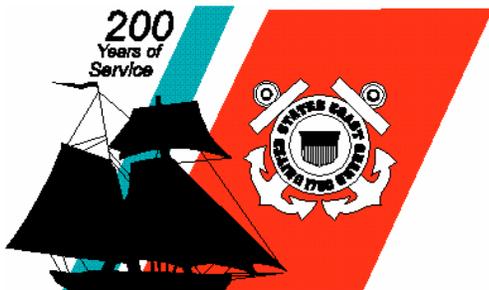




Enforcement Considerations For Regional Fishery Management Councils

Developed by:
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NOAA GENERAL COUNSEL FOR ENFORCEMENT AND LITIGATION,
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GUIDANCE FOR EFFECTIVE FISHERIES ENFORCEMENT

While enforcement is only one piece of the overall fisheries management process, fish stock sustainability cannot occur without proper enforcement of fishery management measures at-sea and ashore. Therefore, it is important for the Council process to ensure that the management and conservation measures that you develop are enforceable.

New fisheries regulations are constantly under consideration, and most of those in place seem to be in a continual state of change. Fishery Management Councils, NMFS Sustainable Fisheries, Protected Resources, and Habitat staffs are tasked with creating and revising these regulations. Although involving enforcement personnel in the process is essential, it is admittedly difficult to include enforcement on every conference call and at every meeting. With that in mind, this document is provided for your consideration.

The enforcement community offers the consolidated advice in this document as it relates to a Fishery Management Plan's (FMP's) effectiveness; one would ideally consider this advice prior to a FMP being approved or implemented. The historical experience of over thirty years of enforcing the many and varied regulations promulgated under the Magnuson-Stevens Act and other marine environmental resource laws provides the basis for these principles.

Please note that the information in this paper is intended only as general guidance. The information contained herein in no way limits the NOAA FISHERIES SERVICE and the U.S. Coast Guard's ability to employ the enforcement techniques that are most appropriate for accomplishing the goals of a specific regulatory program.

Though it may appear that the focus of this paper is on commercial fisheries, the majority of the measures, such as permits, closed areas, etc., are equally applicable to recreational fishermen. In addition, the pros and cons associated with the enforcement measures discussed in this paper also apply to regulations aimed at reducing marine mammal mortality and protecting endangered and threatened marine species.

The fact that all stakeholders have a role in the development of FMP's and the implementation of the management measures is a key function of achieving effective compliance. It is important for enforcement to be included in the participation at the beginning of the debate to help shape the enforceability of alternatives being considered. Each Fishery Management Council has a team of enforcement personnel, including NOAA Office for Law Enforcement (OLE), U.S. Coast Guard, and state enforcement agencies, who are your sounding board for ensuring that regulations under consideration and being proposed are enforceable and will accomplish your Council's desired outcome.

ENFORCEABLE REGULATIONS ARE:

Simple and easy to understand – Clear, straightforward regulations are critical to the success of living marine resource management policies. The more complicated the rules and regulations, the higher the likelihood that loopholes and legal defenses supporting non-compliance will be taken advantage of. Straightforward requirements that are black-and-white and limit 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 a clear and simple prohibition. The prohibition is illegal regardless of where the fish was taken or how it was harvested, and is without regard to any other variable, condition, or stipulation.

Simple regulations are easier for industry to comply with and increase options available to enforcement. Complex regulations are more likely to result in errors, misunderstandings, and may cause some fishers to simply ignore them. Clear regulations reduce enforcement costs by allowing for greater efficiencies. Regulations that are complex tie-up limited law enforcement resources and cause confusion for members of the industry. Complexity is a factor that can lead to poor compliance.

To the extent possible, consideration should also be given to consistency with respect to similar management measures amongst regional FMP’s and regulatory areas, as well as between federal and state waters.

Few as possible - Adding numerous control measures can frustrate industry, yielding lower voluntary compliance. More regulations allow for an increased possibility for mistakes to be made and reports to be forgotten, and further serve to spread finite enforcement resource capabilities more thinly across several competing priorities and mandates. For instance, mandatory reporting should be consolidated and automated where possible, and instructions made simple. Regulations may have to be very restrictive, but the ability to comply should be straightforward.

Accountable of product from harvest through the wholesale process - It is important for enforcement to be able to separate legal product from illegal product as the fish proceeds from stage to stage. A traceable product history is beneficial: this enables enforcement to intercept unlawful seafood at various funnel points such as airports and customs borders. With required documentation and labeling, all product may be linked 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 sufficiently penalizes 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:

Law Enforcement Resource Intensive – Any new plan or regulation must take into consideration the finite enforcement resources of the NOAA OLE and the U.S. Coast Guard. Enforcement operations and planning requires prioritization of some fisheries and fishery regulations over others. Use of technologies such as VMS and electronic logbooks can assist enforcement by allowing for remote monitoring, thereby increasing the efficiency of available at-sea and shoreside enforcement resources.

For example, regulations requiring monitoring of offloads are personnel intensive. Unfortunately, the reality is that NOAA OLE will never have enough manpower to monitor more than a small fraction of total offloads. Regulations which are enforcement resource intensive inherently require shifting of effort from port to port. Constant redeployment of enforcement resources limits enforcement's ability to pro-actively focus on other high priorities and serious offenders.

Complex or Convolutd – Complex or convoluted regulations require additional effort on the part of enforcement personnel to: understand the regulations, identify those instances where non-compliance exists, and hold those who don't comply accountable. As an example, many regulations designed to impose bycatch limits are nearly impossible to enforce at-sea. Instead, effective enforcement of such regulations requires monitoring the entire catch during offload (already identified as a resource intensive proposition). Once pierside, it is too late for the harvester to do anything about any bycatch overages they may have. The fisher must rely on their ability to estimate catch composition at sea to stay in compliance.

Lack Accountability - Without a rigorous system capable of providing traceable accountability or the ability to audit, fish can become "legal" merely by violators doctoring records. Requiring a well designed catch documentation scheme to track fish from harvest to offload, and through the processing and shipping phases, adds transparency and effective accountability.

Based on Estimates - Regulations requiring a vessel captain to estimate catch, catch composition, and/or discards are difficult to enforce. In certain circumstances, estimates may be acceptable for feeding information into the fisheries management process; however, it is difficult for enforcement to prove false reporting of an estimated weight of a discard.

PENALTIES

Once regulations are in place, penalties must be discussed. The goal of regulatory enforcement agencies is to assist with compelling compliance and ensuring a level playing field between participants. In order for this to occur, effective prosecution, including the assignment of penalties, must exist to assess responsibility, establish deterrence, and punish violators. Sometimes, enforcement is criticized for not pursuing cases of wrongdoing more aggressively, and then is criticized for being too heavy-handed when pursuing major civil and criminal violations.

NOAA OLE and the U.S. Coast Guard work with other NOAA divisions, the Fishery Management Councils, NOAA General Counsel, and the U.S. Attorney's Office to determine the appropriate prosecution method for an offense. NOAA 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. For criminal violations, penalties include monetary penalties, home confinement, and/or imprisonment. Criminal investigations and prosecutions are reserved for the intentional violators who are repeat violators, conspire with others, or those who intentionally commit a serious offense where a civil penalty would not be appropriate or adequate.

As previously stated, enforcement's goal is to compel compliance; assessing appropriate penalties for detected violations contributes to attaining this goal. If a penalty is too low, it may have little to no deterrence effect and simply be considered a cost of doing business.

VESSEL MONITORING SYSTEMS (VMS)

The technological sophistication of the modern fishing operations is incredible, and demands equivalent technological applications by law enforcement to effectively and efficiently ensure that regulations and laws are being adhered to. 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 and fishing activity 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 by allowing enforcement to target violators, thereby increasing efficiency. Enforcement assets are still need to conduct at-sea boardings to verify compliance with other regulations, such as net mesh size and prohibited species. VMS is only useful for enforcing regulations that are location specific.

Expansion of VMS into additional domestic fisheries would increase the efficiency of enforcement operations by enabling more efficient patrol planning in those fisheries. The best way to use VMS is in combination with a strong dockside enforcement program. Councils should focus on regulatory frameworks which supports strong offshore monitoring and strong dockside inspection and tracking.

Although not designed to be a safety device, VMS may contribute to increased vessel safety in certain, limited situations. 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 has in some instances aided rescue efforts of the Coast Guard. It is important to note that VMS is not currently a proactive Search and Rescue tool.

OBSERVERS

The NOAA Fisheries Observer Program authorizes NOAA Fisheries Service 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 scientific 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 U.S. 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, the guidelines address safety, economics and biology considerations. The matrix is supplemented by an analysis that defines each management measure, outlines the enforcement advantages and disadvantages of the measure, and then concludes with a recommendation on considerations applicable to the development of regulations seeking to incorporate said measure.

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	Limited	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

Key: Green – Reasonable
Yellow – Possible with some difficulty
Red – Impractical

***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. Compliance requires continuous presence of dockside surveillance, which is nearly impossible to attain given current NOAA OLE resource constraints.
- High-grading may be a concern.

Recommendations:

- Consider prohibitions which regulate areas, seasons, types of gear or types of operations to minimize bycatch.
- Segregating catch at sea facilitates 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 should be required to return to port to preclude further resource degradation and economic advantage over complying competitors.

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 should be required to return to port to preclude high-grading or 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 prevent a bycatch species from becoming the target species.

- Consider regulations that specifically require types of gear or operations that minimize bycatch. 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.

PROHIBITING RETENTION

Definition:

- Regulations designed to prohibit the retention of certain species aboard fishing vessels.

Advantages:

- Allows for at-sea and shoreside enforcement.
- If designed correctly, retention violations are easier to document and enforce than regulations that allow a limited percentage to be retained.

Disadvantages:

- Potentially creates an incentive to hide prohibited species from observers or to underreport prohibited species catch, if it influences the fishing season.

Recommendations:

- Clearly identify when possession of a prohibited species is restricted (*i.e.*, returned to the sea as soon as practicable, etc.).
- 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:

- Measures requiring fishers to retain all catch.

Advantages:

- Allows for enforcement by 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.
- Clearly define situations where full retention is not required. For example, allowing vessels to bleed their nets to allow for vessel safety.
- Limit or eliminate differences between full retention requirements for vessels operating in the same location or fishery.

SIZE RESTRICTIONS

Definition:

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

Advantages:

- Violations are easy to document during at-sea and shoreside inspections. If properly implemented, these regulations are typically easy to prosecute.

Disadvantages:

- At-sea processing can limit the effectiveness of enforcement efforts.
- The effectiveness of size limitation for fisheries management is proportional to the enforcement effort expended on dockside and at-sea inspections.
- The enforcement of this type of regulation has the potential to be manpower intensive.
- Size restriction can create an economic incentive for vessels to high-grade their catch.

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.
- Develop and coordinate consistent regulations across state and federal boundaries.

CLOSED AREAS

Definition:

- Fishing in a specific geographic area is prohibited.

Advantages:

- Fairly easy to enforce when regulations include the below recommendations.
- The use of electronic monitoring (*e.g.* VMS) provides for relatively easy monitoring, provided the regulatory scheme is properly developed. However, even with VMS cueing, a response asset is generally required to document the violation for prosecution. Enforcement agencies also use aircraft and surface patrols to verify the accuracy of the VMS picture.
- Easy-to-document presence in the closed area by aircraft and vessel surveillance. Depending on the fishery and gear type, it is difficult for enforcement agencies to document fishing activity without an at-sea boarding.

Disadvantages:

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

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, irregularly shaped 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.
- Limit the number of closed areas that geographically shift through a season. This increases the confusion of enforcement officials on the current status of an area. It also increases the

likelihood of unintentional violation because of confusion and makes at-sea enforcement more difficult because fishing trips have to be reviewed in sections based on the closed areas that were in-force during segments of the fishing trip.

- Close the area to all fishing activity; limit grand-fathering and other exemptions.
- If transit is allowed, regulations should state that all fishing gear must be stowed while in the closed area and transits must be continuous (i.e. no loitering/stopping). Stowage requirements must be clearly defined. If vessels need to stop/loiter in a closed area, include a requirement to notify enforcement.
- Avoid utilizing regulated gear areas. In most situations, they are difficult to enforce and often require at-sea boardings to verify that fishing vessel is using legal gear in the closed area.

CLOSED SEASONS

Definition:

- A specific fishing activity is prohibited during certain times of the year.

Advantages:

- Large vessel fisheries are easier 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.
- Monitoring the fishing vessels with VMS during closed seasons can greatly aid enforcement.
- The presence of a particular species during a closed season may be detected in the market if retention is prohibited everywhere.

Disadvantages:

- Small vessel fisheries are more difficult to monitor, particularly those where the vessels are launched from trailers rather than moored to piers. 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 can be inspected dockside and at-sea, in most cases.

Disadvantages:

- Restrictions on gear employment (i.e. set/trawl depth) are difficult to enforce. For example, a limitation on amount of fixed gear/hooks is difficult to regulate/enforce.
- Normally gear or vessel restrictions need to be inspected at-sea to ensure compliance while the vessel is engaged in the act of fishing.

Recommendations:

- If a specific type of gear is prohibited for use in a fishery, then carriage of the gear type should also be prohibited.
- Gear restrictions should be standardized across state and federal boundaries.

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 fishermen have met their quota, additional fish are treated as prohibited species, as discussed above.

Disadvantages:

- Manpower intensive. LAPPs spread out fishing effort over longer periods, requiring extended enforcement presence rather than a pulsed presence required of derby fisheries.
- Individual quota holders have the incentive to underreport their landings throughout the fishing season.
- LAPPs can create an economic incentive for vessels to high-grade their catch.

Recommendations:

- Effectiveness depends on monitoring landings.
- Electronic reporting should provide real-time debiting of an individuals quota account. That is beneficial to enforcement, to the fisherman, and fishery managers.
- 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. Converting from an all paper process to electronic process is essential for good enforcement. A benefit of converting to electronic reporting along with a VMS program is that electronic log books, observing systems, real-time catch reporting, real-time landing reporting, etc. can all be carried on the VMS platform.

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.