:** NOAA should establish clear guidelines for use of the AFF and clear punishments for misuse of the AFF.

*Response:* NOAA is establishing the final AFF policy to ensure the approved uses of the AFF are clear to NOAA employees as well as the public. Existing Departmental policy (see Department of Commerce Administrative Order 202-751 - Discipline) already addresses misuse of government funds, including AFF funds.

**Comment 4:** NOAA should establish detailed policy guidelines for any travel that can be eligible for payment by the AFF. Further, only NOAA personnel, not NOAA contractors or subcontractors, should have access to AFF travel funds.

*Response:* Any proposed AFF expenditure of \$1,000 or more must be approved by the NOAA Fisheries Chief Financial Officer. As appropriate, OLE and GCEL will publish additional

internal guidance to implement the final AFF policy. The final AFF policy approves use of the AFF to fund contracts (including travel by contractors) to support investigations, enforcement proceedings, and training. Contractor support for enforcement investigations and proceedings is an important component of a fair and effective enforcement program.

**Comment 5:** The Secretary must establish a separate AFF to enforce the Northeast Multispecies Fishery Management Plan according the requirements of MSA §311(f)(4).

*Response:* NOAA has established a separate specific project code within the AFF to segregate amounts received attributable to fines and penalties imposed for violations of the Northeast Multispecies Fishery Management Plan. The final AFF policy will apply to fines and penalties imposed for violations of the Northeast Multispecies Fishery Management Plan when NOAA seeks to use those funds to enforce the plan.

### **Comments Seeking More Restrictions on Approved Uses of the AFF**

**Comment 6:** NOAA should not reimburse a financial expert who gives an expert opinion on the Respondent's ability to pay a fine assessed by NOAA. This would be a clear conflict of interest when the person opining about Respondents financial capability to pay a fine is subsequently paid for their testimony by those same fines.

*Response:* The use or payment of expert witnesses is not tied to the fines or penalties collected, nor is their payment contingent upon fines or penalties being assessed or recovered. Further, such experts are often useful in assisting NOAA in determining if a respondent in an enforcement proceeding has an inability to pay an assessed penalty such that a reduction of the penalty is appropriate. Finally, the Magnuson-Stevens Act clearly authorizes the use of AFF funds for such law enforcement activities to reduce the burden on taxpayers. NOAA therefore does not agree that any conflict of interest exists.

**Comment 7:** Two commented that the practice of indirectly reimbursing Administrative Law Judges (ALJs) from the AFF was halted during the Inspector General review, that this temporary halt indicates the potential for impropriety, and that the AFF should not be used for such purposes as it compromises the appearance, if not the practice, of impartiality.

*Response:* NOAA's reimbursement of the U.S. Coast Guard for the services of the Coast Guard ALJs is not tied to the fines or penalties collected, nor is their reimbursement contingent upon fines or penalties being assessed or recovered. Further, an opportunity for a hearing before an ALJ as provided for in the Magnuson-Stevens Act is an important component of a fair and effective enforcement program. Finally, the Magnuson-Stevens Act clearly authorizes the use of AFF funds for such law enforcement activities to reduce the burden on taxpayers. NOAA therefore does not agree that there is any impropriety in reimbursing the Coast Guard for the ALJ's services or that it compromises their impartiality.

**Comment 8:** The draft AFF policy recommends unlawful uses of the fund by diverting money to new non-enforcement purposes. NOAA should identify more effective ways in which AFF money can be spent to promote enforcement. Neither the Magnuson-Stevens Act itself nor its

legislative history authorizes funding for compliance assistance from the AFF. The draft policy does not reflect current outreach activities.

*Response:* Based on a careful legal analysis, the General Counsels of the Commerce Department and NOAA have opined that compliance assistance activities can be funded by the AFF through agreements with federal and state partners under Magnuson-Stevens Act §311(e)(1)(F), or in the case of efforts addressing Northeast Multispecies specifically, through enforcement proceeds available to the Secretary under § 311(f)(4). Since at least 2000, OLE has included outreach as a primary activity under its enforcement program. Outreach and compliance assistance are legitimate processes through which enforcement agencies increase levels of voluntary compliance.

### **Comments Seeking Fewer Restrictions on Approved Uses of the AFF**

**Comment 9:** The draft AFF policy would reduce funding for investigations and enforcement. This action contradicts NOAA's goal of promoting deterrence as well as undermines policy recommendations of independent researchers regarding enforcement in the United States commercial fisheries.

*Response:* NOAA remains committed to providing a fair and effective enforcement program nationwide. While the Magnuson-Stevens Act provides broad statutory authority for use of the AFF, the final AFF policy is limiting approved uses as a means of ensuring that there is no conflict of interest – real or perceived – associated with its use. As NOAA completes its work relative to the AFF, it will work to ensure adequate funding is available for a strong, fair, and effective enforcement program.

**Comment 10:** The broad prohibitions on expenditures for vehicles and vessels are inconsistent with Inspector General's Report and the Magnuson-Stevens Act. The Magnuson-Stevens Act provides for expenditures related directly to investigations. The Inspector General's Report only questioned the purchase of vehicles under the existing policy and the use of those taken home.

*Response:* Based on a detailed legal review of the statutory basis of the AFF and other applicable law, the General Counsels of the Commerce Department and NOAA have opined that the purchase or lease of passenger vehicles is not an authorized use of the AFF. Further, under the final AFF policy, NOAA is purposefully limiting the use of the AFF beyond what is statutorily authorized by prohibiting use of the AFF for the purchase or long-term lease of vessels or any equipment associated with vehicles or vessels. While the Magnuson-Stevens Act provides broad statutory authority for use of the AFF, the AFF policy is limiting approved uses as a means of ensuring that there is no conflict of interest – real or perceived – associated with its use.

**Comment 11:** The travel and training restrictions in the draft policy are overly broad. The policy should authorize training related to investigative or enforcement activities, subject to the reasonable limits and auditing by the NOAA comptroller.

*Response:* The final AFF policy provides for limited travel associated with specific investigations, training that is required by national policy, and annual in-service or national training for OLE or GCEL employees. While the Magnuson-Stevens Act provides broad statutory authority for use of the AFF, the AFF policy is limiting approved uses as a means of ensuring that there is no conflict of interest – real or perceived – associated with its use.

***Comment 12:*** The draft policy’s prohibitions on the purchase of equipment are overly broad. NOAA should narrowly tailor the limits to equipment that will be used in enforcement proceedings.

*Response:* The final AFF policy approves use of the AFF for expenditures specifically associated with investigations, but not a broader range of statutorily-authorized uses. While the Magnuson-Stevens Act provides broad statutory authority for use of the AFF, the AFF policy is limiting approved uses as a means of ensuring that there is no conflict of interest – real or perceived – associated with its use.

***Comment 13:*** The complete prohibition on using funds for employee labor, awards, or benefits is overly broad. NOAA should authorize payments to employees that are related to their work in investigations or enforcement.

*Response:* As reiterated in the final AFF policy, NOAA has not and will not use the AFF for NOAA employee labor, awards, or benefits. While the Magnuson-Stevens Act provides broad statutory authority for use of the AFF, the AFF policy is limiting approved uses as a means of ensuring that there is no conflict of interest – real or perceived – associated with its use.

***Comment 14:*** NOAA should continue to support state agencies for enforcement related services to promote compliance with federal and state marine fisheries regulations.

*Response:* The final AFF policy retains the provision approving use of the AFF for reimbursement to state agencies for enforcement-related services and training for state partners regarding Federal statutes and regulations.

### **Other Comments**

***Comment 15:*** One commenter expressed concern with the development of offshore wind technologies near New Bedford, MA.

***Comment 16:*** Several commented that NOAA enforcement personnel should be held accountable for their inappropriate actions relative to the fishing community and use of the AFF.

*Responses:* These comments are not relevant to the content of the final AFF policy.