

PREFACE

A. INTRODUCTION

The National Oceanic and Atmospheric Administration (NOAA) Civil Administrative Penalty Schedule (Penalty Schedule) is a compilation of internal guidelines used by NOAA enforcement attorneys in assessing penalties for violations of statutes and regulations that NOAA enforces. In addition to the Penalty Schedule, Summary Settlement and Fix-It Notice schedules that are utilized by enforcement personnel are also included and have been indexed by region.

The intent of the Penalty Schedule is to permit realization of two equally important goals: 1) assessment of individualized penalties to fit the specific facts of a case; and 2) establishment of relative uniformity in penalties assessed for similar violations nationwide.

The Penalty Schedule provides recommended ranges for penalties and permit sanctions based both on the specific violation and the history of previous violations. NOAA enforcement attorneys are expected to use their prosecutorial discretion in determining the appropriateness of a recommended penalty or permit sanction, basing their decisions on the particular facts of the cases, including aggravating and mitigating circumstances.

B. APPLICATION OF PRIOR VIOLATIONS

A prior violation is a criterion for increasing the penalty assessed or permit sanction imposed for a subsequent violation. The Agency's long standing practice has been to define a "prior violation" broadly to include violations of any statute or regulation administered by NOAA, including violations of permit conditions or restrictions. The Agency may also consider violations of other Federal natural resource statutes as priors. The Agency's procedure for determining applicability of a prior violation to a penalty or permit sanction, is to look back from the date of the current violation and take into account prior violations that have been reduced to final administrative decisions during the previous five years.

A violation is considered to be a prior violation if it has been reduced to either a court decision (civil or criminal) or it has become a final administrative decision of the Agency as defined in 15 C.F.R. §904 *et seq.*. The Agency considers the date that an action becomes a final administrative decision to be the marking date for consideration as a prior violation, both with regard to the Agency's use thereof and a violator's accountability. Finality is necessary to provide actual notice of the prior violation to effectuate an enforcement scheme that uses higher penalties and more severe permit sanctions for repeat violations as an incentive for compliance. Thus, a mere investigation, without a complaint and without a conviction or fine does not constitute a prior violation, nor may a penalty assessment or permit sanction be based upon allegations still in litigation which have not become final. Similarly, simultaneous violations are not considered priors for each other.

When a case involves multiple respondents who may be charged jointly and severally, fairness may require that the respondents be charged individually if their histories of prior offenses are different. In the alternative, they may be charged jointly and severally if the penalty assessed, and/or permit sanction imposed, is based upon the lesser number of priors.

Any violation involving the use of a vessel is a prior violation against that vessel unless controlling ownership changes. A violation by a master or crewmember on a vessel is a prior violation for any subsequent violation they commit on a different vessel. If two or more vessels are owned by the same person, then a violation by one vessel is imputed to be a prior for the other vessel or vessels. 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 is imputed to be a prior for the other vessel or vessels.

C. AGGRAVATING/MITIGATING CIRCUMSTANCES

The following list of factors supersedes all “factors” and “aggravating/mitigating circumstances” contained in any individual NOAA Administrative Penalty Schedule. The superseded factors are incorporated in the broader factors below.

The following list of factors are intended to be broadly construed. NOAA attorneys have wide latitude in considering how the specific facts and circumstances of a particular case apply to these listed factors. Furthermore, the following listed factors are not meant to be an exclusive or exhaustive list. Some factors may be disregarded, while additional factors may be considered, if appropriate, depending on the facts and circumstances of any particular case.

Factors that may be considered in determining the proper penalty level within the penalty range or, where appropriate, above or below the range include, but are not limited to, the following:

- (1) Gravity of the violation;
- (2) Harm to the resource;
- (3) Condition and/or value of resource;
- (4) Whether fish were seized;
- (5) Economic benefit derived from the violation;
- (6) All factors relevant to the violator’s conduct such as: (a) state of mind: knowledge, intent, willfulness, negligence, gross negligence or inadvertence; (b) whether offense was committed in such a way as to avoid detection, e.g., whether there was concealment or flight (to the extent such conduct not charged as a separate offense); (c) degree of dependence on illegal behavior for livelihood (if such information is available at time of charging); (d) whether offense was part of a pattern, course of conduct, common scheme or conspiracy, and violator’s role in the activity;
- (7) Whether there are multiple violations (charged or not charged, including, if appropriate, whether the case involves multiple counts that would justify a downward adjustment of the

- overall assessment in order to reflect appropriately the severity of the illegal conduct);
- (8) Degree of cooperation;
 - (9) Whether violator obstructed administration of justice during investigation or thereafter (to extent not charged as a separate offense) by destroying evidence, intimidating, threatening, materially lying, etc.
 - (10) Acceptance of responsibility;
 - (11) Danger of violence or injuries (or substantial likelihood) to the extent conduct not separately charged;
 - (12) Ability to pay;
 - (13) History of past offenses; and
 - (14) Deterrence of future violations by the violator.

Where authorized by Statute, seizure of the entire catch or its value, and seizure of vessel and/or gear, may apply even on first violations. The quantity and value of each catch should be included in the documentation of each case because such value may be added to NOVA penalty amounts.

(Revised 8/02)