

Draft Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions
NOAA Office of the General Counsel – Enforcement and Litigation

I. Statement of Scope and Purpose

This Policy provides guidance for the assessment of civil administrative penalties and permit sanctions under the statutes and regulations enforced by NOAA.

The purpose of this Policy is to ensure that: (1) civil administrative penalties and permit sanctions are assessed in accordance with the laws that NOAA enforces in a fair and consistent manner; (2) penalties and permit sanctions are appropriate for the gravity of the violation; (3) penalties and permit sanctions are sufficient to deter both particular violators and the regulated community from committing violations; (4) economic incentives for noncompliance are eliminated; and (5) compliance is expeditiously achieved and maintained to protect natural resources. Under this Policy, NOAA expects to improve consistency at a national level, provide greater predictability for the regulated community and the public, improve transparency in enforcement, and more effectively protect natural resources.

This Policy supersedes all previous guidance regarding assessment of penalties or permit sanctions and all previous penalty and permit sanction schedules issued by the NOAA Office of the General Counsel.¹

To assist in the interpretation of this Policy, attached to this Policy are three Appendixes: (1) Appendix 1 is a preliminary penalty assessment worksheet; (2) Appendix 2 consists of seven penalty matrixes, one for each of the seven statutes most commonly enforced by NOAA; and (3) Appendix 3 consists of seven offense level schedules, corresponding to each of the seven matrixes listed in Appendix 2. A more detailed explanation for the use of the Appendixes is described herein.

This Policy provides guidance for the NOAA Office of the General Counsel, but does not, nor is it intended to, create a right or benefit, substantive or procedural, enforceable at law or in equity, in any person or company.

II. Statutory Background and Enforcement Framework

NOAA has authority and responsibility under more than 30 federal statutes to protect living marine resources, including marine areas and species, and create sustainable fisheries. A large proportion of NOAA's enforcement cases are brought under seven statutes – the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the National Marine Sanctuaries Act, the Endangered Species Act, the Marine Mammal Protection Act, the

¹ This penalty policy does not address, and is not meant to affect, NOAA's summary settlement schedules or related delegations of authority. Further, NOAA will consider maintaining any policies brought to its attention during the comment period that are deemed important to maintaining NOAA's enforcement goals.

Lacey Act, the Northern Pacific Halibut Act, and the Antarctic Marine Living Resources Convention Act.

Officers and agents in the NOAA Office of Law Enforcement, the U.S. Coast Guard, Customs and Border Patrol, and State officers authorized under Cooperative Enforcement Agreements monitor compliance and investigate potential violations of the statutes and regulations enforced by NOAA. In general, when an investigating agent identifies a statutory violation he or she may pursue one of several available options, depending on the nature and seriousness of the violation.

Where a violation is less significant or technical, having little to no impact on marine resources, the agent may provide a verbal or written warning or issue a “Fix-It Ticket,” which provides the alleged violator with an opportunity to correct the violation within a certain amount of time and waives all penalties if the alleged violator takes the appropriate curative action.

For certain less significant violations, the agent may also issue a “summary settlement” notice, under authority delegated to the agent by the NOAA Office of General Counsel. Under the terms of a summary settlement, an alleged violator receives a document explaining the alleged violation and the alleged violator is permitted to resolve the matter expeditiously by paying a reduced penalty. The determination of appropriate summary settlement penalties is guided by summary settlement schedules developed by the Office of General Counsel, with input from the NOAA Office of Law Enforcement and, often, the relevant program office. *See* <http://www.gc.noaa.gov/enforce-office3.html>.

Where an agent determines that an alleged violation is significant, or where an alleged violator has one or more prior violations, or does not pay a proposed summary settlement amount, the agent may refer the case to the NOAA General Counsel’s Office for Enforcement and Litigation (GCEL) for further civil action or, often working with GCEL attorneys, to a U.S. Attorney’s office for criminal prosecution. U.S. Coast Guard officers, state officers operating under Cooperative Enforcement Agreements, and agents from the U.S. Fish and Wildlife Service or Customs and Border Protection, investigate cases, and where appropriate, submit proposed cases to OLE agents to determine the proper action to take.

A NOAA attorney assigned to a case, in consultation with the investigating agent, evaluates whether evidence in the case demonstrates a violation of a NOAA statute or regulation, and determines whether to recommend charging the alleged violator or declining the case. If the NOAA attorney determines that it is appropriate to recommend filing charges, the attorney then has a number of remedial options. For less significant cases, the attorney may recommend a Written Warning; this action is appropriate where the alleged activity has a limited impact on natural resources, the alleged violator demonstrates a high degree of cooperation, the alleged violator takes corrective action that substantially mitigates or eliminates the impact of the violation, or a substantial amount of time has passed from the date of the violation. For more significant violations, the NOAA attorney may recommend charges under NOAA’s civil administrative process (*see* 15 C.F.R. Part 904), through issuance of a Notice of Violation and Assessment of a penalty (NOVA), Notice of Permit Sanction (NOPS), Notice of Intent to Deny Permit (NIDP), or some combination thereof. Alternatively, the NOAA attorney may determine

that the violation is sufficiently significant to warrant referral to a U.S. Attorney's office for criminal prosecution.

III. Summary of the Penalty Policy

Any penalty policy must start with the statutory and regulatory requirements for establishing appropriate penalties. While there is significant variation in the maximum penalties and sanctions authorized under the statutes most commonly enforced by NOAA, the factors used to determine an appropriate penalty or permit sanction under these statutes are similar: the nature, circumstances, extent and gravity of the alleged violation, the alleged violator's degree of culpability, the alleged violator's history of prior offenses, and the alleged violator's ability to pay the penalty. *See* 15 C.F.R. 904.108(a).² This Policy utilizes these statutory principles to create a system for determining appropriate penalties.

Under this Policy, penalties and permit sanctions are based on three criteria: (1) a base penalty amount and permit sanction reflective of the seriousness of the violation; (2) an adjustment of the base penalty and permit sanction upward or downward to reflect particular circumstances of a specific violation; and (3) an additional amount added to the adjusted base penalty to recoup the economic benefit of noncompliance. Described as an equation:

[Base Penalty based on Seriousness] + [Upward/Downward Adjustment for Specific Circumstances] + [Economic Benefit] = [Penalty Assessment and Permit Sanctions]

We note that this Policy is a departure from NOAA's prior practice of developing detailed penalty schedules by region and by specific types of violations with broad ranges for both penalty and permit sanctions. The Policy uses a simplified approach of having one penalty and permit sanction matrix for each major statute that NOAA enforces, to be applied nationally, with narrower penalty and permit sanction ranges. This approach assures that NOAA attorneys are

² The most common statutes enforced by NOAA are the Magnuson-Stevens Act (16 U.S.C. 1801, *et. seq.*); the National Marine Sanctuaries Act (16 U.S.C. 1431, *et. seq.*); the Endangered Species Act (16 U.S.C. 1531, *et. seq.*); the Marine Mammal Protection Act (16 U.S.C. 1361, *et. seq.*), the Lacey Act (16 U.S.C. 3371, *et. seq.*), the Northern Pacific Halibut Act (16 U.S.C. 773, *et seq.*), and the Antarctic Marine Living Resources Conservation Act (16 U.S.C. 2431, *et seq.*). The current maximum statutory penalties permitted by the seven statutes most commonly enforced by NOAA are as follows:

Magnuson-Stevens Act – \$140,000 per violation
National Marine Sanctuaries Act -- \$140,000 per violation
Endangered Species Act – \$32,500 per violation (knowing violations - endangered species)
Marine Mammal Protection Act – \$11,000 per violation
Lacey Act -- \$11,000 per violation
Northern Pacific Halibut Act -- \$200,000 per violation
Antarctic Marine Living Resources Conservation Act -- \$11,000 per violation

Notably, at least once every four years, the Department of Commerce adjusts the maximum civil monetary penalties authorized by statute for inflation, pursuant to the Federal Civil Penalties Inflation Act (Pub. L. 101-410) as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104-134). *See* 73 Fed. Reg. 75321 (Dec. 11, 2008).

provided with greater guidance in recommending penalties, and should assure fairness and consistency of approach across NOAA statutes, across fisheries, and across the country.

Base Penalty and Permit Sanction – Under this Policy, two factors are considered in determining the base penalty and permit sanction amount (collectively, the “base penalty”): (1) the potential for harm to the resource or regulatory program; and (2) the alleged violator’s degree of culpability, based on an assessment of the alleged violator’s intent in committing the violation. These two factors constitute the seriousness of the violation.

As detailed more fully below, the base penalty is determined by first finding the charged violation on the attached penalty schedules, which list the most common violations that NOAA charges (*see* Appendix 3). The schedules assign a particular “offense level” to each violation.³ This offense level corresponds to the vertical axis of the attached penalty matrixes, which were developed for each of the seven major statutes that NOAA enforces (*see* Appendix 2). The proper penalty range is determined by using the offense level and the alleged violator’s degree of culpability, to find a penalty box within the appropriate matrix. The final base penalty is the midpoint of the penalty range within that box.

Adjustment Factors -- After determining the appropriate base penalty based on seriousness of the violation, the base penalty may be adjusted upward or downward to reflect the particular circumstances surrounding a specific violation, within the range of penalties and permit sanctions provided in the matrix. The following factors are considered in making this adjustment:

- a. The alleged violator’s history of non-compliance (i.e., whether there have been any prior violations);
- b. Whether the alleged violator’s conduct involves commercial or recreational activity;
- c. The conduct of the alleged violator after the violation – whether there is a good faith effort to comply or evidence of cooperation, or whether there is an attempt to avoid detection, interfere with an investigation, lie, or participate in other negative activity.

Economic Benefit – Finally, once the base penalty and adjustments are determined, an additional amount is added to the penalty to reflect the economic benefit gained by the alleged violator through his or her conduct. This additional amount is meant to remove any actual economic benefit to the alleged violator, and prevent unlawful activity from continuing as a “cost of doing business.” Absent extraordinary circumstances, the NOAA attorney will add to the base penalty, as adjusted, an amount equal to the economic benefit of noncompliance.

³Where a violation is not listed in the schedules, the attorney determines the offense level by using the offense level of a similar listed violation. If no similar violation can be identified, the attorney chooses an appropriate offense level by assessing the seriousness of the violation based on criteria described herein.

IV. Establishing the Base Penalty Matrixes and Schedules

As noted above, to guide a NOAA attorney's recommendation of a base penalty, NOAA has developed a penalty matrix using the two factors that constitute seriousness of the violation for each of the seven statutes that NOAA most commonly enforces: potential harm to the resource or regulatory program and degree of culpability. The matrixes are set forth in Appendix 2. In addition, NOAA has developed corresponding schedules that provide guidance on the potential for harm (the harm "offense level") for the most common violations. These schedules are set forth in Appendix 3.

For each matrix, two factors – potential for harm to the resource or regulatory program and degree of culpability – form the two axes on the matrix. The vertical "potential for harm" axis is split into six different "offense levels" with increasing penalty ranges as the potential for harm to the resource and seriousness of the violation become more significant.⁴ The horizontal "degree of culpability" or "intent" axis is split into four levels of increasing mental culpability, depending on whether the violation was the result of unintentional activity (accident or mistake), negligence, recklessness, or an intentional or willful act (*see* Appendix 2).

In determining the appropriate penalty range for each box in the matrixes, NOAA examined the maximum available penalties under the particular statute, and interpreted the relevant statutes as calling for graduated penalties from the most serious violation, warranting the maximum penalty, down to the least serious violation, warranting significantly lower penalties. We believe that this graduated scheme provides for a fair base penalty depending on the seriousness of the violation, as envisioned by the statutes.

With respect to permit sanctions, where applicable, the statutes that NOAA enforces generally provide broad authority to suspend or revoke permits. We note that while permit sanctions may be an important tool in deterring future violations, we are mindful that vessel or dealer permit sanctions may result in negative financial impacts to parties beyond the alleged violator(s) (e.g., crew, processors/dealers, commercial markets, from lost fishing effort). Given the impact that permit sanctions may have, permit sanctions generally are more appropriate in cases involving violations that are moderate to major in terms of their seriousness. We have therefore provided an incremental gradation of permit sanctions in the matrixes ranging from 0-20 days, 20-40 days, and 40-60 days depending on the seriousness of the violation.

Notably, there are certain circumstances where a permit sanction may be appropriate for offense levels lower than those indicated in the matrixes. For example, NOAA occasionally encounters an alleged violator in possession of large amounts of catch, where the value of the catch is in excess of statutory penalty limits. Historically, in these types of cases NOAA has charged a monetary fine, but then added a permit sanction as an additional penalty. NOAA retains the

⁴ Although there are six potential for harm offense levels for all of the statutes (I through VI), the offense levels have been compressed into four tiers for the Marine Mammal Protection Act, Endangered Species Act, Lacey Act, and the Antarctic Marine Living Resources Convention Act, to reflect the lower maximum penalties specified in these statutes.

discretion to continue this practice in the future to allow recoupment of the economic benefit of noncompliance above statutory penalty limits through an appropriate permit sanction.

Permit revocation is also appropriate in extraordinary cases. *See* 16 U.S.C. 1858(g)(i). Revocation may be appropriate, for example, where a permit is obtained by fraud or false information, or where a monetary penalty and permit suspension do not adequately reflect the serious nature of the violation. Permit revocation may be sought with prior approval of the NOAA General Counsel.

V. Determining the Base Penalty Using the Matrix

In determining an appropriate base penalty, the NOAA attorney first determines an appropriate “potential for harm” offense level, using the listed schedules of common violations as a guide (Appendix 3). Where a violation is not listed in the schedules, the attorney determines the offense level by using the offense level of a similar listed violation. If no similar violation can be identified, the attorney will determine an appropriate offense level by assessing the seriousness of the violation. Once an offense level is established, the attorney will then determine the alleged violator’s degree of culpability, following the criteria set forth below. The base penalty (including the permit sanction) will be the midpoint of the penalty range in the appropriate matrix box determined using this method.

A. Potential Harm to the Resource or Regulatory Program

There are six “potential for harm” offense levels assigned to each vertical axis of the matrixes, although these offense levels have been compressed into four for the Marine Mammal Protection Act, Endangered Species Act, Lacey Act, and Antarctic Marine Living Resources Convention Act (*see* Appendix 2). The six separate offense levels assigned to the Magnuson-Stevens Act, National Marine Sanctuaries Act, and Halibut Act reflect the higher monetary penalties provided for in these statutes, and the need for additional offense level classes to narrow the potential penalty ranges available for a particular violation.

The offense levels reflect a continuum of increasing potential harm to the resource or regulatory program, with offense level I representing the lowest potential harm, and offense level VI the greatest. Offense levels I and II apply to minor violations, which pose a relatively low likelihood of harm or degree of harm to the natural resource, or where the adverse effect on the statutory or regulatory purposes or procedures for implementing or enforcing the program is mostly administrative, technical or limited. Offense levels III and IV apply to moderate violations, which pose a significant likelihood of harm or degree of harm to the natural resource, or have a significant adverse effect on the statutory or regulatory purposes or procedures for implementing or enforcing the program. Offense levels V and VI apply to major violations, which pose a substantial likelihood of harm or degree of harm to the natural resource, or which may have a substantial adverse effect on the statutory or regulatory purposes or procedures for implementing or enforcing the program.

The attached schedules assign the most common violations to an offense level within the matrix. These schedules were created by evaluating the potential for harm resulting from a violation, considering the likelihood and degree of harm to the natural resource or regulatory program that the statute or regulation is intended to protect. The emphasis is placed on the potential harm posed by a violation rather than on whether harm actually occurred. The presence or absence of direct harm in a noncompliance situation is immaterial because it is something over which the alleged violator may have no control and, in cases where the alleged violator does have control, detection of evidence of the harm is easily frustrated. Thus, under this policy, a lower civil penalty is not assessed simply because the violation does not result in actual harm.

In making a determination of a proper penalty, NOAA attorneys will examine the attached schedules, and evaluate the proper offense level for a particular violation. Some violations in the schedules have a range of offense levels assigned to them; in these cases, the NOAA attorney will apply the offense level that corresponds to the potential for harm from the particular violation under review. To determine the proper offense level where a violation is not listed, NOAA attorneys will either determine the offense level by using the offense level of an analogous violation, or independently determine the level by considering the following factors:

- a. The nature and status of the resource at issue in the violation (e.g., is the fishery currently overfished or is the stock particularly vulnerable because it is slow to reproduce; did the violation involve measures designed to protect essential fish habitat, endangered/threatened species, or resources of a national marine sanctuary);
- b. Whether the violation involves fishing in closed areas, fishing in excess of quotas, fishing without a required permit, or fishing with unauthorized gear;
- c. Whether the violation provides a significant competitive advantage over legally operating fishers;
- d. The nature of the regulatory program (i.e., limited versus open access fishery);
- e. Whether the violation is difficult to detect without an on-scene enforcement presence or other compliance mechanisms such as Vessel Monitoring Systems (VMS) or an observer (e.g., unlawful discards; high-grading of catch, use or deployment of fish aggregating devices; gear conflicts; failure to use seabird or turtle interaction devices); and
- f. The potential damage to the regulatory scheme or program.

B. Degree of Culpability or Intent

The second axis of the penalty matrixes focuses on the degree of culpability or intent of the alleged violator when participating in the unlawful activity for which the penalty is being imposed. This axis reflects the importance that NOAA places on the degree of willfulness, recklessness, and/or negligence prior to and at the time of violation by the alleged violator.

There are four levels of culpability reflected in the matrixes: willfulness (intentional acts), recklessness, negligence, and accident or mistake (unintentional acts).

A willful violation generally exists when a violation is committed deliberately, voluntarily or intentionally. Willfulness may be particularly demonstrated by violations committed as part of a pattern, course of conduct, common scheme or conspiracy. Recklessness is a conscious disregard of a substantial risk of violating conservation measures that involves a gross deviation from the standard of conduct a law-abiding person would observe in a similar situation. Negligence is the failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances. The failure to know of applicable laws/regulations or to recognize when a violation has occurred may itself be evidence of negligence. Finally, an unintentional act is one that is inadvertent, unplanned, and the result of an accident or mistake, that should result in an assessment at the lowest penalty range, and reflect the strict liability nature of regulatory violations.

In assessing the degree of willfulness, recklessness, negligence, or unintentional behavior, a NOAA attorney should consider the following factors:

- a. Whether the alleged violator took reasonable precautions against the events constituting the violation;
- b. How much control the alleged violator had over the events constituting the violation;
- c. Whether the alleged violator knew or should have known of the potential harm associated with the conduct;
- d. Whether the alleged violator knew or should have known of the legal requirement that was violated; and
- e. Other similar factors as appropriate.

It should be noted that the factor regarding knowledge of the legal requirement should not be used as a basis to reduce the penalty. To do so would encourage ignorance of the law.

VI. Penalty Adjustment Factors

As set forth in Section V above, the seriousness of the violation and the degree of culpability are considered in determining the base penalty. Further, any system for calculating penalties and permit sanctions must have enough flexibility to make adjustments that reflect legitimate differences between similar violations. These include history of noncompliance, whether the alleged violator's conduct involves commercial or recreational activity, and the conduct of the alleged violator after the violation.

Starting with the midpoint of the appropriate matrix box, the attorney will use the adjustment factors to move to a different box, or up or down on the scale of the box. These factors may

increase, decrease, or have no effect on the penalty and permit sanction to be assessed. Application of the adjustment factors is cumulative, i.e., more than one factor may apply in a case. In applying the adjustment factors, the NOAA attorney will use the information about the alleged violator and the violation available at the time of assessment.

In extraordinary circumstances, the base penalty may be adjusted above (or below) the high (or low) end of the base penalty range, with prior approval of the NOAA General Counsel.

History of Non-Compliance

An alleged violator's previous violation of natural resource protection laws is evidence of a willful disregard for NOAA's statutes or regulations or a reckless or negligent attitude toward compliance with them. Subsequent violations also may be evidence that the prior enforcement response was not sufficient to deter future violations. Accordingly, prior violations are a basis to adjust a penalty upward. Factors the NOAA attorney will consider in applying this adjustment include, *inter alia*, the following:

- a. How similar was the prior violation?
- b. How recent was the prior violation?
- c. The number of prior violations; and
- d. The alleged violator's efforts to correct any prior violation(s).

All prior violations will be considered, with adjustments upward as follows: (1) for each prior violation that is similar to the newly charged violation, that has been charged (e.g., issuance of a written warning, summary settlement, or NOVA) within the prior five years, the NOAA attorney will move an entire base penalty box to the right in the matrix, with a maximum increase of three penalty boxes (note: where it is not possible to move to the right in the penalty matrix, the NOAA attorney should select the box below the previously determined penalty box); (2) for priors that are not similar to the newly alleged violation, that have not yet been charged but occurred within the prior five years, or that have been charged more than five years prior to the present violation, the NOAA attorney will increase the penalty within the range of the box determined in Section V above.

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

Commercial versus Recreational Activity

Where a violation arises from non-commercial activity, the status of the alleged violator – a recreational fisherman, for example – may be deemed to be a mitigating factor justifying a downward adjustment in the base penalty, including a movement left, or up, in the matrix, to a lesser penalty range. This is appropriate because a recreational violator is likely to have a lesser impact on the natural resource or regulatory program and typically does not obtain the same degree of economic gain as a commercial enterprise. Of course, an adjustment for recreational activity is not always appropriate: for example, in the case of a violation involving a vessel grounding in a national marine sanctuary, the operator of a recreational vessel may be deemed to be just as culpable as the operator of commercial vessel.

Activity After Violation – Good Faith Efforts to Comply; Cooperation/Noncooperation

The NOAA attorney may also move above or below the midpoint of the range by taking into account the good or bad faith activities of the alleged violator after a violation occurs. Good faith factors, which may mitigate a penalty, include promptly reporting noncompliance, talking with and providing helpful information to investigators, and cooperating with investigators in any on-going investigation. Alternatively, actions taken in bad faith, which may result in an increased penalty, include any attempt on the part of the alleged violator to avoid detection (e.g., concealment or flight), or whether there was evidence that the alleged violator interfered with the investigation by destroying evidence, intimidating or threatening agents or witnesses, lying, or similar activity. No downward adjustment will be made if the good faith efforts to comply primarily consist of coming into compliance.

VII. Economic Benefit

This Policy includes the consideration of the economic benefit of noncompliance to an alleged violator when penalties are assessed. The economic benefit to an alleged violator is taken into account to prevent violators from engaging in improper behavior as a “cost of doing business,” knowing that their illicit activities are more economically advantageous than the cost of a potential penalty. Taking into account economic benefit also levels the playing field of the regulated community, as violators do not gain economic or strategic benefits over their law-abiding competitors by violating the law. Absent extraordinary circumstances, an economic benefit component will be calculated and added to the base penalty.

The NOAA attorney will examine the following types of economic benefit from noncompliance in recommending the economic benefit component:

- a. Gross value (not net) of fish or other product illegally caught
- b. Gross revenues (not net) of charter fishing vessel or whale watching vessel that violated regulatory restrictions
- c. Economic advantage from delayed costs (delay in purchase of required equipment, e.g., turtle excluding devices or vessel monitoring systems)

- d. Economic advantage from avoided costs (fuel saved by transiting through, not around, a protected area; costs of an observer on fishing trips; costs of infrastructure improvements, e.g., fish ladders and screens to protect ESA-listed species)

In some cases, there may be more than one type of economic benefit to the alleged violator. In calculating economic benefit, the NOAA attorney will consider each of these categories of potential economic benefit to calculate a combined economic benefit. Factors to be considered in assessing economic benefit are described below.

Gross Value of Fish or Product Illegally Caught or Revenues Received

In assessing the economic benefit of the violation where fish or other product was caught in violation of the statutory or regulatory requirements, the benefit will be assessed based on the gross ex-vessel value of the fish or other product. Where a charter fishing vessel or whale watching vessel is involved, economic benefit should include the gross revenues from the trip that gave rise to the violation.

If the illegal catch was seized and forfeited by the alleged violator, or if the alleged violator voluntarily abandoned the illegal catch or product, the economic benefit was likely already recouped from the alleged violator and the economic benefit for the penalty assessment will likely be \$0.

Delayed Costs

Delayed costs are expenditures that have been deferred by the alleged violator and result in a failure to comply with the regulatory program. The alleged violator eventually will have to spend the money in order to achieve compliance, but during the period of non-compliance the violator has gained an economic benefit over his or her competitors who have paid to come into compliance. The economic benefit for delayed costs consists of the amount of interest on the unspent money that reasonably could have been earned by the alleged violator during noncompliance.

Avoided Costs

Avoided costs are expenditures that are nullified by the alleged violator's failure to comply. These costs will never be incurred. Examples of avoided costs include, *inter alia*:

- a. Cost savings for operation and maintenance of equipment that the alleged violator failed to install;
- b. Failure to properly operate and maintain existing equipment (e.g., fish ladders and screens for the protection of ESA-listed species);
- c. Failure to employ sufficient number of adequately trained staff; and
- d. Failure to establish or follow precautionary methods required by rules or permits.

For avoided costs, the economic benefit equals the cost of complying with the requirement from the time that compliance was required until the violator comes into compliance.

VIII. Ability to Pay

The goal of NOAA's enforcement program is securing compliance with the laws that protect natural resources, not putting alleged violators out of business. Thus, NOAA will consider at the appropriate stage the ability of the alleged violator to pay a penalty as described below. The NOAA attorney will generally not consider the alleged violator's ability to pay in making a recommendation regarding issuance of a NOVA because he or she will not have relevant information available before the NOVA with proposed penalty is issued.⁵ Once a NOVA is issued, the burden to demonstrate inability to pay rests with the alleged violator. *See* 15 C.F.R. 904.108(c) – (e) (describing process for demonstrating inability to pay). The alleged violator must provide requested information that is verifiable, accurate and complete to enable consideration of this factor in adjusting the proposed penalty.

When an alleged violator cannot afford the penalty prescribed by this policy, or payment of all or a portion of the penalty will preclude the alleged violator from achieving compliance or from carrying out remedial measures more important than the deterrence effect of the penalty, the NOAA attorney may consider, *inter alia*, the following options:

- a. An installment payment plan with interest;
- b. A reduction of the penalty amount in exchange for a comparable increase in the permit sanction component;
- c. A suspended penalty subject to specified conditions; and
- d. Straight penalty reductions.

The amount of any downward adjustment of the penalty is dependent on the individual financial facts of the case.

IX. Application of the Penalty Policy and Periodic Review⁶

Use of Preliminary Worksheet with Rationale for Assessed Penalty – In preparing a recommendation to charge an alleged violation through issuance of a NOVA, NOPS, or both, the NOAA attorney will complete the Preliminary Worksheet attached as Appendix 1 to establish a recommended penalty and permit sanction for each alleged violation. Each section of the

⁵ Unlike other statutes NOAA enforces, the Lacey Act requires consideration of ability to pay at the time of charging. 16 U.S.C. 3373(a)(6); *see also* 15 C.F.R. 904.108(g) – (h) (describing process for consideration of ability to pay at the charging stage).

⁶ This Policy does not address issues related to charging decisions, such as the appropriate “unit of prosecution” (e.g., whether an unpermitted fishing trip is one violation, or multiple violations for each fishing day). Instead, by separate policy, NOAA will provide guidance for making charging decisions under the statutes NOAA enforces.

worksheet corresponds to a section of the Policy as summarized in Sections V through VII above. The Preliminary Worksheet is an internal NOAA document reflecting attorney work product that will not be available to respondents; however, the basis of the penalty will be included in charging documents.

Multiple Violations – In certain situations, several violations may have been committed. An assessment will be undertaken for each violation charged.

Penalty Assessment Against Vessel Owner and Operator – Absent extraordinary circumstances, the penalty will be assessed jointly and severally against all appropriate actors (e.g., the vessel owner and operator).

Application to Violations of Other NOAA Statutes – As noted above, this Policy supersedes all previous guidance regarding assessment of penalties or permit sanctions and all previous penalty and permit sanction schedules issued by the NOAA Office of the General Counsel. This Policy, and the attached matrixes and schedules, address the seven major statutes that NOAA enforces. While NOAA develops base penalty matrixes for other statutes NOAA enforces, the NOAA attorney should use the closest one by analogy, i.e., the matrix developed for MSA violations should be used to develop a recommended penalty under other fishery laws with comparable statutory penalties.

Further, although all previous penalty and permit schedules are superseded by this Policy, they may still be used as an historical reference point to be considered in application of this Policy. In transitioning to this new Policy for assessing penalties and permit sanctions, the NOAA General Counsel's Office will monitor the situation closely, and any penalty or permit sanction under this Policy that is substantially higher or lower than under the prior penalty schedules will be subject to a higher level review before a charging decision is made.

Periodic Review – The NOAA General Counsel's Office will review this Policy within one year from its final effective date and revise or modify it as appropriate to ensure that it continues to serve the stated purposes of the Policy above.

APPLICATION OF POLICY – SPECIFIC EXAMPLES

EXAMPLE 1 – MAGNUSON-STEVENS ACT

Description of Violation

Commercial fishing vessel, Vessel A, owned and operated by Captain X, lands 5,000 pounds of redbtail groundfish, which is 2,000 pounds (approximately 67%) in excess of the applicable 3,000 pound trip limit. The trip limit had been in effect for several months as of the date of the violation. The violation occurs during a routine landing, which is monitored by a NOAA enforcement agent. The excess fish is voluntarily abandoned by Captain X. When interviewed by the NOAA agent, the captain says that the overage is due to a mistake by an inexperienced crewmember who was unaware of the 3,000 pound limit. At the time of the violation, Vessel A is participating in the groundfish fishery as a federally permitted, limited entry fishing vessel. Limited entry vessels qualify for a higher trip limit for redbtail groundfish than do open access vessels. Redtail groundfish are not considered an overfished species. No other violations are found in connection with the overage. Captain X has one prior violation for an overage of groundfish, which occurred two years prior to the present violation.

The following is a discussion of the methodology used to calculate the amount of the proposed civil monetary penalty for the violation, under the penalty policy.

Base Penalty

Offense Level: Level III. The Magnuson-Stevens Act schedule provides for an offense level range of II to III, but here the potential for harm to the resource or regulatory program is moderate. The overage violation poses some degree of harm to the fishery resource because the overage is significantly in excess of the applicable limit, and occurred in a limited entry fishery. Had the overage gone undetected, the violation would have provided a significant competitive advantage to Captain X over legally operating fishers.

Degree of Culpability: Level B. Although the Captain indicated that the violation was unintentional, the Captain's knowledge of the 3000 lb limit and the size of the overage implies negligence in overseeing the vessel's crewmembers, particularly those who were inexperienced.

Matrix Penalty: The penalty range is IIIB, \$5,000-\$10,000, with a midpoint of \$7,500

Adjustment Factors

History of Compliance: Captain X had one similar violation within the previous two years; this increases the penalty range to III C, \$10,000-\$15,000, with a midpoint of \$12,500, which represents an upward adjustment of \$5,000 over the base penalty.

Commercial vs. Recreational Activity: the violation occurred in the commercial, limited entry groundfish fishery. The fact that Vessel A was participating in a limited entry fishery was considered in determining the base penalty. The limited entry fishery management program is by definition applicable only to commercial fishing vessels, therefore no further adjustment is warranted.

Activity After Violation/Cooperation: Although Captain X voluntarily abandoned the excess fish, there was not cooperation with authorities in this case to a degree warranting a downward adjustment of the penalty.

Adjustment to Base Penalty: Increase base penalty to \$12,500 ($\$7500 + \$5000 = \$12,500$).

Economic Benefit

N/A; Captain X voluntarily abandoned the excess fish.

Total Penalty (I. + II. + III.): \$12,500

EXAMPLE 2 – MAGNUSON-STEVENSON ACT

Description of Violation

Commercial fishing vessel, Vessel A, owned and operated by Captain X, lands 830 pounds of Atlantic sea scallops that are sold for \$6 per pound, for a total of \$5,229. Because the vessel was issued a valid Limited Access General Category permit, it is limited to landing 400 pounds of scallops. Captain X completes a vessel trip report stating that only 400 pounds of scallops were landed, and submits this report to the National Marine Fisheries Service. The dealer to which the scallops are sold (Dealer Y) reports to NMFS that it has purchased only 400 pounds of scallops. When interviewed by the investigating agent, Dealer Y denies purchasing any illegal scallops. When the investigating agent interviews Captain X, Captain X admits landing excess scallops and selling them to Dealer Y for cash. Captain X also admits submitting a false trip report. Further, he acknowledges that he has worked out an agreement with Dealer Y to report only 400 pounds. Captain X's admissions lead to the retrieval of Dealer Y's record that reveals the excess 430 pounds of scallops were purchased with cash for \$2,580 (430 lbs. x \$6 per lb.). Neither Vessel A nor Captain X have any prior history of violations. Based on this example, Vessel A and Captain X fished for, caught, possessed, landed, and sold scallops in excess of the 400 pound landing limit and submitted and maintained a false vessel trip report.

The following is a discussion of the methodology used to calculate the amount of the proposed civil monetary penalties for the violations against Vessel A/Captain B under the penalty policy.

Base Penalty

Count 1: Possession of excess scallops

Draft NOAA Policy for Assessment of Penalties and Permit Sanctions – October 18, 2010 - Page 15 of 45

Offense Level: Level III. The Magnuson-Stevens Act schedule provides for an offense level range of II to III, but here the potential for harm to the resource or regulatory program is moderate. The overage amount is significantly higher (107%) than the legal amount and occurred in a limited entry fishery controlled by individual quotas and the 400 pound landing limit. Had the overage gone undetected, the violation would have provided a significant competitive advantage to Vessel A and Captain X over legally operating fishers.

Degree of Culpability: Level D. The evidence indicates the violation was intentional.

Matrix Penalty: The penalty range is III D, \$15,000-\$25,000, with a midpoint of \$20,000.

Count 2: False Trip Report

Offense Level: Level III. The Magnuson-Stevens Act schedule provides for an offense level range of II to III, but here the potential for harm to the resource or regulatory program is categorized as moderate. Accurate reporting is a vital part of the Atlantic sea scallop fishery management program (*See, e.g. In re Atlantic Spray Corp.*, 1996 WL 1352603 (NOAA)). Moreover, Captain X conspired with Dealer Y to hide the scallop overage, causing a potentially significant harm to the regulatory program.

Degree of Culpability: Level D. The evidence indicates the violation was intentional.

Matrix Penalty: The penalty range is III D, \$15,000-\$25,000, with a midpoint of \$20,000.

Adjustment Factors

History of Compliance: Captain X has no prior enforcement history.

Commercial vs. Recreational Activity: the violation occurred in the commercial, limited entry scallop fishery. The fact that Vessel A was participating in a limited entry fishery was considered in determining the base penalty. The limited entry fishery management program is by definition applicable only to commercial fishing vessels, therefore no further adjustment is warranted.

Activity After Violation/Cooperation: Captain X admitted the illegal landing and false reporting without making any further false oral statements and was cooperative. His admission and cooperation assisted the investigating agent's retrieval of evidence and uncovered the dealer's full role in the transaction. This significant degree of cooperation

supports a downward adjustment of \$5,000 to the low end of the penalty range for the false reporting count.

Adjustment to Base Penalty: Count 1: No decrease/increase. Count 2: Decrease base penalty to \$15,000 (\$20,000-\$5,000=\$15,000).

Economic Benefit

\$2,580, which is added to the penalty for possessing excess scallops.

Total Penalty (I. + II. + III.): Count 1: \$22,580; Count 2: \$15,000; total: \$37, 580.

EXAMPLE 3 – MAGNUSON-STEVENSON ACT

Description of Violation

A foreign-flagged longline fishing vessel owned by Company Z and operated by Captain Y was documented, by a U.S. Coast Guard (USCG) air patrol, fishing inside the U.S. Exclusive Economic Zone (EEZ). USCG witnesses photographed and videotaped the vessel actively engaged in fishing in U.S. waters. In addition, USCG personnel prepared written statements documenting the fishing activities that they witnessed. USCG records provide the specific latitude and longitude inside the U.S. EEZ where the foreign fishing vessel was located. The vessel never came into a U.S. port and was never boarded by USCG or NOAA. Numerous violations by foreign –flagged fishing vessels have occurred in this area, which is extremely remote with little to no nearby enforcement assets. Patrols in this area are rare and expensive; accordingly, violations of this type often go undetected in this area.

The following is a discussion of the methodology used to calculate the amount of the proposed civil monetary penalty for the violation, under the penalty policy.

Base Penalty

Offense Level: Level VI. The Magnuson-Stevens Act schedule provides for an offense level of VI for this violation because the potential for harm to the resource or regulatory program is major. Many tuna stocks in the Pacific are subject to overfishing. In addition, foreign fishing vessels may not fish inside the U.S. EEZ without a permit, which the vessel did not have. Such violations harm U.S. fishers, because a foreign vessel is appropriating U.S. fishery resources. Moreover, this type of violation is difficult to detect. Overall, the violation had “substantial adverse effect on the statutory or regulatory purposes” of eliminating unregulated foreign fishing inside U.S. waters.

Degree of Culpability: Level D. The evidence indicates the violation was intentional. The foreign fishing vessel was more than 20 nautical miles inside the U.S. EEZ.

Matrix Penalty: The penalty range is VI D, \$100,000-\$140,000, with a midpoint of \$120,000.

Adjustment Factors

History of Compliance: Neither Company Z or Captain Y have any prior violations.

Commercial vs. Recreational Activity: The violation was by a commercial longline vessel, a factor already accounted for in the base penalty assessment.

Activity After Violation/Cooperation: There was no interaction with Company Z or Captain Y after the violation.

Adjustment to Base Penalty: None.

Economic Benefit

There was no opportunity to board the vessel, so it is not clear how many fish were caught or the species composition of the fish caught. However, based on the amount of time that the vessel was fishing inside the EEZ, and the typical catch within this area, circumstantial evidence establishes that it is more likely than not that the economic benefit was well in excess of \$20,000. Accordingly, the penalty is increased to the statutory maximum.

Total Penalty (I. + II. + III.): \$140,000

EXAMPLE 4 – NATIONAL MARINE SANCTUARIES ACT

Description of Violation

Recreational vessel A, owned and operated by Captain X, grounds in a seagrass habitat in the Florida Keys National Marine Sanctuary. When interviewed by law enforcement officers, Captain X advises that he had lost his bearings. An assessment of the grounding reveals that over 80 square yards of habitat is impacted, including prop scars and a blowhole.

The following is a discussion of the methodology used to calculate the amount of the proposed civil monetary penalty for the violation, under the penalty policy.

Base Penalty

Offense Level: Level III. The National Marine Sanctuaries Act schedule provides for an offense level range of II to IV, and here the potential for harm to the resource or regulatory program is moderate.

Degree of Culpability: Level B. The evidence indicates that although the grounding is unintentional, Captain X attempted to power off, thus creating a blowhole, which is negligent.

Matrix Penalty: The penalty range is III B, \$5,000 - \$10,000, with a midpoint of \$7,500.

Adjustment Factors

History of Compliance: Captain X does not have any previous violations.

Commercial vs. Recreational Activity: Although there could be a distinction between commercial and recreational activity for grounding cases, in this example, the penalty would be the same.

Activity After Violation/Cooperation: The evidence does not indicate that Captain X was unusually cooperative or uncooperative.

Adjustment to Base Penalty: None

Economic Benefit

N/A.

Total Penalty (I. + II. + III.): \$7,500

EXAMPLE 5 – MARINE MAMMAL PROTECTION ACT

Description of Violation

Upon arrival at a known haul-out for marine mammals, a state game warden is contacted by a civilian witness who states that she has just observed and photographed a man taking photos of elephant seals. The witness states that, at first, the man was just shooting photos of elephant seals at close proximity with little or no interaction with the animals. After a few minutes however, the man began to toss rocks onto one large bull elephant seal while attempting to take photographs of the animal's reaction. The man then began to pelt the animal's torso with rocks while taking photos. Finally, the man hit the animal on the tail with a large stick, which elicited an aggressive response (charge) from the animal. The man took one final photograph of the animal and then retreated quickly up the beach with the animal in close pursuit for several yards.

With the assistance of the witness, the warden is able to identify the man in a nearby parking lot and interview him. Initially, the man denies any wrongdoing and refuses to give his name or any other information. When the warden explains that his earlier actions had been

photographed and that his camera would be seized as evidence of a violation of the MMPA, the photographer becomes very agitated and yells at the warden, stating that he did not hurt the elephant seals and that he just wanted to get a good photograph. Upon further questioning, the photographer states that he wants to be a professional wildlife photographer, that he loves marine mammals and wouldn't do anything to hurt them. No investigation of the health of the elephant seal is conducted.

The following is a discussion of the methodology used to calculate the amount of the proposed civil monetary penalty for the violation, under the penalty policy.

Base Penalty

Offense Level: Level II. The Marine Mammal Protection Act schedule provides for an offense level of II for harassing a marine mammal, and a range of to III to IV for harming one. Because of the use of rocks and a stick to strike the animal, there is a moderate potential for harm to this particular elephant seal. Although there may have been actual harm to the animal because it is struck, there is no evidence on the record to support such a finding, accordingly the actions rise to the level of "harassment," a level II offense.

Intent Level: Level D. The evidence indicates that the photographer intentionally harassed the animal.

Matrix Penalty: The penalty range is II D, \$2,000-\$3,000, with a midpoint of \$2,500.

Adjustment Factors

History of Compliance: The Photographer has no prior violations.

Commercial vs. Recreational Activity: Although there is some indication of a commercial motivation for the violation, in that the alleged violator wants to become a professional photographer, there are no facts to support that this violation was conducted for a specific commercial activity.

Activity After Violation/Cooperation: The alleged violator was uncooperative, and initially made an uncharged false statement to the investigating officer. These facts support an upward adjustment of \$1,000.

Adjustment to Base Penalty: Increase base penalty to \$3,500 ($\$2,500 + \$1,000 = \$3,500$).

Economic Benefit

N/A

Total Penalty (I. + II. + III.): \$3,500

EXAMPLE 6 – ENDANGERED SPECIES ACT

Description of Violation

A Maui resident (Mr. X) was documented approaching an endangered Humpback whale. Regulations under the Endangered Species Act and the National Marine Sanctuaries Act prohibit approaching endangered Humpback whales within 100 yards in the waters around Hawaii. In this case, two sanctuary outreach and education volunteers spotted Mr. X and his teenage daughter approaching Humpback whales just offshore. According to eyewitnesses, Mr. X and his daughter approached to within less than 10 feet. The witnesses provided statements and photographs to enforcement. Mr. X was well aware of the regulations establishing the prohibition on approaching Humpback whales.

The following is a discussion of the methodology used to calculate the amount of the proposed civil monetary penalty for the violation, under the penalty policy.

Base Penalty

Offense Level: Level II. The Endangered Species Act schedule provides for an offense level range of II to IV, but here the likelihood of harm to the endangered Humpback whales was low.

Intent Level: Level D. According to eyewitnesses, Mr. X deliberately and directly approached Humpback whales, violating the prohibition against approaching endangered species. The evidence indicates the violation was willful.

Matrix Penalty: The penalty range is II D, \$6,000 - \$11,500, with a midpoint of \$8,750.

Adjustment Factors

History of Compliance: Mr. X has no prior violations.

Commercial vs. Recreational Activity: There are no facts to support that this violation was conducted for a specific commercial activity – the activities in question appeared to be fully recreational in nature. Because the activities were recreational, and did not result in financial gain (as opposed to a company that might take kayakers out to observe Humpback whales), it is appropriate to move down a box in the matrix, reducing the penalty to a II C penalty range, \$3500 - \$6000, with a mid-point of \$4750.

Activity After Violation/Cooperation: Although Mr. X refused to speak to the investigating officer, the refusal to speak, standing alone, is not a degree of lack of cooperation that creates a basis for an upward adjustment of the penalty.

Adjustment to Base Penalty: Decrease base penalty to \$4750 (\$8750 - \$4000 = \$4750).

Economic Benefit

N/A

Total Penalty (I. + II. + III.): \$4,750

APPENDIX 1

Preliminary Worksheet – Recommended Assessment of Penalty and Permit Sanction

Name of alleged violator(s): _____

Description
of Violation: _____

I.

- A. Offense Level (I through VI)
- B. Intent Level (A through D)
- C. Matrix Penalty

Base Penalty

II.

- A. History of Compliance
- B. Commercial vs. Recreational Activity
- C. Activity After Violation/Cooperation

Adjustment Factors

III. Economic Benefit

Economic Benefit _____

(Economic benefit of fish caught illegally measured at gross ex-vessel value)

IV. Total Penalty (I. + II. + III.) _____

(Penalty per violation must be no more than statutory maximum.)

TOTAL PENALTY (from all worksheets) _____

(Ability to pay will generally not be considered in the initial assessment of a penalty, except in Lacey Act cases. The NOAA attorney will consider reducing the penalty post-charging if the alleged violator raises ability to pay as an issue and produces appropriate documentation)

NOAA Enforcement Attorney _____

Date _____

APPENDIX 2

Penalty Matrix for the Magnuson-Stevens Act

	Level of Intent			
Harm to the Resource or Regulatory Program, Offense Level	A Unintentional	B Negligent	C Reckless	D Willful
I	Written warning-\$1,000	Written warning-\$1,500	Written warning-\$2,000	Written warning-\$2,500
II	Written warning-\$2,000	\$2,000-\$5,000	\$5,000-\$10,000	\$10,000-\$15,000
III	\$2,000-\$5,000	\$5,000-\$10,000	\$10,000-\$15,000	\$15,000-\$25,000
IV	\$5,000-\$15,000	\$15,000-\$25,000	\$25,000-\$50,000 and permit sanction of 10-20 days*	\$50,000-\$80,000 and permit sanction of 20-60 days*
V	\$15,000-\$25,000	\$25,000-\$50,000 and permit sanction of 10-20 days*	\$50,000-\$80,000 and permit sanction of 20-60 days*	\$60,000-\$100,000 and permit sanction of 60-180 days*
VI	\$25,000-\$50,000	\$50,000-\$80,000 and permit sanction of 20-60 days*	\$60,000-\$100,000 and permit sanction of 60-180 days*	\$100,000-statutory maximum and permit sanction of 1 year-permit revocation*

*Under catch share or similar programs, where permits allow for a certain amount of catch per year (instead of fishing days per year), permit sanctions will be assigned as a percentage of the catch, at a rate of 2% for each 10 day permit sanction listed in the matrixes.

Penalty Matrix for National Marine Sanctuaries Act

	Level of Intent			
Harm to the Resource or Regulatory Program, Offense Level	A Unintentional	B Negligent	C Reckless	D Willful
I	Written warning-\$1,000	Written warning-\$1,500	Written warning-\$2,000	Written warning-\$2,500
II	Written warning-\$2,000	\$2,000-\$5,000	\$5,000-\$10,000	\$10,000-\$15,000
III	\$2,000-\$5,000	\$5,000-\$10,000	\$10,000-\$15,000	\$15,000-\$25,000
IV	\$5,000-\$15,000	\$15,000-\$25,000	\$25,000-\$50,000	\$50,000-\$80,000
V	\$15,000-\$25,000	\$25,000-\$50,000	\$50,000-\$80,000	\$60,000-\$100,000
VI	\$25,000-\$50,000	\$50,000-\$80,000	\$60,000-\$100,000	\$100,000-statutory maximum

Penalty Matrix for the Lacey Act

	Level of Intent			
Harm to the Resource or Regulatory Program, Offense Level	A Unintentional	B Negligent	C Reckless	D Willful
I	Written warning-\$200	Written warning-\$500	Written warning-\$750	Written warning-\$1000
II	Written warning-\$1,000	\$1,000-\$1,500	\$1,500-\$2,000	\$2,000-\$3,000
III-IV	\$1,000-\$2,000	\$2,000-\$3,000	\$3,000-\$4,000	\$4,000-\$6,000
V-VI	\$2,000-\$3,000	\$3,000-\$5,000	\$5,000-\$8,000	\$8,000-statutory maximum

Penalty Matrix for Endangered Species Act

	Level of Intent			
Harm to the Resource or Regulatory Program, Offense Level	A Unintentional	B Negligent	C Reckless	D Willful
I Endangered	Written warning-\$500	Written warning-\$1000	Written warning-\$1500	Written warning-\$2000
Threatened	Written warning-\$200	Written warning-\$500	Written warning-\$750	Written warning-\$1000
II Endangered	Written warning-\$2,500	\$2,500-\$3,500	\$3,500-\$6,000	\$6,000-\$11,500
Threatened	Written warning-\$1,000	\$1,000-\$1,500	\$1,500-\$2,500	\$2,500-\$4,500
III-IV Endangered	\$2,500-\$6,000	\$6,000-\$11,500	\$11,500-\$17,000	\$17,000-\$23,000
Threatened	\$1,000-\$2,500	\$2,500-\$4,500	\$4,500-\$7,000	\$7,000-\$9,000
V-VI Endangered	\$6,000-\$11,500	\$11,500-\$17,000	\$17,000-\$23,000	\$23,000-statutory maximum
Threatened	\$2,500-\$4,500	\$4,500-\$7,000	\$7,000-\$9,000	\$9,000-statutory maximum

Penalty Matrix for Marine Mammal Protection Act

	Level of Intent			
Harm to the Resource or Regulatory Program, Offense Level	A Unintentional	B Negligent	C Reckless	D Willful
I	Written warning-\$200	Written warning-\$500	Written warning-\$750	Written warning-\$1000
II	Written warning-\$1,000	\$1,000-\$1,500	\$1,500-\$2,000	\$2,000-\$3,000
III-IV	\$1,000-\$2,000	\$2,000-\$3,000	\$3,000-\$4,000	\$4,000-\$6,000
V-VI	\$2,000-\$3,000	\$3,000-\$5,000	\$5,000-\$8,000	\$8,000-statutory maximum

Penalty Matrix for Northern Pacific Halibut Act of 1982

	Level of Intent			
Harm to the Resource or Regulatory Program, Offense Level	A Unintentional	B Negligent	C Reckless	D Willful
I	Written warning-\$1,000	Written warning-\$1,500	Written warning-\$2,000	Written warning-\$2,500
II	\$3,000-\$7,000	\$7,000-\$15,000	\$15,000-\$25,000	\$25,000-\$35,000
III	\$7,000-\$15,000	\$15,000-\$25,000	\$25,000-\$35,000	\$35,000-\$70,000
IV	\$15,000-\$25,000	\$25,000-\$35,000	\$35,000-\$70,000	\$70,000-\$115,000
V	\$25,000-\$35,000	\$35,000-\$70,000	\$70,000-\$115,000	\$85,000-\$145,000
VI	\$35,000-\$70,000	\$70,000-\$115,000	\$85,000-\$145,000	\$145,000-statutory maximum

Penalty Matrix for the Antarctic Marine Living Resources Convention Act

	Level of Intent			
Harm to the Resource or Regulatory Program, Offense Level	A Unintentional	B Negligent	C Reckless	D Willful
I	\$1,000-\$4,000	\$3,000-\$6,000	\$5,000-\$8,000	\$7,000-statutory maximum
II	\$6,000-\$8,000	\$7,000-\$9,000	\$8,000-\$10,000	\$9,000-statutory maximum
III-IV	\$8,000-\$10,000	\$9,000-statutory maximum	statutory maximum	statutory maximum
V-VI	statutory maximum	statutory maximum	statutory maximum	statutory maximum

APPENDIX 3
Offense Level Guidance
Magnuson-Stevens Act Schedule

VIOLATION	LEVEL
VIOLATIONS REGARDING GEAR	
<p>Minor-Moderate Violations</p> <p>Examples: Violating area specific gear requirements, having non-complying gear onboard, or fishing with non-compliant gear; falsifying or failing to affix vessel markings; failing to comply with gear tag or marking requirements; dumping gear.</p>	II - III
<p>Moderate Violations</p> <p>Example: Fishing for Western Pacific bottomfish management unit species (MUS) using prohibited gear.</p>	IV
VIOLATIONS REGARDING THE FACILITATION OF ENFORCEMENT, SCIENTIFIC MONITORS OR OBSERVERS	
<p>Minor - Moderate Violations</p> <p>Examples: Failing to provide information, notification, accommodations, access, or reasonable assistance to either a NFMS-approved observer or a sea sampler conducting his or her duties aboard a vessel; submitting false or inaccurate data, statements, or reports; discarding, release, or transferring fish before bringing it aboard or making it available to an observer for sampling.</p>	II-III
<p>Moderate Violations⁷</p> <p>Examples: Assaulting, resisting, opposing, impeding, harassing, intimidating or interfering with or impeding, threatening or coercing any NMFS approved observer or authorized officer; refusing to carry an observer or fishing without</p>	III-IV

⁷ Note that section 309 of the Magnuson-Stevens Fishery Conservation and Management Act (186 U.S.C. § 1859) makes these violations criminal offenses. Major violations will be considered appropriate for criminal referral.

<p>an observer; refusal to allow a boarding/entry to area of custody, or inspection; forcibly assaulting officer, or resisting arrest; providing false statements to an authorized officer; harassing, interfering, or intimidating an observer.</p>	
<p>VIOLATIONS REGARDING PERMITS, REPORTING, DOCUMENTATION, AND PERMIT REQUIREMENTS</p>	
<p>Minor - Moderate Violations</p> <p>Examples: No vessel/operator permit onboard; no vessel permit issued; failing to report changes in permit information; altering, erasing or mutilating a permit or application; purchasing, possessing, or receiving catch without a dealer permit; purchasing, possessing, or receiving from an unpermitted vessel; providing false information in connection with application, declaration, record or report; failing to comply in a timely fashion with log report, reporting, record retention, inspection, or other requirements, including failure to submit affidavits or other required forms; failure to provide accurate or legible logbooks or other reports.</p>	<p>II – III</p>
<p>Moderate - Major Violations</p> <p>Example: fishing for, taking or retaining particularly vulnerable or depleted species (e.g., deepwater shrimp) without a permit; tampering with, damaging, destroying, altering or in any way distorting, rendering useless, inoperative, ineffective, or inaccurate the VMS or VMS unit; failure to comply with VMS/days at sea reporting or having approved operational unit onboard; fishing for license limitation species without holding a valid license limitation permit; fishing for, receiving, processing or possessing limited entry or catch share species without holding a valid permit..</p>	<p>IV-V</p>
<p>VIOLATIONS REGARDING TIME, AREA, EFFORT, OR SECTOR RESTRICTIONS</p>	
<p>Examples: fishing in a closed area or during a closed season; entering a closed area or transit in a closed area with gear not properly stowed; failure to comply with permit restrictions or IFQ transfer requirements; fishing with excess crew; fishing illegally in EEZ; fishing for, taking, retaining, possessing or landing any coral reef MUS in any low-use marine protected area (MPA), or otherwise, when prohibited.</p>	<p>III – IV</p>
<p>Foreign fishing vessel fishing in U.S. waters without a permit.</p>	<p>VI</p>

VIOLATIONS REGARDING SIZE/CONDITION/QUANTITY OF FISH OR LANDING/POSSESSION REQUIREMENTS	
Examples: fishing for, taking, or retaining particularly vulnerable or depleted species (e.g., wild live rock or live hard, precious, live pink, or live black coral) unless otherwise allowed; fishing, receiving, trading or possessing more fish than allowed by regulation, permit, notice, or other means; catching undersized or oversized fish/lobster; illegally discarding fish or violating fish retention requirement; possession of prohibited species or fishing/possession while in possession of non-allowed species.	II - III
Violating food safety regulations.	VI
VIOLATIONS REGARDING TRANSFER, PURCHASE, TRADE, SALE (AND ATTEMPTS)	
Examples: Purchasing, receiving, transferring, trading, or selling more fish than allowed by regulation, permit, notice, or other means; illegal transfer from vessel at sea; damaging or stealing gear or fish; dumping fish.	III-IV
VIOLATIONS OF ACTS IMPLEMENTING INTERNATIONAL AGREEMENTS (Western and Central Pacific Tunas Convention Act & Atlantic Tunas Convention Act)	
Minor - Moderate Violations Examples: fishing in excess of catch limits (Anglers & General); fishing within 100 yards of corkline of purse seiner fishing for bluefin tuna; failing to request a purse seine vessel, net or fish inspection; failing to submit reports in a timely manner, or submitting inaccurate reports (Dealer); failing to release tuna which will not be retained immediately and with a minimum of injury.	II-IV
Major Violations Examples: using a fishing vessel equipped with purse seine gear to fish in a closed area; setting a purse seine around, near or in association with a Fish Aggregating Device (FAD) or deploying or servicing a FAD during a FAD closure or prohibited period; failing to comply with sea turtle mitigation gear and handling requirements; using a fishing vessel to fish in the Pacific Ocean using longline gear inside and outside the Convention Area on the same fishing trip when prohibited; fishing during closure; fishing in excess of quota,	V – VI

allocation, or incidental catch limits; fishing for or retaining undersized tuna; purchasing or receiving tuna for a commercial purpose without a license; failure to file or maintain reports (dealer); failing to report taking of commercial sized bluefin tuna (dealer); landing tuna in other than prescribed forms; retaining tuna caught under tag and release program; transferring, purchasing, or receiving Atlantic bluefin tuna from any person or vessel without a valid dealer permit; selling, offering for sale, or transferring any Atlantic bluefin tuna to any person other than a permitted dealer.

National Marine Sanctuaries Act Schedule

VIOLATION	LEVEL
GENERAL VIOLATIONS	
SEABED / LAKEBOTTOM ACTIVITIES	
Examples: anchoring in a prohibited manner or area; mineral or hydrocarbon exploration, development, or production; alteration or destruction of seabed or lake bottom, including dredging, drilling, coring, and construction; collection (jade).	II-IV
FISHING	
Possessing or using prohibited gear; fishing in a prohibited area or prohibited manner.	II-III
Trawling	IV-V
EXPLOSIVES	
Examples: Possessing or using explosives, electrical charges, poisons, or similar destructive devices.	II-III
VESSEL / AIRCRAFT	
Examples: motorized personal watercraft operations in prohibited areas; aircraft disturbance of marine mammals or seabirds, including low overflight; mooring.	I-II
Operate vessel or aircraft in prohibited areas, or in a prohibited manner.	II-IV
HISTORICAL / CULTURAL	
Examples: Disturbing, damaging, destroying, moving, removing, salvaging, recovering, injuring, altering, or possessing historical or cultural resources (or attempting the same) ; use of grappling hooks, suction, conveyors, dredging, wrecking or anchoring devices.	III-IV
DISCHARGES & DEPOSITS	
Examples: Discharge or deposit, from within Sanctuary boundaries, any non-exempt material or other matter (e.g., hydrocarbons or hazardous substances, fuel, oil, oily bilge waste; unprocessed, non-hazardous trash or raw material, or entangling material); discharge or deposit, from beyond Sanctuary boundaries, any non-exempt material or matter that subsequently enters and injures a Sanctuary resource; deposit of wrecks / desertion or abandonment of vessel.	III-IV

LIVING MARINE RESOURCES	
Examples: attracting fish; injuring, moving, removing, taking, possessing, harvesting, landing, damaging, disturbing, or possessing (or attempting the same) living marine specimens (e.g., sharks, rayscoral, live rock, tropical fish, invertebrates, algae, marine plants, etc.).	III-IV
MISCELLANEOUS	
Examples: Breaking, taking, cutting, removing, damaging, or possessing any bottom formation; defacing, damaging, or removing any signage, boundary markers, stakes, mooring buoys, boundary buoys, trap buoys, scientific equipment, navigation aids, notices, or placecards; violating a Sanctuary permit condition or term; releasing or introducing non-native species.	II-IV

Lacey Act Schedule of Offenses

VIOLATION	LEVEL
Marking Violations	
Import, export, or transport in interstate commerce any container of fish (including shellfish) which has not been marked in accordance with applicable regulations and/or laws.	I-III
Non-Marking Violations	
Examples: Attempt to or import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law; Within the special maritime and territorial jurisdiction of the United States – attempt to or possess any fish or wildlife taken, possessed, transported, or sold in violation of any foreign or Indian tribal law; including attempts.	V-VI

Endangered Species Act Schedule

VIOLATION	LEVEL
Taking Violations	
<p>Moderate Violations</p> <p>Examples: Wounding, injuring, hunting, or capturing an Endangered or Threatened Species; harassment (Endangered or Threatened); collecting parts (Endangered or Threatened); Stellar Sea Lion violations including approaching designated rookery or haulout in buffer area or on land, fishing within a designated rookery or haul-out buffer area, discharging a firearm within 100 yards of a sea lion.</p>	III-IV
<p>Major Violations</p> <p>Examples: Killing an Endangered or Threatened Species; taking via significant Habitat Modification or Degradation (Endangered or Threatened).</p>	V-VI
Transportation and Transactions Violations	
<p>Examples: Import/Export (Endangered or Threatened); possess, deliver, carry, transport, sell or ship illegally taken threatened or endangered species in interstate or foreign commerce; trade in violation of CITES.</p>	III-IV
Violations Related to Enforcement, Monitoring and Observers	
<p>Examples: observer interference; interference with a lawful investigation or inspection.</p>	III-IV
Other Violations (Endangered or Threatened Species)	
<p>Minor- Moderate Violations</p> <p>Examples: violating certificate of exemption regulations; violating the conditions of a permit issued for research or propagation; violating distance restrictions for watchable wildlife; failure to maintain records as required by federal regulation or permit; failure to allow inspection of records as required by federal regulation or permit.</p>	II-IV

Moderate - Major Violations

Examples: Failure to comply with the terms and conditions of an incidental take permit; failure to comply with all applicable TED regulations and enforcement provisions; refusing to allow a boarding, entry to an area of custody, or inspection; dumping fish or other matter (including nets or other gear); interfering with an investigation; violations of speed restrictions by vessels greater than or equal to 65ft (19.8m) in overall length.

IV-VI

Marine Mammal Protection Act Schedule of Offenses

VIOLATION	LEVEL
Taking Violations	
Harass, or Collect Parts of Marine Mammal	II
Harm, Hunt, Capture of Marine Mammal	III-IV
Killing of Marine Mammal	V-VI
Transportation and Transaction Violations	
Examples: Import, export, transport, sell, possess, purchase; violations related to illegal importation, purchasing, possession, landing, transport or sale of tuna and Violations related to record keeping, reporting or FCO requirements.	III
Commercial Fisheries Violations	
Minor Violations Examples: Failure to register (i.e., fishing without authorization); failure to display annual sticker/decals, fail to carry certificate on board, or failure to file annual report; failure to report taking of a marine mammal.	II
Major Violations Examples: Assaulting an observer, failure to take observer or impeding, intimidating, impairing, or interfering with an observer or observations; providing false information; commercial whaling.	V-VI
Violations Related to Labeling Standards	
Examples: Federal Trade Commission; violations related to tracking fishing operations; false statement/endorsement on a tuna tracking form; violations related to canning operations (other than record keeping/reporting).	III-IV

Violations Related to Enforcement, Monitoring and Observers	
Examples: observer interference; interference with a lawful investigation or inspection.	III-IV
Other Violations	
Examples: Violate native agent regulations or permit conditions; violations of speed restrictions by vessels greater than or equal to 65 ft (19.8 m) in overall length; violations related to unauthorized/non-permitted fishing, fishing methods or fishing gear; exceeding DML or intentionally deploying net on dolphins after DML has been reached; violations related to notification requirements; permit violations; violations related to labeling standards.	III-IV
Pinger violations not covered on Summary Settlement or Fix-It schedules.	V

Northern Pacific Halibut Act Schedule of Offenses	
VIOLATION	LEVEL
VIOLATIONS REGARDING GEAR	
Examples: fishing for halibut with other than hook and line gear, possessing halibut taken with other than hook and line gear; failure to have setline gear or skate marker buoys properly marked; fishing for halibut, or possession of halibut on board a vessel that is equipped with or possesses an automated hook stripper; sport fishing for halibut with other than a handline or rod with no more than two hooks attached.	II-III
VIOLATIONS REGARDING THE FACILITATION OF ENFORCEMENT, SCIENTIFIC MONITORS OR OBSERVERS	
Examples: Failure to obtain, at the location and times specified, a valid clearance and hold inspection both before fishing for or unloading halibut; failure to submit to a hold inspection as requested by a fishery officer; failure to permit inspection by authorized officer upon request .	II - III
VIOLATIONS REGARDING PERMITS,REPORTING, DOCUMENTATION AND PERMIT REQUIREMENTS	
Examples: commercial fishing for halibut, or operating a charter vessel fishing for halibut, or receiving halibut without holding a valid IPHC license; failure to keep an accurate log of halibut fishing operations, or to keep an accurate record of purchases or receipts of halibut; failure to carry license onboard; making false entries in a fishing log or on a fish ticket; failure to update fishing log within time specified; subsistence fishing for halibut without a Subsistence Halibut Registration Card.	II-III
VIOLATIONS REGARDING TIME, AREA, OR EFFORT RESTRICTIONS	

<p>Examples: Fishing for, landing, or retaining halibut during a closed period, in a closed area, or in an area where the IPHC has announced that the catch limit has been taken; possession of halibut aboard a vessel in an area where commercial halibut fishing is not permitted; possession of halibut during a closed period while fishing for other species of fish; sport fishing for halibut out of season.</p>	<p>II-IV</p>
<p>VIOLATIONS REGARDING SIZE/CONDITION/QUANTITY OF FISH OR LANDING/POSSESSION REQUIREMENTS</p>	
<p>Examples; take or possess halibut less than 32 inches with head on, or less than 24 inches with head off; exceeding the daily bag limit or possession limit; catching undersized halibut; possession of subsistence-caught halibut on a vessel with commercial or sport caught halibut onboard; exceeding the daily personal limit of 20 subsistence halibut/person/day by more than 5 halibut; disfigurement of halibut that prevents minimum size or catch limit determination; exceeding halibut fishing period limit.</p>	<p>I-II</p>

Antarctic Marine Living Resources Convention Act Schedule

VIOLATION	LEVEL
HARVESTING VIOLATIONS	
Examples: harvesting Antarctic Marine Living Resources (AMLR) contrary to permit, area, catch limit or gear requirements, regulations or binding conservation measures.	III-IV
TRAFFICKING VIOLATIONS	
Examples: importing or exporting AMLRs taken by vessel with no harvesting permit, without a dealer permit or re-export permit, unaccompanied by a complete and validated Dissostichus Catch Document (DCD), or contrary to the provisions of any permit or DCD; shipping, transporting, selling, purchasing, importing, exporting, or having custody, control or possession of AMLRs harvested in violation of any binding conservation measure; receiving AMLRs from a vessel without a Harvesting or Dealer Permit.	III-IV
MONITORING AND ENFORCEMENT VIOLATIONS	
Examples: Refusing to permit a boarding by, or provide assistance to, a CCAMLR inspector; assault, resist, oppose, impede, intimidate or interfere with a CCAMLR inspector; Resisting arrest or interfering with arrest of another; frustrating timely identification of harvesting vessel or gear.	IV-V