

## Who really “destroyed a decade of law enforcement?”

FishNet USA/December 28, 2011

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In the last week of November Bloomberg Businessweek on the MSNBC website posted an article titled “*The Gloucester Fish War – How a small town in Massachusetts destroyed a decade of law enforcement,*” by Brendan Borrell.

Mr. Borrell’s point seemed to be that something approaching a conspiracy by Gloucester fishing interests, local, state and federal politicians, the Gloucester Daily Times and the Inspector General’s office in the US Department of Commerce victimized the entire federal fisheries enforcement process in the Northeast. Reminiscent of the horse operas of yesteryear, National Oceanic and Atmospheric Administration enforcement personnel, wearing the white hats à la such stalwarts as John Wayne and Jimmy Stewart, gave their all to fighting the good fight; but rather than rustlers or bandits they were fighting fishermen from a community where cheating was an accepted way of life.

Given the title of his article, it will come as no surprise to anyone that Mr. Borrell painted the hats that the fishermen – and their supporters – wear a pretty unequivocal black.

Did Mr. Borrell get the right hats on the right heads? Having been a fairly close observer of the situation as it unfolded, I would have to answer that he wasn’t even close. And putting together the observations of a number of eminently qualified people and organizations who were directly involved in several connected investigations, people with no particular ax to grind, I’d suggest that they would agree with me. My purpose here is to lay out all of the information that seems to have escaped Mr. Borrell’s notice and let the folks who read this decide for themselves.

But before getting into that, let’s take a look at some of Mr. Borrell’s factual content, the kind of stuff that, particularly with today’s access to the internet, is so easy to get right.

### **Georges Bank? The Grand Banks? Newfoundland? Massachusetts? Collapsing stocks? Record recruitment? Haddock? Cod? They’re kind of all the same, aren’t they?**

The story starts out with a “raid” on the Gloucester Seafood Display Auction on December 6, 2006. Wearing bullet proof vests instead of buckskin and armed with Glock semi-automatic pistols instead of six shooters, 16 federal agents descended on the auction with a U-Haul to cart off three years of business records in an attempt to prove wrongdoing on the part of “mustached” (I’ll get back to this later) Larry Ciulla, the founder and CEO of the auction.

Mr. Borrell wrote “*at the time of the raid (December 7, 2006), cod, haddock, flounder, and other groundfish, which are all caught by dragging a net along the ocean bed, were being harvested so heavily that the stock was in danger of collapsing, as it seems to have in the much larger Georges Bank off Newfoundland.*”

Considering that Georges Bank is off Cape Cod, and has been since it was deposited there by a withdrawing glacier at the end of the last ice age, I’ll have to assume that Mr. Borrell really meant to write “*...in the much larger **Grand Banks** off Newfoundland.*” Considering that most of the groundfish landed in Gloucester are caught on Georges Bank, he must have been referring to the “*cod, haddock, flounder, and other groundfish*” there.

Figure 2.12 on the National Oceanic and Atmospheric Administration (NOAA)/National Marine Fisheries Service (NMFS) Northeast Fisheries Center’s website - <http://www.nefsc.noaa.gov/sos/spsyn/pg/haddock/> - shows that recruitment of Georges Bank haddock was at the highest point ever measured in 2003, and that in 2006 the biomass of haddock on Georges Bank was approaching a corresponding record level. Acadian redfish – another groundfish – were mostly unfished in 2006. Landings were over 100,000 metric tons in the early 1950s but had plummeted to less than 500 mt in 2006. According to trawl surveys their abundance, like haddock, was approaching record levels. Cod and (yellowtail and winter) flounder stocks weren’t in as good shape as haddock or redfish, but to write that the entire groundfish stock on Georges Bank was in danger of collapsing is stretching the truth to epic proportions.

Unfortunately, we’ve become used to such “inaccuracies” in reporting on the condition of our fisheries. Why, after all, should something like accuracy intrude on a good story line or a particular agenda?

According to the author, the intent of this NOAA “raid” was to send the “overfishing doesn’t pay” message to the fishermen of Gloucester.

That it was necessary to get this message to Gloucester's fishermen was required because, according to Mr. Borrell, University of Maryland economist Dennis King "*estimated that 12 percent to 24 percent of the total trawl catch in the Northeast was illegal.*"

### **The Pew Trusts - what are the odds?**

This probably won't come as a surprise to my regular readers, but Dennis King's work was funded by the Lenfest Ocean Program, which is administered by the Pew Charitable Trusts.

I wrote a critique of Dr. King's illegal fishing research, which he accomplished with John Sutinen at the University of Rhode Island (it's available at <http://www.fishnet-usa.com/All%20Stolpe%20Columns.htm#Law%20enforcement>). In a footnote, Drs. King and Sutinen wrote "*interviews with NOAA enforcement staff and others familiar with this database indicate that in many cases enforcement officers have probable cause to inspect for a violation and, if after inspecting they decide to report a violation, it probably is a violation even though it may not be prosecuted or have a resolution that results in a penalty.*" Then "*based on this criterion, 1,614 of the 1,689 incidents (95.6%) reported during this period probably are actual violations and, for purposes of this analysis, will be treated as actual violations.*" Applying this "you're guilty because we suspect you're guilty, regardless of whether you're charged or convicted" attitude seems to be a pretty shaky reason to indict an entire fishing community, but that surely didn't interfere with Mr. Borrell's story.

### **"Enrichment" is a subjective kind of thing**

Underlying Mr. Borrell's "*Fish War*" and his destruction of "*a decade of law enforcement,*" is an investigation of federal fisheries enforcement in the Northeast and nationally by the U.S. Department of Commerce Office of Inspector General (OIG). This investigation, which was called for by Members of Congress, local and state government officials and seafood industry members alike, brought to light significant problems that were endemic to the way that Administrative Law Judges, NOAA administrators, enforcement agents and attorneys had been persecuting (note that I didn't use "prosecuting") fishermen and people in related businesses who they felt were violators (as did Drs. King and Sutinen above), and benefitting from that persecution in the process.

Mr. Borrell wrote of the investigation "*no agents were enriched, and the most significant problems that the Inspector General's report identified were with the regulations themselves.*" Much of the OIG investigation focused on the NOAA Asset Forfeiture Fund (AFF), which was composed of fines either paid by people/businesses that violated federal fisheries laws or funds that resulted from the sale of assets – mostly fish and other seafood - that were forfeited by those people/businesses. How those funds can be used was specified by Congress in the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA).

### **But a financial audit isn't**

The OIG brought in the international accounting firm KPMG to perform a forensic audit of the AFF. Though the funds available wouldn't cover a full audit, among KPMG's findings were:

- *AFF's current balance likely falls within a broader range. Based on complicated definitional, data analysis, and reconciliation efforts, KPMG found that during the period of its forensic review (January 1, 2005, through June 30, 2009), the AFF received approximately \$96 million (including interest on prior balances), while expending about \$49 million through over 82,000 transactions. This analysis suggests that the balance could be much higher than \$8.4 million; however, NOAA must review KPMG's analysis and determine what a more accurate figure may be. NOAA should work with the Department to better define the fund and determine its balance.*
- *KPMG's findings show that NOAA has administered the AFF in a manner that is neither transparent nor conducive to accountability, thus rendering it susceptible to both error and abuse.*
- *Regarding purchase cards issued to nearly all OLE special agents and enforcement officers, KPMG tested all purchase card transactions where the monthly total value purchased from any single vendor had a value above \$3,000. KPMG selected 394 for further review, of which 54 percent (totaling approximately \$204,000) did not have required supporting documentation.*
- *KPMG found that 62 percent of 604 transactions it selected for further analysis (i.e., document review) did not have required supporting documentation, and 27 percent did not have required approvals.*
- *OLE policy authorizes AFF expenditures for vehicle leasing and rentals, but does not include authorization of AFF expenditures for vehicle purchases. OLE's vehicle inventory as of June 1, 2010, lists 202 vehicles, only two of which*

are leased. According to OLE, the other 200 were purchased at a cost of about \$4.6 million, predominantly with AFF monies. OLE's 202 vehicles exceed by a substantial margin its staffing of approximately 172 enforcement personnel.

- Between January 2005 and June 2009, OLE and GCEL charged nearly \$580,000 to the AFF for international travel to over 40 destinations. However, only about 17 percent of the cost for this travel was directly related to specific investigations or enforcement proceedings (the only MSFCMA authorized expenditures for these funds), according to NOAA records. The remaining 83 percent of the cost for such travel was for the purpose of training or attending meetings. For example, in 2008, 15 OLE and GCEL employees traveled to Norway to attend the week-long Global Fisheries Enforcement Training Workshop, at a cost of \$109,000.

Mr. Borrell writes that an almost \$100 million unaudited "slush fund" provided by fines levied on fishermen in the government agency charged with enforcing federal fishing regulations and having no effective limits on how the money was spent was not among the most significant problems identified in the Inspector General's report. And he continues "*no agents were enriched,*" in spite of the fact that government agents and attorneys benefitted from foreign travel for professional development, had lax (or no) "bothersome" controls on spending a whole bunch of money, and had what appears to be unlimited access to government vehicles bought with those funds. I've worked as a government bureaucrat and at the time, if I were offered the chance to be freed of purchasing controls, to have a vehicle permanently assigned to me and to be offered foreign travel for training and professional development, I would have certainly considered myself enriched.

#### **And neither is having a workforce that is overqualified (and overpaid) for the work it's performing.**

In addition to the Department of Commerce Inspector General's office problems with the Asset Forfeiture Fund, the report also noted that "*NOAA needs to reassess its OLE (Office of Law Enforcement) workforce composition (presently 90 percent criminal investigators), to determine if this criminal-enforcement-oriented structure is the most effective for accomplishing its primarily regulatory mission. Based on OLE's data, its caseload from January 1, 2007 through June 30, 2009, was about 98 percent noncriminal.... There are also indications in the record that this workforce composition was driven by considerations of the better pay and benefits that apply to federal criminal investigators, rather than by strict mission requirements.*"

Perhaps Mr. Borrell doesn't consider that better pay and benefits for a workforce that is almost completely out of balance with the work it is required to do amounts to personal enrichment either.

#### **NOAA enforcement was "dismantled" by one man?**

In his zeal to implicate anyone or anything in wrongdoing other than NOAA, Mr. Borrell wrote "(Larry) Ciulla's success in dismantling NOAA's enforcement helped other fishermen." While Mr. Borrell wants his readers to believe that the fisheries enforcement problems were limited to the Gloucester Seafood Display Auction and the fishermen of Gloucester, the Inspector General's report stated "*in short, we found systemic, nationwide issues adversely affecting NOAA's ability to effectively carry out its mission of regulating the fishing industry. These issues have contributed significantly to a highly-charged regulatory climate and dysfunctional relationship between NOAA and the fishing industry—particularly in the Northeast Region (the Northeast Region extends from Cape Hatteras in North Carolina to the Gulf of Maine).*" He also implies that a demonstration that was held in the parking lot of the NOAA/NMFS administrative headquarters building in Gloucester was a "local" effort focusing on local problems. To the contrary, there were fishermen there and participating from fishing ports extending from Maine to New Jersey.

As the statements that were the results of all of the investigations make abundantly clear, neither Mr. Ciulla, the fishermen of Gloucester, nor other fishermen anywhere else were responsible for anything other than drawing national attention to problems that NOAA enforcement personnel and their higher-ups in the agency brought upon themselves. That's what accounted for the "*dismantling,*" not Mr. Ciulla's nor any other private citizen's actions.

#### **And that diminished "NOAA's will to regulate?"**

Mr. Borrell also wrote "*as seems to have been the intention, the called-for investigation successfully diminished NOAA's will to regulate.*"

In his own words "...*Ciulla no longer has to pay an \$85,000 agreement he made to settle a trio of cases that dated back a decade. The 'auction was clearly the target of selective enforcement and subject to excessive fines,' the judge (appointed Special Master and retired federal judge Charles B. Swartwood, III) wrote.*" Here a federal enforcement agency and its personnel were caught with their hands in the symbolic cookie jar up to their symbolic elbows and he describes the agency's reaction as a diminished will to regulate? And that this was the intention of the citizens and their elected officials in clamoring for the investigation? And that those carrying out the investigations were somehow manipulated into enabling this bizarre campaign?

How about, much more simply, that people in the seafood industry nationally, but most particularly from Maine to North Carolina, were tired of being pushed around and manipulated by an out-of-control bureaucracy that benefitted from the inflated fines that it's conflicted, inadequately controlled personnel forced on them, went to their elected officials and finally got some high level attention focused on what had become a festering problem?

### **We're from the government and we're here to destroy your life.**

Mr. Borrell wrote of "a precedent-setting case against a scalloper named Larry Yacubian, who was accused of fishing in closed waters. The case was the first to use satellite technology to track the position of fishing boats. Yacubian settled with the agency for \$430,000, a loss that forced him to sell his boat and home. It was a major coup for NOAA and was supposed to mark the beginning of a new, more accountable fishing industry." He then quoted an attorney in the Justice Department's environmental crimes section "they (NOAA) have gotten some of the most sophisticated cases with some of the highest sentences I have seen in wildlife crime cases." What he neglected to mention was that the "home" Mr. Yacubian was forced to sell – to pay for his fine and his legal fees - was the Quansett Farm in Westport, Massachusetts. This farm had been in his wife's family since her ancestor Job Almy, built it in 1742. Mr. Yacubian, a lifelong fisherman, also lost his fishing permits. He and his family relocated to Florida.

While he did note that "scallop fisherman Yacubian is slated to get back \$400,000 he paid in 2005," Mr. Borrell also neglected to mention that the Honorable Charles B. Swartwood, III, the Special Master who was appointed to review a number of cases prosecuted by NOAA, determined that "the timing and circumstances of ALJ (U.S. Coastguard Administrative Law Judge) McKenna's involvement in this (Larry Yacubian's persecution/prosecution) case gives credence to the perception that, in general, the Coast Guard Administrative Law Judges are biased in favor of NOAA and in particular, that ALJ McKenna was biased in this case which, in turn, allowed EA (NOAA Enforcement Attorney) Juliard and EA MacDonald to extract an excessive settlement from Mr. Yacubian." He recommended that "Mr. Yacubian be reimbursed the total sum of \$330,000 as follows: \$210,000, which was coerced in return for permission to sell the Independence (Mr. Yacubian's scallop vessel), with its permit and \$110,000 representing the excessive monetary penalty paid." Of course that didn't get the Quansett Farm back, but apparently in Mr. Borrell's view, mentioning such "minor" points isn't as important as keeping his good guy/bad guy fantasy intact.

The Special Master reviewed 31 cases that had been handled by NOAA Enforcement Agent Andrew Cohen, and ordered that \$650,000 be returned to 11 fishermen.

### **Perhaps NOAA enforcement personnel didn't all deserve Brendan Borrell's white hats.**

Below are some quotes concerning what it seems impossible to think of as anything less than endemic and widespread problems in NOAA enforcement:

- "Of the 27 complaints we examined, we confirmed 9—including cases involving false information in an affidavit for an inspection warrant; entry into a facility for other than authorized purposes; excessive fines, including for first-time violators; and comparatively steep assessed penalties in the Northeast Region which leverage settlement while deterring respondents from taking their cases to hearing." (USDOC, Report No. OIG-19887-2, 09/2010).
- "The AFF (Asset Forfeiture Fund) has not functioned as a coherent program, despite being a substantial source of agency operational funding—outside and supplemental to annual appropriations—drawn solely from the proceeds of NOAA enforcement actions against industry parties. Rather, as KPMG found, the AFF has operated through poorly defined, disjointed, and inconsistent processes that lack effective internal controls, and for which no single NOAA office appears to be in charge or accountable because it is so decentralized." Memo from USDOC Inspector General Todd Zinser to NOAA Chief Jane Lubchenco, 07/01/2010).
- "As a result of my investigation, I have found conduct... which amounted to overzealous, abusive or arbitrary conduct by NOAA personnel which unfairly impacted the outcome of several of the reviewed cases. Some of the inappropriate conduct which I have uncovered during my investigation was not known to the OIG when it concluded its investigation." (Report And Recommendation Of The Special Master Concerning NOAA Enforcement Action Of Certain Designated Cases, 04/2011).
- "As the top cop at NOAA and a longtime investigator himself, Dale Jones must be acutely aware that shredding documents during a federal investigation raises serious questions about his commitment to a full and fair look at all the facts," (House Oceans and Wildlife Subcommittee Chairwoman) Madeleine Bordallo (D-Guam) said at a subcommittee hearing on the issue yesterday." NY Times, 03/04/2010).
- (Congressman Walter B.) "Jones (R-NC) Praises Dismissal Of Fisheries' Top Cop-Says Much More Needs To Be Done." (headline of press release from Congressman Jones, 04/09/2010).

- “(NOAA Enforcement Agent Andrew) Cohen's June 19, 2009, press release (that was provided to the Boston Globe four hours before anyone at the auction was notified) stated that ‘NOAA is now notifying the auction it must comply with the 2003 agreement's terms and serve the 10-day sanction, effectively shutting down the auction to federally managed fish for 10 days.’ The auction at the time had filed a federal court appeal of NOAA's sanction decision, which precluded Cohen's enforcement of the appealed order — and brought the matter to (U.S. District Court Judge Douglas) Woodlock's courtroom. Woodlock chastised Cohen and NOAA for the tactics. NOAA never followed with news releases that reported the judge's repudiation of Cohen's efforts, or the settlement on terms favorable to the auction.” (R. Gaines, The Gloucester Daily Times, 09/21/2010)
- “U.S. Commerce Secretary Gary Locke announced today that \$649,527 in fisheries enforcement penalties will be returned to 11 individuals or businesses after an independent review of their cases concluded the NOAA enforcement program had in some instances “overstepped the bounds of propriety and fairness.” In his decision memo issued today, Secretary Locke acted on 30 cases reviewed by the Special Master, Judge Charles Swartwood III, accepting all of his recommendations that the law allows and taking additional actions in several cases. Secretary Locke appointed Judge Swartwood to conduct the independent review of cases identified by the Department of Commerce’s Inspector General as problematic. The individuals and businesses will receive their remittances within 30 days of receipt of payment information.” (From a Department of Commerce Press release on May 17, 2011)
- “Federal law enforcement officials buy a \$300,000 luxury boat and can’t document that it’s used for work.” From the website of Iowa Senator Chuck Grassley)

The Secretary of Commerce, a retired federal judge, a sitting federal judge, the head of the Department of Commerce’s internal watchdog agency, an official report of an investigation by that agency, participants in a Congressional hearing and Members of Congress from both sides of the aisle representing constituencies far from Gloucester are on the record with thousands of words which can’t be looked at as anything less than a scathing indictment of NOAA enforcement’s operations and attitudes going back for years, and Mr. Borrell actually tries to convince his readers that this was all part and parcel of an effort to undermine NOAA’s enforcement capabilities in Gloucester.

#### **But then again... and here we hear from some more Pew folks.**

In his effort to minimize the significance of the results of an OIG investigation, an audit by an international accounting firm, a review of the most obviously questionable NOAA Enforcement prosecutions and a Congressional hearing or two, Mr. Borrell wrote that the Executive Director of the Marine Fish Conservation Network pointed out “*that the number of complaints from fishermen that had any merit was “comparatively small.”*” The Marine Fish Conservation Network has received almost \$5 million from the Pew Trusts. He continued “*King, the (Pew/Lenfest funded) economist, says the findings of the Inspector General were misconstrued and blown out of proportion, and he says the industry needs more, not less, enforcement. “This was political theater driven by a handful of fishermen.”*”

I have to emphasize that it wasn’t a fisherman, or a handful of fishermen, who carried out the file-shredding extravaganza in the midst of an investigation by the Department of Commerce Inspector General’s office, it was Dale Jones, the head of NOAA enforcement. That’s not political theater, it’s Cinéma vérité at its most real, and the people doing the driving weren’t a handful of fishermen, they were the people in charge at NOAA.

#### **To really separate the good guys from the bad guys....**

Mr. Borrell appears to go to significant lengths to draw as stark a contrast as possible between members of the fishing industry and the NOAA enforcement machine. He starts out with “mustached” Larry Ciulla, who he also describes as “*the former bad boy,*” a “*thrill seeker*” who bought a Corvette, took flying lessons, risked life and limb in the greasy pole competition each June at the St. Peter’s Fiesta in Gloucester and “*married the former Ms. Massachusetts Petite America.*”

He also refers to the auction’s “*curly-haired bookkeeper,*” who when questioned by the bulletproof vest wearing, Glock brandishing NOAA enforcement agents about the location of records, responded “*I’m not saying anything.*” He later mentions that she “*recently answered the phone at the Exchange*” (that’s the Cape Cod Seafood Exchange, which took over the Gloucester auction site after it filed for bankruptcy) and said “*she does not have current contact information for Ciulla.*”

#### **Levels of complexity and more Pew Trusts \$millions**

And then he writes “*if politicians and the local media painted Ciulla as the face of an honest businessman battered by overzealous regulators, the situation behind the scenes was more complex.*” The complexity is a suit filed by Eric Hesse and another fisherman “*against Ciulla in federal court, demanding \$1 million for breach of contract and deceptive business practices*”

over six years.” Eric Hesse is the Chairman of the Board of the Cape Cod Commercial Hook Fishermen’s Association (CCCHFA). The CCCHFA has received over one and a half million dollars from the Pew Trusts. Then, “on Oct. 4, Hesse’s lawyer—a partner in the firm that once represented Ciulla—brought a class action against the auction, adding two named defendants and alleging the auction violated the Racketeer Influenced and Corrupt Organizations (RICO) Act.” “More complex” might be a world-class understatement.

Fancy cars, fast living, beautiful women, curly hair, mustaches and a lawsuit based on the violation of the Racketeer Influenced and Corrupt Organizations Act; what kind of Hollywood inspired connections come to mind?

Contrast this with Mr. Borrell’s treatment of the NOAA enforcement people as victims of their war with what he wants us to think of as the illegal fishermen of Gloucester and their supporters. Compare his treatment of Larry Ciulla to that of Enforcement Agent Andy Cohen. While Mr. Borrell had Mr. Ciulla, the “former bad boy” driving flashy cars, flying airplanes, marrying beauty/talent contest winners and recklessly risking life and limb, Agent Cohen was fishing from a kayak or spending time in Haiti “with an aid organization.” There’s not much of a question of who Mr. Borrell wants us to think should be wearing the white hats, is there?

### **Last but certainly not least**

In the program of 2nd International Marine Conservation Congress held in Victoria, BC, Canada in May of 2011, Brendan Borrell is listed as a grantee of the Communication Partnership for Science and the Sea (COMPASS) Journalist Fellowship Program (along with fellow Society of Environmental Journalists members Juliet Eilperin and Jeff Burnside – see my *In the Belly of the Big Green Beast* at [http://www.fishnet-usa.com/In the belly of the beast.pdf](http://www.fishnet-usa.com/In%20the%20belly%20of%20the%20beast.pdf) ). COMPASS has received over \$2.6 million from SeaWeb, which was created by the Pew Trusts and has received over \$17 million from the Pew Trusts and the Packard Foundation.

### **So....**

From the title of his article onward, at the most superficial level it’s impossible to come away from Mr. Borrell’s over 3,000 words without the feeling that NOAA enforcement, whose agents and attorneys were the only things protecting the Northeast groundfish fishery, was victimized by the Gloucester fishing industry and its allies. Only by being familiar with an admittedly complicated situation or by doing significant background research does it become evident how much he downplayed the degree to which members of Gloucester’s and much of the rest of U.S.’s fishing industry had been “victimized” by NOAA enforcement, and he totally missed the connections of so many of his sources to the Pew Trusts, a multi-billion dollar foundation that has spent hundreds of millions of dollars in furthering what many people consider an anti-fishing agenda. This, the rest of the story, should shed some much needed light on what it’s difficult to see as anything less than a major blot on the history of fisheries enforcement – and fisheries management - in the U.S. (For the broader implications of the NOAA fisheries enforcement scandal on federal fisheries management, see *When it comes to the NOAA Law Enforcement scandal, “we’re sorry” doesn’t cut it* at <http://www.fishnet-usa.com/All%20Stolpe%20Columns.htm#Sorry%20not%20enough>.)