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U.S. House of Representatives
Committee on Natural Resources
Washington, DC 20515

October 31, 2013

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DEMOCRATIC STAFF DIRECTOR

Dr. Kathryn Sullivan
Acting NOAA Administrator
1401 Constitution Avenue, NW
Room 5128
Washington, DC 20230

Dear Dr. Sullivan:

The Committee on Natural Resources (“Committee”) is conducting oversight of the National Oceanographic and Atmospheric Administration’s (“NOAA”) preparation for and activities during the recent lapse in appropriations, including the process used for determining which employees were exempt from furlough, the availability of fishery management cost recovery programs to continue certain operations, and the activities of senior NOAA staff during the shutdown.

One issue of particular concern was the failure to properly plan for and consider funding alternatives that would have allowed the Bering Sea and Aleutian Islands (“BSAI”) crab fisheries to open on time. The National Marine Fisheries Service (“NMFS”) employees responsible for issuing the individual quotas for the fisheries were deemed non-essential and, therefore, were unavailable to process the quotas before the start of the season.

However, the Magnuson-Stevens Act Section 304(d)(2)(A), authorizes NMFS to collect a fee to recover the actual costs of management, data collection, and enforcement of Limited Access Privilege (“LAP”) programs. The Crab Rationalization Program (“the Program” or “CRP”), a limited access fishery program, provides for the collection of cost recovery fees, which completely fund the operation of the Program without the need for federal appropriations.

According to the FY 1012 President’s budget request, “Funds collected under this authority are deposited into the ‘Limited Access System Administrative Fund’ (“LASAF”). Fees shall not exceed three percent of the ex-vessel value of fish harvested under any such program, and shall be collected at either the time of the landing, filing of a landing report, or sale of such fish during a fishing season or in the last quarter of the calendar year in which the fish is harvested. The LASAF shall be available, without appropriation or fiscal year limitation, only

for the purposes of administrating the central registry system; and administering and implementing the Magnuson-Stevens Act in the fishery in which the fees were collected. Sums in the fund that are not currently needed for these purposes shall be kept on deposit or invested in obligations of, or guaranteed by the U.S.”

During the 2011/2012 Bering Sea crab fishery, NOAA collected more than \$3.7 million in fees. Those fees covered management costs for the 2011/2012 fishery, the 2012/2013 fishery, and, at the time of the shutdown, over \$200,000 from that fishery remained unspent and available for NOAA’s management of the fishery for 2013/2014.

NOAA apparently did not consider in advance, or during the shutdown, whether such funds would be available to support issuing the quotas so fisheries could open on time. NOAA apparently did not have an existing policy in place to deal with a self-funding program like the CRP, and the legal advisors who could have provided an opinion on the matter were furloughed during the entire shutdown period.

NOAA’s inability to determine the legal authority to use Crab Rationalization Program funds prior to or during the shutdown is also troubling given the fact that NOAA’s General Counsel, Lois Schiffer, headlined a D.C. Bar event entitled “Legends of Environmental Law” on October 15 – the same day the crab fisheries were supposed to open. The notice for the event prominently described Ms. Schiffer as General Counsel for NOAA, and according to news accounts of the event, Ms. Schiffer discussed the shutdown but said she herself was furloughed at the time and was appearing in a personal capacity. This raises questions about why Ms. Schiffer appeared at an event identified by her title as NOAA General Counsel during the shutdown while NOAA itself was without legal counsel available to advise whether it had legal authority to use the cost recovery fees to pay for essential staff to set the quota amounts. If NOAA’s General Counsel could address the D.C. Bar during the shutdown, surely she could have assisted with the opening of the BSAI crab fisheries.

Under Rule X of the House of Representatives, the Committee has jurisdiction over fisheries and wildlife, including research, restoration, refuges, and conservation; international fishing agreements; marine affairs, including coastal zone management (except for measures relating to oil and other pollution of navigable waters); and oceanography, among other subjects.

In order to better understand the concerns discussed above, it is requested that NOAA provide the following documents and information by close of business on November 21, 2013, so that the Committee can fulfill its oversight responsibilities:

- (1) A list of all NOAA Headquarters, including Office of General Counsel, and National Marine Fisheries Service employees and summary of job duties for such employees who were identified as exempt from the furlough, organized by NOAA organizational unit;
- (2) A list of all employees in NOAA’s Office of the General Counsel or the NMFS Alaska Regional Office who were recalled from furlough status during the shutdown, as well as the legal basis and period of time for their recall;

- (3) Any documents, policies, or opinions regarding the operation of self-funding programs like the Crab Rationalization Program during a lapse in appropriations;
- (4) All communications between NOAA's Office of the General Counsel and the National Marine Fisheries Service Alaska Regional Office regarding the furlough of NMFS employees responsible for issuing the quotas;
- (5) Any legal opinions concerning the opening of the BSAI fisheries for the 2013-2014 season, including the availability of resource management fees to pay for staff to establish quotas;
- (6) Copies of all communications between NOAA and the White House, including the Office of Management and Budget, concerning the use of resource management fees, including those paid to support the Crab Rationalization Program, to continue or resume operations during the lapse in appropriations;
- (7) Copies of any documents concerning Ms. Schiffer's appearance at the D.C. Bar event, including any documents concerning any NOAA approval for her appearance at an outside activity; and
- (8) Any documents or communications concerning the operation, updating, and maintenance of NOAA's website during the lapse in appropriations.

Enclosed with this letter are instructions and definitions to be used in complying with this request. Please have your staff contact Byron Brown or Jessica Conrad in the Office of Oversight and Investigations at 225-2761 with any questions.

Sincerely,



Doc Hastings
Chairman

Enclosure

Responding to Committee Document Requests

A. Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, recorded notes, letters, notices, confirmations, receipts, checks, envelopes, presentations, pamphlets, brochures, interoffice and intra office communications, electronic mails (e-mails), instant message, notations of any type of conversation, telephone call, voice mail, phone mail, meeting or other communication, diaries, analyses, summaries, messages, correspondence, circulars, opinions, work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and electronic, mechanical, and electric records or representations of any kind, and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, e-mail, discussions, releases, personal delivery, or otherwise.
3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this document request. The singular includes the plural. The masculine includes the feminine.
4. As used herein, “referring” or “relating” means and includes “constituting,” “pertaining,” “evidencing,” “reflecting,” “describing,” or “having anything to do with,” and in each instance, directly or indirectly. These terms mean, without limitation, any reference or relationship which either (a) provides information with respect to the subject of the inquiry, or (b) might lead to individuals who, or documents which, might possess or contain information with respect to the subject of the inquiry.

B. Instructions

1. In complying with this document request, you are required to produce all responsive documents, materials, or items that are in your possession, custody, or control, whether held by you or your past or present agents, employees, representatives, subsidiaries, affiliates, divisions, partnerships, and departments acting on your behalf. You are also required to produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. No records, documents, data or information called for by this request shall be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization, or individual denoted in this document request has been, or is also known by any other name than that herein denoted, the document request shall be read also to include them under that alternative identification.
3. Each document produced shall be produced in a form that renders that document capable of being printed or copied.
4. Documents produced in response to this document request shall be produced together with copies of file labels, dividers, envelopes, or identifying markers with which they were associated when this document request was served. Documents produced to this document request shall also identify to which paragraph from the document request such documents are responsive. Moreover, please include with your response, an index identifying each record and label (preferably by bates stamping) the documents. The Committee prefers, if possible, to receive all documents in electronic format.
5. It shall not be a basis for refusal to produce documents that any other person or entity also possesses documents that are non-identical or identical copies of the same document.
6. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, memory stick, or computer back-up tape), state the form in which it is available and provide sufficient detail to allow the information to be copied to a readable format. If the information requested is stored in a computer, indicate whether you have an existing program that will print the records in a readable form.
7. If compliance with the document request cannot be made in full, compliance shall be made to the extent possible and shall include a written explanation of why full compliance is not possible.
8. In the event that a document is withheld, in whole or in part, based on a claim of privilege, provide the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter of the document; (d) the date, author, and any recipients; and (e) the relationship of the author and recipients to each other. Claims of privileges are considered under Committee on Natural Resources Rule 4(h) and, similar to all common-law privileges, are recognized only at the discretion of the Committee.
9. If any document responsive to this document request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances by which the document ceased to be in your possession, custody, or control.
10. If a date or other descriptive detail set forth in this document request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or

is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

11. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon location or discovery subsequent thereto.
12. Production materials should be delivered to:

Committee on Natural Resources
U.S. House of Representatives
1324 Longworth House Office Building
Washington D.C. 20515