Response to Public Comments on NOAA's Revised Penalty Policy

July 1, 2014

On February 26, 2014, NOAA issued a Federal Register Notice providing notice that it was revising its Penalty Policy to improve enforcement consistency nationally, increase predictability in enforcement, improve transparency in enforcement, and more effectively protect natural resources (79 FR 10776). In that notice, NOAA provided the public with an opportunity to review and provide comments on its Penalty Policy revisions.

In response to that notice, NOAA received 13 comments from 7 commenters. The following is a summary of, and NOAA's responses to, those comments.[1] Where several commenters made substantively the same comment, those comments have been combined.

Comment 1: One commenter noted that penalties for Marine Mammal Protection Act (MMPA) violations should extend to the statutory maximum of $11,000.

Response: NOAA agrees, and notes that both the current Penalty Policy and the Revised Penalty Policy already provide that penalties for the most serious violations of the MMPA range from $8,000 to the current statutory maximum of $11,000.

Comment 2: One commenter took issue with the following Penalty Policy provision: "if two or more vessels are owned by separate corporations, but the same person or company controls these corporations, then a violation by one vessel will be an imputed violation for the other vessel or vessels" (Penalty Policy at page 11). The commenter stated that this provision was problematic because NOAA does not have the authority to "impute" liability from one legal entity to another.

Response: The comment is noted, but NOAA disagrees. Notably, this provision has been in the Penalty Policy since 2011. Under several statutes NOAA enforces, NOAA is required to take into consideration multiple factors when determining an appropriate penalty, including the history of prior violations and "other matters as justice may require."[2] These provisions supply authority for NOAA to consider the violations of one vessel against a second vessel owned by the same person or company because an owner of multiple vessels, whether incorporated singly or collectively, is responsible for the conduct on all of the vessels. One of the most important purposes of assessing a penalty is to deter persons and corporations from violating the law in the future. This principle would be undermined if NOAA did not consider prior violations of vessels

[1] Some of the comments were beyond the scope of the Notice. For example, one commenter encouraged NOAA to seek higher statutory penalties from Congress under the Endangered Species Act and the Marine Mammal Protection Act. Another took issue with the complexity of New England Multispecies regulations. Responses are not provided to these and similar comments unrelated to the Penalty Policy.

[2] For example, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires that, "[in] determining the amount of [the] penalty, the Secretary shall take into account… with respect to the violator…any history of prior offenses, and such other factors as justice may require." 16 U.S.C. § 1858(a).

organized under separate corporations that are actually managed and/or controlled by the same person or entity.

To clarify this provision NOAA has revised the Penalty Policy to remove the word "imputed." Instead, the Penalty Policy now states that NOAA will "take into account" the prior violations of one vessel when assessing a penalty against a second vessel that is managed and/or controlled by the same person or entity.

Comment 3: There were four comments expressing concern over the following Penalty Policy provision: "where a master or crewmember has a prior violation and commits a later violation on a different vessel with a different owner, the prior violation will be imputed to the new owner unless the new owner exercised due diligence regarding the prior violation of the master or crewmember." (Penalty Policy at page 11). These commenters challenged NOAA's authority to "impute" liability, and stated that this provision was unfair and would result in owners being forced to hire unqualified and inexperienced people.

Response: The comments are noted, but NOAA disagrees. This provision has been in the Penalty Policy since 2011. This provision supports NOAA's approach that owners are in a favorable position to prevent violations from occurring aboard their vessels, and that NOAA's assessment of higher penalties against owners who have not exercised due diligence in employing those with prior violations will provide strong incentive for owners to ensure that their employees follow the law.

However, to address these commenters concerns NOAA has clarified the Penalty Policy to provide examples for how an owner may exercise due diligence in handling current or prospective masters or crewmembers who have prior violations. Specifically, the Penalty Policy now states that a vessel owner may demonstrate due diligence by requiring current or prospective masters or crewmembers to certify whether they have prior violations; by providing adequate training to, and closer supervision of, those found to have priors; or by taking other actions to ensure that a master or crewmember with prior violations complies with the law.

NOAA further revised the Penalty Policy to clarify that the prior violation by the master or crewmember is not being "imputed" to a new owner. The Penalty Policy now states that NOAA will "take into account" the prior violations of a master or crewmember when determining the penalty to be assessed jointly and severally against the owner and the master or crewmember.

Comment 4: One commenter sought clarification of the statement in the Revised Penalty Policy that, "[a]ll prior violations that have been finally adjudicated within five years of the current violation (including written warnings, summary settlements, administrative settlements, final judgments, or consent decrees) will be considered . . ."

Response: Under the Revised Penalty Policy, NOAA will no longer consider finally adjudicated priors more than five years old when formulating a penalty assessment. Prospectively, only prior violations (including, but not limited to, written warnings, summary settlements, administrative settlements, final judgments, or consent decrees) that have been finally adjudicated within 5

years of the date of the current violation will provide a basis for an upward adjustment to a penalty.

Comment 5: One commenter stated that "[a]t present, a Notice of Violation and Assessment ("NOVA") does not usually contain any statement of the allegations that form the basis of the assessed penalty, only a single amount for a particular count."

Response: The comment is noted, but NOAA disagrees. Every NOVA is now accompanied by a completed Penalty Assessment Worksheet (Appendix 1 to the Penalty Policy) that details the penalty computation for each individual count charged in the NOVA.

Comment 6: One commenter stated that the Penalty Matrix Tables (Appendix 2 to the Penalty Policy) do not explain why certain offenses are treated with differing levels of gravity and/or culpability calculations.

Response: NOAA agrees that, when read alone, the Penalty Matrix Tables do not describe why offenses are assigned certain gravity or culpability levels, factors that NOAA must take into account when assessing penalties under many of its statutes -- but the Penalty Matrix Tables are read together with the Offense Level Guidance (Appendix 3 to the Penalty Policy) to determine an appropriate penalty. When read together, the Penalty Matrix Tables and Offense Level Guidance provide adequate notice to the regulated community, and clear guidance to NOAA enforcement attorneys, as to the relative gravity and culpability levels of particular violations. Notably, the Offense Level Guidance was formulated after a careful review of historical penalty data and NOAA's enforcement priorities, and was adopted only after public comment.

Comment 7: One commenter stated that the Penalty Policy ignores NOAA's authority to "compromise, modify, or remit, with or without conditions, any civil penalty which is subject to imposition or which has been imposed. 16 U.S.C. § 1858(e)."

Response: The comment is noted, but NOAA disagrees. The Penalty Policy provides numerous considerations based on the facts and circumstances of a particular offense for mitigating a potential penalty, which are applied with an eye towards consistency and fairness. Moreover, NOAA utilizes its authority to compromise, modify or remit civil penalties throughout the enforcement process. For example, NOAA compromises penalties when it issues Summary Settlements or Written Warnings. NOAA further modifies or compromises civil penalties based on, for example, ability to pay, culpability, and additional information that becomes available after the NOVA is filed. NOAA often compromises or modifies penalties by accepting settlements of NOVAs at a reduced rate based on timely acceptance of responsibility and prompt settlement, among other reasons. In short, NOAA regularly uses its authority to "compromise, modify, or remit" civil penalties.

Comment 8: One commenter stated that "NOAA enforcement attorneys . . . are often confused about the actual value of fish, the notion of net profit, and the impact of a civil penalty of any amount on the way business is done."

Response: The comment is noted, but NOAA disagrees. NOAA enforcement attorneys are experienced in evaluating the value of fish. NOAA has determined, and courts have consistently agreed, that gross ex-vessel value of illegally caught fish is the most appropriate measure of determining the economic benefit portion of the penalty assessment.

Comment 9: NOAA received two comments relating to penalties for gear conflicts between mobile and fixed gear. One of the comments noted that, "when mobile gear damages unmarked fixed gear, both parties are at least equally culpable" and should be penalized at the same level. The second commenter disagreed, stating that treating gear owners equally in such a circumstance would not be enforceable.

Response: These comments have been noted. Typically, if a mobile gear operator damages marked fixed gear, the mobile gear operator will be liable. If mobile gear damages unmarked fixed gear (with no buoy or other device indicating the fixed gear's presence underwater), the mobile gear operator would typically not be liable; instead, the fixed gear operator likely will be liable. However, NOAA looks at the facts of each case to determine culpability in a given situation. For consistency, NOAA will move the two gear violations listed in the "Transfer, Purchase, Trade Sale (and Attempt)" section to the "Violations Regarding Gear and ByCatch Mitigation Requirements" section of Appendix 3 to the Penalty Policy.

Comment 10: One commenter asked "who determines the degree of culpability," and "how do they determine intent."

Response: The NOAA General Counsel or Deputy General Counsel approve all civil enforcement actions taken by the Agency based on recommendations from NOAA enforcement attorneys. In determining whether to take an enforcement action, the General Counsel, Deputy General Counsel, and enforcement attorneys take into account culpability and gravity levels of an offense after a review of the investigation report and other evidence, and discussions with law enforcement officers and witnesses, taking into consideration all of the available facts and circumstances related to the alleged violation.

Comment 11: One commenter requested that the Penalty Policy include a "Level" to show when violations become criminal.

Response: The Penalty Policy applies only to civil administrative cases brought by NOAA. The decision to prosecute a case criminally rests solely with the Department of Justice. In determining whether to bring a criminal action, the Department of Justice applies standards set out in the United States Attorney's Manual, and other sources. See, e.g: http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm

Comment 12: One commenter stated that NOAA should consider increasing the penalty for certain violations in the Atlantic herring fishery related to reporting and "slippage," a type of discarding violation that prevents observers from sampling catch.

Response: NOAA notes the comment, and stresses that the revised Penalty Policy provides an appropriate framework for assessing penalties for both reporting violations and violations that prevent observers from performing their responsibilities in all fisheries.

Comment 13: One commenter stated that a summary settlement should not be considered as a prior violation.

Response: The comment is noted, but NOAA disagrees. As previously noted, several statutes that NOAA enforces require NOAA to take prior violations into consideration when determining an appropriate penalty. Summary settlements are finally adjudicated violations that could have been charged by NOVA, but involve lesser offenses that can be quickly resolved for reduced penalties where a violator is willing to admit liability. Whether a violation is charged by summary settlement or a NOVA it is still a violation of the law, and therefore is considered a prior violation under the Penalty Policy.