

## ENFORCEMENT CONSULTANTS REPORT ON DRAFT NOAA POLICY FOR THE ASSESSMENT OF CIVIL ADMINISTRATIVE PENALTIES AND PERMIT SANCTIONS

The Enforcement Consultants (EC) reviewed the document *Draft NOAA Policy for Assessment of Penalties and Permit Sanctions – October 18, 2010* and appreciates the opportunity to provide related comment. As you know, your EC is structured in a way to ensure that all enforcement entities with a stake in Council business have an opportunity to be a part of the process and comment on issues before you. Our formal committee comments are generally the result of a team approach. However, given that National Oceanic Atmospheric Administration’s Office of Law Enforcement (NOAA OLE) is the subject of the Office of the Inspector General (OIG) investigation, NOAA OLE representatives have recused themselves from our formal comment on this matter.

The EC applauds the NOAA Office of General Counsel – Enforcement and Litigation (GCEL) efforts to develop guidance to NOAA Attorneys on penalties and permit sanctions. The EC did, however, identify three areas of concern related to this new draft NOAA policy: (1) the policy is based on a “one size fits all” strategy, (2) the discretion of the NOAA attorney prosecuting the case is limited and the process is slowed by further GCEL Headquarter review, and (3) the penalty matrix requires penalty ranges higher for the most part than currently seen on the West Coast.

### One Size Fits All

This draft policy is an attempt to provide a nationwide policy but does not take into account nor give flexibility to regional differences and issues. The complexity and differences in the way fisheries are prosecuted on the West Coast sets us apart from other areas of the nation. Violations that are viewed as significant in some areas may be viewed as less severe in other areas. For instance, a grounding event in West Coast rocky shoreline habitat conditions is different than a grounding event in a sensitive coral habitat. Yet based on the new schedule, these two events would be evaluated with the same criteria and penalty assessments. The EC is concerned that regional enforcement efforts would be compromised by an arbitrary system that does not allow for flexibility and localized discretion regarding penalties.

### Limits Discretion and Slows Process

As reported in the draft policy, page 2 bottom paragraph, NOAA attorneys only have an option to recommend charges. Recommendations are a new requirement and NOAA attorneys must forward all recommendation to NOAA GCEL Headquarters in Silver Spring, Maryland, where all cases are reviewed and charging decisions determined. While some oversight may be necessary, the EC feels this extra layer of mandated oversight will only lengthen the time frame of charging notification and case conclusion.

As the EC previously commented upon in June 2010, regarding the *NOAA Fisheries Enforcement Programs and Operations* document (Agenda Item A.3), the EC understands the importance of operators and/or vessel owners receiving timely notification of enforcement actions. The inability to be timely may be related to in-depth or complex investigations requiring

more time to conclude. Having said that, timely prosecution is the expectation and right of every US citizen. Failure to provide this erodes compliance in the long term.

### Higher West Coast Penalties

According to the OIG report, penalties for east coast violations were disproportionately higher than other parts of the country. This design does not appear to address that issue, and in fact increases current west coast penalties without justification.

This policy establishes a punishment range based on a number of criteria as displayed by the penalty matrix. While the EC agrees that structure should be present in the assessment process, fitting violation categories nationwide into the same boxes increases the penalty of a number of current violations for the west coast fisheries. This may result in unreasonable fine levels depending on the offense and the impact of the violation on legitimate fishing industry and natural resources. Consistent with our comments from June 2010 Council meeting, we (EC) do agree that violations should have clear punishments with ranges that make sense.

On the west coast, the states adopt Federal regulations into state rule, and violations thus can be charged in the state or Federal system. The differences in penalties between state and Federal schedules should be considered when determining reasonableness of the proposed Federal penalty schedule. For instance, Southern Resident Orca whales are listed as endangered under Federal and state law. Vessel harassment is a concern and regulated by a state law. Coming within 100 yards of an Orca whale is punishable in the state system by a \$500 civil fine. Conversely, in the Draft NOAA Penalty Assessment document (Pg. 21 Example 6) coming within minimum distances of a Humpback whale is punishable with a \$4750 civil penalty.

As outlined previously, the EC is of the opinion that the new policy as proposed by NOAA, will adversely affect regional enforcement efforts on the west coast by instituting a one size fits all policy placing limits on regional discretion, slowing the overall process, and placing more severe penalties on west coast fisheries without justification for the increases.

The goal of enforcement is to ensure compliance with management and regulatory systems. It is advantageous to have a number of options for enforcement that can achieve compliance. The EC is supportive of a consistent and objective process for assessing any penalty. The EC suggests that NOAA GCEL take a regional approach to the policy development. In this approach NOAA, regional State partners, and industry representatives can meet to discuss a proposed penalty assessment model. The resulting penalty schedule should result in a more localized and effective tool for compliance.

PFMC  
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