



New England Fishery Management Council

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MEETING SUMMARY

VMS/Enforcement Committee and Advisors meeting Sheraton Colonial, Wakefield, MA April 15, 2014

The VMS/Enforcement Committee met on April 15, 2014 in Wakefield, MA to: discuss alternatives under consideration in Framework 4 to the Herring FMP, and review NOAA Office of General Council's proposed Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions.

MEETING ATTENDANCE: Terry Alexander (Chairman), Frank Blount (Vice Chair), Ellen Goethel, John Quinn, CDR Kurt Virkaitis, Logan Gregory, Patrick Moran (Committee); Kirby Aarsheim, Beth Casoni, Claire Fitz-Gerald, Peter Hanlon, James Kendall, Lt. Michael Eastman, Richard Bellavance Jr., Lt. Ellen Motoi, Michael Pierdinock (Advisors); Louis Goodreau, Lori Steele (NEFMC staff); Jason Berthiaume, William Semrau (NMFS GARFO staff); Joseph Heckwolf (NOAA General Counsel, also an Advisor); Maggie Raymond, David Goethel, Peter Shelley, Greg Wells (Attendance attached).

KEY OUTCOMES:

- The Committee made specific recommendations concerning dealer weighing/reporting requirements and measures to address net slippage in Herring Framework 4, and
- Made several major comments on NOAA's proposed policy, especially 1) Master or crewmen's prior violations should not be imputed to a new vessel owner, 2) unmarked gear penalty Levels, and 3) determining criminal violations.
- Both are attached

PRESENTATION: FRAMEWORK ADJUSTMENT 4 TO THE ATLANTIC HERRING FMP

Lori Steele (Council Staff) presented the options, the Herring Committee recommendations, and issues where Enforcement input was desired, for both dealer weighing/reporting requirements and measures to address net slippage sections (attached).

HERRING FRAMEWORK 4:

The Enforcement Committee (Committee) focused on the Herring Committee's recommendations with respect to dealer weighing/reporting, Alternatives 2 and 3.

Under Dealer Alternative 2, the Committee concurred with part C that requires fish holds on limited access herring vessels be empty before leaving the dock when declared into the herring fishery. This requirement will be considered by ASMFC in an upcoming Addendum to Interstate Herring FMP, and, as such, would provide for consistency across jurisdictions.

Parts A and B of Dealer Alternative 2 were more problematic. The programs in both A, Fish-on-Line to validate information, and B, VTR and dealer reports, were previously analyzed by the Regional Office. The change to the VTR and dealer reports program is to require submission within 24 hours, rather than the current one week. The Regional Office concluded that the cost to change the Fish-on-Line program may outweigh the utility of the change, and that there is no huge discrepancy now between the VTR and dealer reports. Bill Semrau said that the change to VMS forms to implement the declaration under part C would require notice of 60 days.

The Committee found no enforcement issues with Dealer Alternative 3, which is designed to be a cross check on the catch. All relevant vessels already have their capacity certified, and, if necessary, commercial marine surveyors would perform that task, not government. The Observer Program would be required to add the additional task of estimating the weight of the total catch with the measuring stick.

CONSENSUS RECOMMENDATIONS:

- Enforcement Committee finds no enforcement issues with Alternative 3 (certified capacity, measuring stick used by Observer)
- Enforcement Committee has reservations about Alternative 2, but strongly supports Alternative 2-C (empty fish hold requirement)
 - Recommend that Council examine the utility of Alternative 2-A (Fish-on-Line) and B (24 hour VTR and dealer submission), relative to NOAA cost estimates
 - Caution that Alternative 2-C, empty fish holds, will require 60 notice for changes to VMS forms

The Enforcement Committee (Committee) next discussed Measures to Address Net Slippage. The Committee again focused on the Herring Committee's recommendations for Operational Discard Option B, Gear Damage Option A, and Slippage Alternative 4 (for A/B herring vessels only).

There is a problem with using VMS notification for a slippage event. The messaging and location systems are different, so a slippage event notification, reporting time and date, must be matched with the closest, in time, location report.

The Herring Committee made it clear that Observers will not report violations to Enforcement, but act as information gatherers only. The Enforcement Committee (Committee) thus found the Herring Committee's recommendations not enforceable; there are not sufficient at-sea enforcement resources. Logan Gregory offered that these recommendations be made more enforceable by the improving the timeliness of access to Observer Program information to NMFS. He also thought that the VMS notification as proposed would help to achieve the timeliness of access.

The issue of self-reporting, then, becomes quite important. CDR Kurt Virkaitis said that regulations that are based on the need for self-reporting are unlikely to be effective. Joe Heckwolf said that the requirement for self-reporting did, in fact, provide a second violation in addition to the slippage incident; he recommended increasing penalties for both and the Committee agreed. Joe cautioned, however, that the case rests on what the Observer saw versus what the Master reports.

Self-reporting is critical in Slippage Alternative 4 (the Herring Committee's recommended alternative), a 15 nm move-along for slippage from safety, mechanical, or dogfish, and trip termination for other slippage events, to apply to limited access herring vessels. Without at-sea resources to canvas the herring fleet, or Observer participation in reporting slippage events to enforcement, the only tip to initiate an investigation is through VMS notification by the vessel. The location at which the self-report is made, becomes the center of a 15 nm radius circle, in which the self-reporting vessel may not fish.

Several recommendations by the Enforcement Committee may make this scenario more reasonable. Quick and complete access to Observer information by the Office of Law Enforcement will facilitate analysis to find slippage events. Increased fines for both net slippage and failure to self-report will make prosecution, however small the probability, more intimidating. Additionally, investigation of slippage events that are reported may yield information that may be used to develop a profile of likely slippage cases.

The Gear Damage Option A (the Herring Committee's recommended alternative) needs clearer definition, according to the Enforcement Committee.

Some discussion arose among several members of the Committee regarding the total catch and the small amounts found in slippage events and operational discards (hundreds of thousands of pounds versus 8230 pounds versus 198 pounds), and the species mix of bycatch (unlimited haddock, of any size), but these were considered management, not enforcement, issues by the Enforcement Committee.

CONSENSUS RECOMMENDATIONS:

- Enforcement of these regulations at-sea is not possible unless the event is explicitly observed at the time it occurs
- Enforcement dockside/post-trip is complicated. Suggestions to address enforceability include:
 - Support for VMS requirement for slippage notification (self-reported) for trips with observers on board
 - The Council should send a letter to the Office of General Counsel requesting consideration of increasing penalties for non-reporting and non-compliance, with requirements for an affidavit
 - The Council should send a letter to NMFS requesting that a process be adopted to address the need for timely and regular access to observer data by enforcement personnel
 - Clarify that 15 nm move-along rule applies to when the vessel could resume fishing operations (i.e., the vessel would be required to move 15 nm before it could set out for the next tow)
 - Ultimately, enforcement of these rules will rely on what the observer documents versus what the captain reports.

PRESENTATION: NOAA'S POLICY FOR THE ASSESSMENT OF CIVIL ADMINISTRATIVE PENALTIES AND PERMIT SANCTIONS

Joe Heckwolf (NOAA General Counsel) presented an overview of NOAA's Enforcement Program, the purpose of the Penalty Policy, the adjustment factors considered when assessing a penalty, the Penalty Matrix, and how NOAA is revising them (attached).

NOAA'S PENALTY POLICY

Joe Heckwolf described the changes proposed by NOAA, including decreasing the penalty range for unintentional offense level II and III violations for consistency in the Penalty Matrix, numerous revisions to Offense Level Guidance, reducing the time period encompassing previous violations to 5 years, and adding the potential for downward adjustment for a long history of compliance.

The Committee took issue with the new wording added to clarify when a Master or crewmember's prior violations on another owner's vessel are imputed to the owner. Ellen Goethel said there are not many crew from whom to pick, and the choice may be someone with priors or sailing with no crew. Maggie Raymond said the current policy, without the changes, is

already a problem. Kirby Aarsheim pointed out that, for multi-vessel owners, violations are imputed across the fleet, currently. John Quinn stated that a summary settlement should not count as a prior, because many people will choose it as the least cost alternative to hiring a lawyer. Also, the NOVA counted as a prior must be a final adjudication, and not in the works, during the last 5 years. The owner pays for crew violations now, except in Observer harassment cases, according to Logan Gregory. Dave Goethel supported the new policy, in general, but added that it is unfair to provide no second chance for crewmembers with prior violations. Joe Heckwolf emphasized that the crewmember must be involved in the violation; his priors will not apply to violation attributable to the vessel or Master alone. Peter Hanlon felt this new policy, requiring certification of no prior violations to demonstrate due diligence by the owner, would create a black market for captains. Mike Pierdinock asked if it was legal to even ask a potential crewmember if they had prior violations, and certainly to require them to sign an affidavit stating such. Dave Goethel wanted to clarify if this new rule applied to both commercial and recreational fishermen.

Ellen Goethel had a question regarding seizure of the catch. Joe Heckwolf replied that, in such cases, the Master could voluntarily hand over the catch, otherwise NOAA will seize it. Then, while the case is being processed, from prosecution to appeal, the money will be held in abeyance, and, upon resolution, handed over to either the vessel or the government. Ellen Goethel added that boats have had problems with Observers reporting things in such a way that seizure of the catch is made, when that was not necessary. John Quinn requested that NOAA begin writing a seizure policy.

David Goethel requested, under the Offense Level Guidance section of the proposed rule, that the gravity of unmarked gear be changed from Level II to Level IV, to match the level for gear damage at Level [IV]. He reasoned that, when mobile gear gets entangled in an unmarked lobster trawl, the gear damaged will certainly exceed \$2000 (the criterion for Level I versus Level IV gear damage), and both parties should be held responsible because the fixed gear is unmarked.

Frank Blount asked that the proposed policy language be more rigorous. The difference between 'would' and 'could' may change the meaning of 'intentional' (page 9) to result in a witch hunt for honest people.

David Goethel gave an example of tilapia labelled as cod; what is the offense level. Logan Gregory explained that miss-labelling is a less serious violation than false labeling (tilapia for cod), which may be criminal. David thought that was a loophole. Logan clarified that a conspiracy would lead to criminal charges.

Beth Casoni said that the cost of lobster gear is \$150-250 per pot. She thought that a compromise of Level III may be appropriate, but it would be better to leave unmarked gear and Levels I and II and [change the top level for gear damage] from Level IV to Level II.

LCR Kurt Virkaitis said that consistency is good, but our [USCG] goal is to preserve the resource and level the playing field for all fishermen. He said that we must hold people accountable, or there will be less incentive to follow the rules. He added that we must not

become too lenient with [flagrant, habitual] violators, especially, and that, without teeth, it becomes very difficult for the enforcement agents and officers on the dock and at sea.

CONSENSUS RECOMMENDATIONS:

The over-arching concerns are 1) Master or crewmen's prior violations being imputed to a new vessel owner, 2) unmarked gear penalty Levels, and 3) no indication of when violations become criminal.

The specifics of concerns 1 and 2 are:

- The manner in which NOAA/NMFS defines the intent of a person to commit a violation, and leaving too much room for interpretation by the attorney in the penalty schedule. Who determines the degree of culpability, the attorney, the agent/officer, or both? How do they determine the intent when assigning an intentional violation? The latter appears to be a subjective determination.
 - **The Council recommends revision to remove this ambiguity.**
- Particular concern is raised with the proposed liability of the vessel owner for a master or crewman's previous record, on another owner's vessel (page 11).
 - **The Council recommends a clearer definition of when a Master or crewman is liable for a violation; the Master should be the only one liable, unless the crewman is directly involved in the violation, and**
 - **A violation that a Master brought with him from another owner's vessel should never be imputed to the owner.**
- ...the prior violation will be imputed to the new owner unless the new owner exercised due diligence regarding prior violations of the master or crewmember (implies for all violations on the new owner's vessel). Such diligence may be demonstrated ... by requiring certification (page 11).
 - **The Council questions whether Labor Laws may be violated by requiring certification (an affidavit was given as an example), and if Labor Laws may be violated by anything in this proposed policy.**
- Under Appendix 3 (Magnuson-Stevens), Violations Regarding Gear and Bycatch Mitigation Requirements, unmarked gear receive Level I or II offense, while, under Violations Regarding Transfer, Purchase, Trade, Sale (and Attempts), damaging gear is combined with stealing gear and receives a Level I or IV offense.
 - **The Council believes that, when mobile gear damages unmarked fixed gear, both parties are at least equally culpable, and, in the more severe case, both be penalized at the same Level IV.**
- The Penalty Matrix and Schedule for the Lacey Act both describe "false-labeling offenses", of minor and severe effects, but some cases may result in criminal charges.
 - **The Council requests that the matrices and schedules, for the Lacey Act and all others (Magnuson-Stevens, etc.) include a Level to show when violations become criminal.**

OTHER BUSINESS

Jason Berthiaume described the process for the new gear stowage proposed rule, to add options to the present rule. He said GARFO will hold a public hearing at the next MAFMC meeting May 10-12, 2014, but the comment period would not extend beyond the NEFMC meeting the following week, May 17-19, 2014.

1. MOTION: Ellen Goethel/John Quinn

That the Chair ask the full Council to consider giving the VMS/Enforcement Committee the authority to comment on the proposed rule regarding gear stowage, and specifically to comment to include the yellow mesh in addition to orange mesh in the additional measures.

Discussion on the Motion: LCR Kurt Virkaitis observed that both yellow and orange mesh are viewable from the air by USCG, but that the yellow cargo net made fade to brown, over time.

Public Comment:

- **DisplayText cannot span more than one line!.**

MOTION #1 Carried 7/0

Bill Semrau advised fishermen who want to use the previous VMS code, to call the IVR system at 1-800-284-4904 and follow the directions. Ellen Goethel thought this was a good idea. David Goethel cautioned that it should be clear to people that this is not all they need to do. Bill Semrau concurred that using the IVR system is not in lieu of the VMS requirements.

The VMS/Enforcement Committee meeting adjourned at approximately 4:00 PM.