

COASTAL PELAGIC SPECIES ADVISORY SUBPANEL REPORT ON WASHINGTON  
DEPARTMENT OF FISH AND WILDLIFE (WDFW) ENFORCEMENT REPORT

The Coastal Pelagic Species Advisory Subpanel (CPSAS) received a report from National Oceanic and Atmospheric Administration (NOAA) counsel Paul Ortiz relating to the proposed Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions (“Penalty Policy”). Under the Penalty Policy, penalties are based on three criteria: (1) penalty amount reflects the seriousness of the violation; (2) penalty adjustment to reflect particular circumstances, and (3) additional amount added to the penalty to recoup the economic benefit gained by the violator. The Penalty Policy is intended to standardize or provide a “one size fits all” penalty schedule across all regions and fisheries.

The CPSAS believes the proposed Penalty Policy deprives NOAA attorneys of the needed flexibility to recommend penalties that reflect the unique factual pattern that inevitably surrounds each and every alleged violation. This policy will result in excessive penalties for many technical or minor violations and will impede the fair and expeditious settlement of violations through the administrative process. The CPSAS believes this policy is in response to examples of inconsistent enforcement and imposition of penalties in the East Coast ground fisheries. Simply put, it is wholly unnecessary to create a national policy for a problem that does not exist nationwide.

With that said, the CPSAS believes the proposed Penalty Policy, at a minimum, must address the following:

1. NOAA attorneys must have greater flexibility in determining the base penalty amount. Having one penalty matrix for all Magnuson-Stevens Act violations simply does not allow sufficient discretion to take into account the economic diversity of fisheries and the respective management/conservation measures. NOAA should maintain its current practice of allowing its attorneys to recommend penalties unique to each region, fishery, and type of violation.
2. A single occurrence could lead to multiple violations and resulting penalties. The policy provides no clear guidance on how such violations would be considered for penalty purposes. Again, the desire to standardize penalties and eliminate discretion could very well result in highly punitive and wholly unintended consequences.
3. No one disputes that repeat violators should face stiff penalties and potential license sanctions. However, not all violations, especially prior warnings or minor violations, should be considered prior violations for purposes of increasing penalties. If minor violators would have known that NOAA would later seek this proposed Penalty Policy calling for significantly higher penalties and/or permit sanctions, they may have elected to contest the violation. For this reason, no prior violation before the effective date of this Penalty Policy should be considered prior non-compliance unless it involved a clear intent to violate the statute or an economic benefit in excess of \$10,000.

4. Today's fisheries often require the vessel owner to hire a substitute or alternate operator. If the hired operator has a prior violation and engages in conduct resulting in a subsequent violation while operating the owner's vessel, then that owner is also treated as a prior violator. Under these circumstances, the Penalty Policy should allow the NOAA attorney broad discretion relative to the owner's penalty when it can be established that the owner exercised due diligence to determine whether the operator had a prior violation.
5. The CPSAS received the copy of the Federal Register Notice (Agenda Item C.1.c Proposed Penalty Schedule). This did not give anyone adequate time to read or comprehend the scope of proposed penalty changes. Nor was there any outreach to the industry to see how such changes might adversely affect their livelihoods. Some of these proposed changes are draconian and sweeping in nature. The character of these are difficult to understand and seem aimed to further punish an industry that must now consult numerous regulations before they can ever put a line in the water or drop a net over the side. In short, the vessels and processors are now facing additional liability in their day-to-day operations.

PFMC  
11/7/10