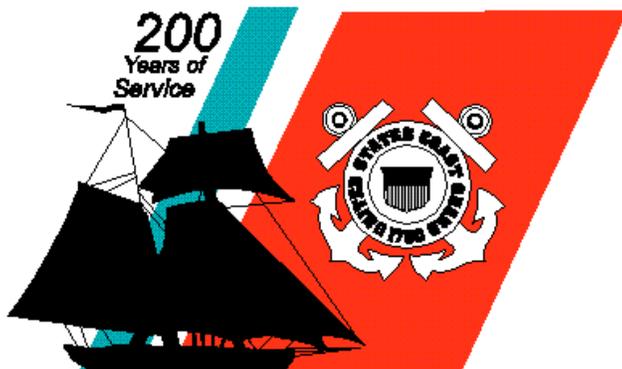




Enforcement Considerations For Regional Fishery Management Councils

Developed by NOAA Office for Law Enforcement,
NOAA General Counsel for Enforcement and Litigation, and
The U.S. Coast Guard

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**NOAA OFFICE FOR LAW ENFORCEMENT,
NOAA GENERAL COUNSEL FOR ENFORCEMENT AND LITIGATION
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UNITED STATES COAST GUARD**

GUIDANCE FOR EFFECTIVE FISHERIES ENFORCEMENT

Fisheries regulations are constantly being written and most of those in place seem to be in a continual state of change. Fishery Management Council, NMFS Sustainable Fisheries, Protected Resources, and Habitat staffs are tasked with the creation and revision of these regulations. Although involving enforcement personnel in the process is essential, it is difficult to include enforcement on every conference call and at every meeting. With that in mind, the following is provided for consideration by those who are assigned a project which include elements of enforcement.

Before approval and implementation of a Fishery Management Plan (FMP), the following measures are enforcement's advice as it relates to the plan's efficacy. The basis for these principles is the historical experience of over thirty years of enforcing the many and varied regulations promulgated under the Magnuson-Stevens Act on a nationwide basis.

Please note that the information in this paper is intended only as general guidance. Depending on the specific design of any regulatory program, the enforcement tools and strategies used in that program may require mixing or even deviation from the individual enforcement precepts mentioned in this paper. The information contained herein in no way limits NMFS and the Coast Guard's ability to employ the enforcement techniques that it considers most appropriate for accomplishing the goals of a specific regulatory program.

Each Fishery Management Council has a team of enforcement personnel, including NOAA Enforcement, Coast Guard, and State Enforcement, who should be your sounding board for ensuring that the regulations you are proposing are enforceable and will accomplish the desired outcome.

ENFORCEABLE REGULATIONS ARE:

Simple and easy to understand - The more complicated the rule, the higher the likelihood of creating loopholes and legal defenses. Straightforward requirements that are black and white without exceptions make it more difficult for intentional violators and conspirators to evade enforcement. For example, "possession of an undersize halibut on a commercial fishing vessel" is clearly a simple prohibition. It is illegal regardless of where taken or how it was harvested or any other variable, condition or stipulation.

Simple regulations are easier for industry to comply with. Complex regulations result in errors, misunderstandings, and cause industry to simply ignore them.

To the extent possible, consideration should be given to consistently similar management measures amongst the FMPs and regulatory areas, as well as between federal and state waters.

Few as possible - Adding too many control measures frustrate the industry as well as enforcement. Too many regulations allow for more possibilities for mistakes to be made and reports to be forgotten; and it gives more work for enforcement. Reports should be consolidated where possible, and instructions made simple. Regulations sometimes have to be very restrictive, but compliance should be easy for the industry.

Fish is accountable and traceable throughout the wholesale process - The intent of this requirement is for there to be traceability of product wherever found. This enables enforcement to intercept unlawful seafood at various funnel points such as airports and customs borders. With required documentation and labeling, everything could be traced back to the responsible harvester.

Supported by appropriate penalties up to and including permit revocation and criminal charges for the most egregious offenses - The penalty schedule of NOAA General Counsel is constantly evaluated to ensure it is sufficient to effectively penalize civil offenders commensurate with their violations. However, chronic repeat offenders who do not possess resources to pay their fines may warrant permit sanctions or revocations. Those who commit egregious crimes must be punished via criminal sanctions up to the felony level. In these cases, incarceration may be the appropriate avenue of attaining justice. (See PENALTY section below for more on this subject)

REGULATIONS ARE MORE DIFFICULT TO ENFORCE IF THEY ARE:

Man power intensive regulations – Regulations requiring monitoring of offloads are manpower intensive. Enforcement will never have enough manpower to monitor more than a small fraction of the total offloads. This requires constant shifting effort from port to port, while not having adequate resources to properly be pro-active towards serious offenders. Use of technologies such as VMS and electronic logbooks can allow enforcement to monitor remotely, reducing manpower needs.

Complex or convoluted regulations - Regulations such as by-catch limits are nearly impossible to enforce at-sea. Enforcement of these regulations requires monitoring the entire catch during offload. At that time, it is too late for the vessel to do something about any overages it may have. The fisherman must rely on their ability to estimate catch composition at sea to stay in compliance.

Lack of accountability - Fish can become “legal” merely by doctoring the records, without traceable accountability, or the ability to audit. Requiring a paperwork trail to track fish from harvest, to offload, and through the processing and shipping add to good accountability.

Estimates - Regulations requiring a vessel captain to estimate catch, catch composition, and/or discards are difficult to enforce. Using estimates may work just fine for managing a fishery.

However, enforcement cannot prove the false reporting of an estimated weight of a discard, nor can we establish how close an estimate must be before we can cite someone.

Law Enforcement resource intensive - Finally, any new plan or regulation must take into consideration the enforcement resources of the NMFS and the Coast Guard in terms of maximum capable enforcement contacts and investigative effort. Nationwide, enforcement is spread thin, so adding more regulations to enforce, usually means decreasing, or in some cases ceasing, effort in other areas.

PENALTIES

Once regulations are in place, penalties are discussed. The goal of regulatory enforcement agencies is to ensure compliance, whereas prosecution agencies exist to assess responsibility and punish violations. The NOAA Fisheries Office for Law Enforcement (OLE) has both mandates. These two mandates often lead to conflict when we are criticized for not pursuing cases of wrongdoing more aggressively, and then criticized for being too heavy handed when pursuing major civil and criminal violations. OLE works with various NOAA and NMFS divisions, the Fishery Management Councils, NOAA General Counsel, and the U.S. Attorney's Office to determine the appropriate prosecution method for an offense. OLE has one of the most versatile selections of penalties of any agency in the United States. For civil violations, these include verbal warnings, fix-it notices, written warnings, summary settlement fines, as well as monetary penalties permit sanctions, permit suspensions, and permit revocations from NOAA General Counsel. There are also options for hearings with a Civil Administrative Law Judge or with a federal judge in federal civil court. Our goal is to seek the least penalty to gain compliance. If a penalty is too low, it may result in being considered simply the cost of doing business. If a penalty is too high, a person discovering they have committed a civil violation may decide to cover up the error instead of reporting it. Or, they may feel the need to challenge the violation in court, not to claim innocence, but to petition for a lower penalty. For criminal violations, penalties include monetary penalties, home confinement, and/or imprisonment. Criminal investigations and prosecutions are saved for the intentional violators who commit the violation many times, conspire with others, or those who intentionally commit one serious offense where a civil penalty would not be appropriate or adequate.

VESSEL MONITORING SYSTEMS (VMS)

The technological sophistication of the modern fisherman is incredible, and demands equivalent technological applications by law enforcement to ensure that regulations and laws are being adhered to while at sea. VMS allows enforcement to use 21st century technologies to monitor compliance, track violators and provide substantial evidence for prosecution while maintaining the integrity of the individual fisherman's effort. VMS uses electronic transmitters placed on fishing vessels to transmit information about the vessel's position to enforcement agencies via satellite. This position information is used by enforcement to focus limited patrol time on those areas with the highest potential for significant violations. It is critical to recognize that VMS cannot replace at-sea enforcement by aircraft, vessels, and boarding teams, but rather complements existing capability and allows enforcement to target violators, thereby increasing efficiency. VMS is only useful for enforcement of regulations that are location specific, at-sea

boardings are still needed to verify compliance with other regulations, such as net mesh size and prohibited species.

Although not primarily a safety device, VMS may contribute to increased vessel safety. Some VMS transceivers allow constant two-way communication between the vessel and shoreside monitors. If an accident were to occur, the recorded track of the vessel may aid rescue efforts.

Expansion of VMS into additional domestic fisheries would increase the efficiency of enforcement operations by enabling more efficient patrol planning in those fisheries.

OBSERVERS

The NOAA Fisheries Observer Program authorizes NOAA Fisheries employees or contract personnel to embark on fishing vessels in support of an FMP. It is critical to note that observers are NOT enforcement personnel. Rather, they provide fishery managers with more accurate data with which to make management decisions. Maintaining the integrity of unbiased observer data is at the core of effective fisheries management and is a top enforcement priority. Significant violations include failure to carry a required observer, observer harassment, and biasing of samples. NOAA Fisheries regulations establish national safety standards for commercial fishing vessels carrying observers. These regulations require that any commercial fishing vessel, not otherwise inspected, must pass a Coast Guard dockside safety examination before carrying a NOAA Fisheries observer. Further, an observer may conduct an independent review of the fishing vessel's major safety items and may refuse to sail if there are major deficiencies. This is significant because NOAA Fisheries prohibits a vessel required to carry an observer from fishing if an observer is not aboard.

MATRIX of MANAGEMENT MEASURES

The following matrix is designed to help fishery managers and staff better understand the enforcement aspects related to certain management measures. It is important to note that these guidelines address the enforceability of regulations, not necessarily the merits of the regulation. Where it is applicable and important to enforcement agencies, the guidelines address safety, economics and biology considerations.

This matrix allows fishery managers and staff rapidly identify how enforceable a management measure is by at-sea cutter patrols, aircraft patrols, and dockside enforcement. The matrix is supplemented by an analysis defining each management measure, outlines the enforcement advantages and disadvantages of the measure, and then concludes with a recommendation on how to write regulations to make the management measure the most enforceable.

Fishery Management Measure Enforceability Matrix

| | Surveillance – Aircraft/Ship/VMS | At-Sea Boarding | Dockside |
|--|---|----------------------------|-----------------|
| Limiting Amount/ Percent Landed | No | No | Yes |
| Limiting Amount/ Percent Onboard | No | Limited | Yes |
| Prohibiting Retention | No | Yes | Yes |
| Requiring Retention | Limited | Yes | No |
| Size Restrictions | No | Yes | Yes |
| Closed Areas | Yes | Yes | No |
| Closed Seasons | Limited | Yes | Yes |
| Gear/Vessel Restrictions | Limited | Yes | Limited |
| Limited Access Privilege Programs | No | Limited | Yes |
| Recordkeeping/ Reporting | No | Limited | Yes |
| Permits | Limited | Yes | Yes |

ENFORCEMENT ADVANTAGES AND DISADVANTAGES OF FISHERY MANAGEMENT MEASURES

LIMITING AMOUNT/PERCENT LANDED

Definition:

- This management measure aims to reduce bycatch retention/mortality by limiting the amount or percentage landed.

Advantages:

- Measure acts as an incentive to focus fishing efforts in areas that minimize bycatch if there is some penalty associated with excessive bycatch (i.e. fishery will be closed as a result of reaching a limit).

Disadvantages:

- This is a landing provision, and is difficult to enforce at sea, through either surveillance or boardings. Effectiveness is directly proportional to dockside effort expended.
- High grading may be an issue.

Recommendations:

- Consider prohibitions which regulate areas, seasons, types of gear or types of operations to minimize bycatch.
- Policies should incorporate industry best practices and consider industry recommendations.
- Segregating catch at sea would facilitate enforcement.
- On catcher processor vessels, regulations should prescribe that eventual landing limits shall not be exceeded while at sea. This allows for enforcement at sea as well as dockside. If an at sea boarding determines that the trip limit is met, then the F/V returns to port to preclude further resource degradation/economic advantage.

LIMITING AMOUNT/PERCENT ON BOARD

Definition:

- This management measure aims to reduce bycatch retention/mortality by limiting the amount or percentage of a bycatch species allowed on board a fishing vessel.

Advantages:

- This measure is similar to limiting amount/percentage landing, but allows for at sea enforcement.
- If an at sea boarding determines that the limit/percentage is met, then the fishing vessel returns to port to preclude further retention.

Disadvantages:

- Full and accurate count of catch onboard cannot easily be done at sea during in most fisheries (due to species mixing, loading, icing, safety of boarding party in accessing fish hold at sea, etc.).
- High-grading may be an issue.

Recommendations:

- Regulations should specify how much target species catch is required to justify retention of bycatch species and in what amounts. This is necessary to preclude bycatch species from becoming a targeted catch.
- Consider prohibitions which regulate types of gear or types of operations to minimize bycatch catches. When regulating gear, it is best if the gear types are readily identifiable by aircraft.

- Policies should incorporate industry best practices and consider industry recommendations.
- Segregating catch at sea would facilitate enforcement.
- This provision works best with frozen product.

PROHIBITING RETENTION

Definition:

- This enforcement measure aims to restrict retention by prohibiting the retention of certain species aboard fishing vessels.

Advantages:

- Prohibition violations are easier to document and enforce than regulations that allow a limited percentage to be retained.
- Allows for at-sea enforcement. Once fish are landed, detecting a violation for retention of prohibited species is easy if enforcement is present.

Disadvantages:

- May create an incentive to hide prohibited species from observers or to underreport prohibited species catch if it influences the fishing season.

Recommendations:

- Consider prohibitions which regulate types of gear or types of operations to minimize bycatch catches. When regulating gear, it is best if the gear types are readily identifiable by aircraft.
- Policies should incorporate industry best practices and consider any industry recommendations.

REQUIRING RETENTION

Definition:

- This enforcement measure requires retention of all catch.

Advantages:

- Allows for enforcement during boardings or aircraft/vessel surveillance, as catch discards can be observed from a distance.
- Provides managers with a more accurate picture of the impact of a fishery on target and bycatch species, and allows managers to close the fishery when a limit is landed.

Disadvantages:

- Difficult to enforce shoreside.

Recommendations:

- Policies should incorporate industry best practices and consider industry recommendations.

SIZE RESTRICTIONS

Definition:

- Possession or fish below or above a specified size is prohibited.

Advantages:

- Violations are easy to document and prosecute.

Disadvantages:

- Effectiveness is limited by the amount of processing done at sea.
- Effectiveness is proportional to the effort expended in dockside checks and at-sea boardings. Has potential to be manpower intensive.

- May provide incentive to high-grade.

Recommendations:

- Prohibit processing/filleting at sea for fisheries where size restrictions are used. Measurements should include head and tail intact.
- Require standardized measurement procedures, equipment and techniques by state and federal agencies.
- Maintain same regulations across state and federal boundaries.

CLOSED AREAS

Definition:

- Fishing in a specific geographic area is prohibited.

Advantages:

- Fairly easy to enforce if below recommendations are followed.
- Very easy to monitor with VMS. However, even with VMS cueing, a response asset is generally required to document the violation for prosecution. Aircraft and surface patrols also verify the accuracy of the VMS picture.
- Easy to document presence in the closed area by aircraft and vessel surveillance. It is tougher to document fishing activity without an at sea boarding, depending on the fishery and gear type.

Disadvantages:

- Without VMS, effectiveness is directly proportional to the surveillance effort.

Recommendations:

- Clearly defined areas. Use exact latitude/longitude and straight lines. Avoid simply stating distance offshore, center point and radius, or depth contours.
- Regular shaped areas. In most situations, closed areas are easier to enforce if they are square or rectangle shaped, since it is more clear cut that a vessel is west/east, north/south of an indicated line, and therefore, in or outside a closed area.
- Large closed areas are preferred in most situations. Small closed areas with open areas in between make it easier to cheat by enabling a vessel to quickly enter and exit a closed area. However, if making smaller areas opens fishing grounds, then there may be less incentive to violate the closed area restriction.
- Temporary, short-term closures can be difficult to enforce, as communicating the requirement to the fishing fleet can be challenging.
- If possible, close an area to all activity; limit grand-fathering and other exemptions. Where practical, areas should be closed to all types of fishing as well as transiting fishing vessels.
- If transit is allowed, fishing gear should be stowed and transit must be continuous (i.e. no loitering/stopping). If vessels need to stop/loiter in a closed area, include a requirement to notify enforcement. Stowage requirements must be clearly defined.
- Regulated gear areas are difficult to enforce, because they still require at-sea boardings to verify that fishing vessel is using legal gear in the closed area.

CLOSED SEASONS

Definition:

- Fishing during specific times of the year is prohibited

Advantages:

- Large vessel fisheries are easy to monitor since vessels are in port or in other fisheries.
- Gear intensive fisheries (pots, etc.) are noticeable if a vessel gears up for a trip.
- The presence of a particular species in the marked during a closed season should be detected if retention is prohibited everywhere.

Disadvantages:

- Small vessel fisheries are more difficult to monitor. Smaller quantities are easier to hide in the market.
- Fisheries with multiple gear types for the same species are especially difficult to enforce if only one gear type has a closed season.

Recommendations:

- See Closed Areas: ensure closures are clearly defined; limit exemptions to the closed season, and dates/times should be defined to the minute.
- Regulations should fully describe what activity is allowed to occur before, during, and after the closure. For example: all gear must be hauled in prior to the closure, gear may not be set prior to the opening. For short duration fisheries, prohibit all fishing with any gear type 72 hours before and after the fishery.
- Monitoring the fishing vessels with VMS during closed seasons can greatly aid enforcement.

GEAR/VESSEL RESTRICTIONS

Definition:

- Specific gear types or gear modifications are prohibited. Gear includes not only the primary methods and tools to harvest the resource, but also includes vessels, horsepower and other such variables. Certain regulatory gear may be required to minimize catch of bycatch species and/or protect certain marine species (i.e., pelagic vs. demersal trawls or protected species avoidance gear).

Advantages:

- Gear is easy to inspect dockside and in most cases, readily visible at sea.

Disadvantages:

- Restrictions on gear employment (i.e. set/trawl depth) are more difficult to enforce. For example, a limitation on amount of fixed gear/hooks is difficult to regulate/enforce.
- Normally gear needs to be inspected at-sea to ensure gear is in compliance while engaged in the act of fishing. This becomes resource intensive as it may require multiple checks at sea and is intrusive; as it may require interrupting fishing operations for the gear to be inspected while at sea, which tends to foster ill will towards enforcement officers.

Recommendations:

- If use is prohibited, then allowing the gear on board should be prohibited.
- Gear restrictions should be standardized across state and federal boundaries.
- Federal and state enforcement officers should develop and use standard procedures, equipment and techniques.

LIMITED ACCESS PRIVILEGE PROGRAMS

Definition:

- These programs delineate a specified amount of particular fish species to be allocated to an individual, a particular vessel, a processor, or a community.

Advantages:

- LAPPs are often praised for their safety benefits. By allowing a quota that can be caught over an extended period of time, fishermen are able to choose when to fish rather than being forced to fish during bad weather based on mandated time periods (e.g. derby fisheries).
- Once an individual fisherman has met their quota, additional fish are treated as prohibited species, as discussed above.

Disadvantages:

- Manpower intensive. LAPPs spread out fishing effort over long periods, requiring increased monitoring and enforcement.
- Individual quota holders have the incentive to underreport their landings throughout the fishing season.

Recommendations:

- Effectiveness depends on monitoring landings.
- Electronic reporting provides real time debiting of an individual's quota account. That is beneficial to enforcement, to the fisherman, and fishery managers. Electronic reporting also decreases reporting errors.
- VMS should be considered for LAPP fisheries.
- If at-sea quota debiting is allowed, the use of certified scales, observers, and video monitoring should be considered to ensure accuracy.

RECORDKEEPING AND REPORTING

Definition:

- A requirement to keep records of specified information on board the vessel. As technology permits, the data from records could be transmitted to managers for decision-making, depending on the fishery and the need for near real-time catch/effort information.

Advantages:

- At-sea boardings can verify the presence and use of logbooks and other records.
- Dockside monitoring of offloads can verify accuracy of catch data.

Disadvantages:

- Full and accurate count of catch onboard is difficult at sea for unprocessed fish, due to species mixing, loading, icing, safety of boarding party in accessing fish hold at sea, etc.

Recommendations:

- Regulations need to identify the time requirements for completing reports and entering data into logbooks (e.g. per set, daily, end of trip). By specifically describing the time requirement, enforcement can better determine whether to focus effort at-sea or shoreside.
- Require a standard logbook format for all federal fisheries.
- Use of electronic reports can simplify enforcement. Electronic reports can be used as a way to provide enforcement near real-time data before or during a boarding. Electronic reporting also reduces reporting errors.

PERMITS

Definition:

- Document which indicates allowable gear type, fishing areas, and/or species which are allowed to be retained.

Advantages:

- Easy to track and identify.
- Revocation or suspension of permit is an effective penalty provision.
- Easy method for enforcement to determine lawful operations.

Disadvantages:

- Permits are largely used by enforcement to identify allowed fishing activity, but the bureaucracy for amending and issuing them creates a system that can be frustrating for fishermen to follow.

Recommendations:

- Require original permits, not copies, to be carried on board the vessel at all times.
- Permit transfers must follow strict guidelines and should require adequate notification to enforcement.
- Standardize permit format across fishery management plans where possible.