

Enforcement Considerations
For
NOAA Fisheries and North Pacific Fishery Management Council

DRAFT

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NOAA OFFICE FOR LAW ENFORCEMENT
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GUIDANCE FOR EFFECTIVE FISHERIES ENFORCEMENT

Regulations are constantly being written and most of those in place seem to be in a continual state of change. North Pacific Fishery Management Council (Council), NMFS Sustainable Fisheries, Protected Resources, and Habitat staffs are tasked with the creation and revision of the 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 management plan, 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 twenty years of enforcing the many and varied regulations promulgated under the Magnuson Act, and later, the Magnuson-Stevens Act on a nationwide basis.

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

OVERVIEW – GENERAL ENFORCEMENT OPERATIONS

Enforcement operations, be they at-sea or dockside, are resource-intensive. Available enforcement resources are maximized by enacting regulations that can be enforced at more than one point during fishing activity (e.g., not just at the point of landing or when gear is deployed).

Dockside enforcement – Regulations that can be enforced through the monitoring of offloads are particularly resource intensive. Even with support from state law enforcement agencies, Office of Law Enforcement (OLE) lacks sufficient law enforcement personnel to monitor more than a small fraction of the total fish landings. To compensate for the lack of manpower, OLE must frequently shift enforcement effort from port to port, thus hampering OLE's ability to be more proactive in its visibility of offload operations. However, this resource gap is mitigated to a small degree with the use of electronic monitoring technologies such as vessel monitoring system (VMS), electronic logbooks, and pre-landing notifications to monitor remotely and improve directed tasking of available resources.

At-sea enforcement – The Coast Guard is responsible for the at-sea enforcement and monitoring of fisheries activities through at-sea patrols, fisheries law enforcement boardings, and commercial fishing vessel safety inspection efforts. The Coast Guard works directly with OLE ashore to effectively target vessels of interest, enforce regulations, and provide adequate evidence for successful investigations and case evaluations, particularly those involving area, gear, and prohibited species restrictions. The Coast Guard also uses electronic monitoring technologies such as VMS, electronic logbooks, and pre-landing notifications to remotely monitor vessels and to improve directed tasking of available resources.

REGULATIONS ARE MORE ENFORCEABLE IF:

They are simple and easy to understand – the more complicated the rule, the higher 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 undersized halibut on a commercial 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 provide cause for industry to simply ignore them.

To the extent possible, consideration should be given to consistently similar management measures amongst the Fishery Management Plans (FMP) and regulatory areas.

There are as few as possible – adding too many control measures can frustrate and create ambiguity amongst industry as well as enforcement. Too many regulations allow for more opportunities for mistakes to be made and reports to be forgotten; and it generates more work for enforcement to regulate and compel compliance. Reports should be consolidated where possible, and instructions made simple. Regulations at times need to be very restrictive, but compliance should be relatively easy for industry.

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

They are 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)

WHAT IS MORE DIFFICULT TO ENFORCE:

Man power intensive regulations – the halibut and sablefish Individual Fishing Quota (IFQ) regulations are manpower intensive. Enforcement lacks the manpower to monitor more than a small fraction of the total offloads. This shortage of resources requires constant shifting of effort from port to port, which can create significant gaps in the ability to detect serious offenders. Use of technologies such as VMS and electronic logbooks can provide enforcement the ability to monitor remotely, thus reducing manpower needs.

Complex or convoluted regulations – regulations such as by-catch limits on catcher vessels are extremely difficult to enforce at-sea. Enforcement of these regulations requires monitoring the entire catch during an offload which is unreasonable given the enforcement resource limitations. Also at that time, it is too late for the vessel to compensate for any overages it may have. The fisherman must rely on their ability to estimate catch composition at sea to stay in compliance. Regulations that are relatively simple to understand and comply with are the easiest to enforce.

Loss of accountability – fish can become “legal” merely by doctoring the records, without traceable accountability, or the ability to audit. Records to track fish from harvest, to the offload, and through the processing and shipping add to good accountability and ease the demands on enforcement.

Estimates – regulations requiring a vessel captain to estimate catch, catch composition, and /or discards are difficult to enforce. Using estimates may be successful in effectively managing a fishery. However, enforcement entities cannot easily prove the false reporting of an estimated weight of a discard, nor can they easily establish allowable error from an estimate and determine what constitutes a violation.

Finally, any new amendment plan or regulation must take into consideration the enforcement resources and capabilities of NOAAOLE and the Coast Guard in terms of maximum achievable contact rate with industry and feasible investigative effort. Nationwide enforcement is limited, so adding additional regulations to enforce, especially those that are relatively complex in nature, usually means decreasing, or in some cases ceasing, effort in other areas.

USE VMS

VMS is a tool used by law enforcement to focus patrol efforts on high priority areas. VMS does not replace at-sea enforcement by aircrafts, vessels, and boarding teams, but rather complements these traditional surveillance platforms with additional targeting information, thereby increasing the level of monitoring possible. This may, by extension, increase levels of compliance as well. In addition to providing law enforcement with information regarding vessel position and movements, VMS can also communicate information about the gear on board and the fish species being targeted through the use of VMS advanced features. Other capabilities may be available through the use of VMS advanced features and it may be reasonable for managers and enforcement to consider these options. Expanding the use of VMS in monitoring domestic fisheries will increase the effectiveness of law enforcement operations by increasing the efficiency of patrols, vessel boardings, and inspections.

OBSERVERS

Observers are not law enforcement personnel. Observers provide fishery managers with data to help make management decisions. Unbiased observer data is vital to effective fisheries management and ensuring its integrity is a law enforcement priority. Law enforcement documents various activities that can undermine the effective use of observers. These include failure to carry a required observer, observer interference and harassment, influencing sampling, and failing to comply with NMFS observer safety regulations. Among other things, these safety regulations require that any commercial fishing vessel must pass a Coast Guard dockside safety examination if operating beyond 3 nautical miles. Observers may also conduct an independent review of the fishing vessel's major safety items and may refuse to sail if there are major deficiencies. A vessel that is required to carry an observer, but cannot carry one because of failure to meet the safety requirements, cannot legally fish without an observer on board.

PENALTIES

Once regulations are in place, penalties are determined. The goal of regulatory enforcement agencies is to ensure compliance, whereas prosecution agencies exist to assess responsibility and punish violations. OLE is responsible for both mandates. These two mandates often lead to conflict. OLE works with various NOAA and NMFS divisions, the Council, 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 lowest penalty to effectively gain compliance. If a penalty is too low, it may result in deliberate violation of regulations or subsequent violations due to the perceived minimal penalty. If a penalty is too high, there is incentive in covering up the error instead of reporting it. Or, violators may

feel the need to challenge the violation in court, not to merely 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 a violation multiple times, conspire with others, or those who intentionally commit a serious offense where a civil penalty would not be appropriate or adequate.

MATRIX OF MANAGEMENT MEASURES

The U.S. Coast Guard and NOAA OLE completed a matrix to help fishery managers and staff better understand enforcement aspects related to certain management measures. It is important to note these guidelines address the enforceability of the regulation, not necessarily the merits of the regulation. Where it is applicable and important to enforcement agencies, the guidelines address safety, economics, and biology considerations.

These guidelines provide a matrix to 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. For ease of organization, the management matters are listed and described alphabetically.

Matrix Defining the Enforceability of Fishery Management Measures

	At-sea ship	At-sea aircraft	Dockside
Limiting amount/percent landed	Impractical	Impractical	Reasonable
Limiting amount/percent onboard	Possible with some difficulty	Impractical	Reasonable
Prohibiting retention	Reasonable	Impractical	Reasonable
Closed areas	Reasonable	Reasonable	Impractical
Closed seasons	Reasonable	Possible with some difficulty	Reasonable
Gear/vessel restrictions	Reasonable	Possible with some difficulty	Possible with some difficulty
ITQs/IFQs	Possible with some difficulty	Impractical	Reasonable
Recordkeeping & reporting	Possible with some difficulty	Impractical	Reasonable
Permits	Reasonable	Possible with some difficulty	Reasonable
Size restrictions	Reasonable	Impractical	Reasonable

LIMITING AMOUNT/PERCENT LANDED

Definition: This management measure aims to reduce non-target species retention (and minimize its mortality) by limiting the amount or percentage landed.

Advantages:

- There is an incentive to limit the amount of non-target species retained if the fishery will be closed as a result of reaching a limit.

Disadvantages:

- Since this a landing provision, it is difficult to enforce at sea. Effectiveness is directly proportional to dockside effort expended.
- High grading may be an issue.

Recommendations:

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

LIMITING AMOUNT/PERCENTAGE ON BOARD

Definition: This management measure aims to reduce non-target species (and minimize its mortality) by limiting the amount or percentage of a non-target species allowed on board a fishing vessel.

Advantages:

- Allows for the potential for at-sea enforcement. If at-sea boarding determines that the limit/percentage is met, then the fishing vessel may be directed to port to preclude further retention.

Disadvantages:

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

Recommendations:

- Regulations should specify how much primary catch is required to justify retention of non-target species and in what amounts. This is necessary to preclude non-target species from becoming a targeted catch.
- Consider prohibitions which regulate types of gear or types of operations to minimize non-target catches.
- Policies should incorporate industry best practices and consider any industry recommendations.
- Segregating catch at sea would facilitate enforcement.
- This provision works best with frozen product. Also, where there are only two species retained, segregation would help enforcement.

PROHIBITING RETENTION

Definition: This enforcement measure aims to restrict retention by prohibiting the retention of a 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 and enforcement 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 non-target catches.
- Policies should incorporate industry best practices and consider any industry recommendations.

CLOSED AREAS

Definition: Fishing in specific area is restricted

Advantages:

- Fairly easy to monitor if below recommendations are followed.
- Very easy to monitor with VMS and its advanced features. However, even with VMS activated and polling, a response asset is generally required to also witness and document the violation for prosecution due to the possibility of VMS errors.
- Easy to document presence in the closed area by aircraft overflight and Coast Guard cutter monitoring. It is more difficult to confirm and document fishing activity, depending on the fishery and gear type.

Disadvantages:

- Without VMS, the effectiveness is directly proportional to the surveillance presence and 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, inside or outside of 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.
- 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 (no loitering/stopping). Stowage requirements must be clearly defined.
 - Regulated gear areas are difficult to enforce, because this still requires an enforcement unit verify that fishing vessel is using legal gear in the closed area.
- Utilize VMS advanced features of geo-fencing and increased automated polling rates to ensure vessels are not fishing in a closed area. The addition of these VMS features would also address some of the challenges of enforcing irregular shaped area closures and extremely small area closures. A geo-fence surrounding a small closure are coupled with automatically increasing polling rates of a vessel entering the area, could assist enforcement to determine if a vessel is displaying fishing behavior.

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 species in a closed season should be detected if it shows up in the market if retention is not allowed anywhere.

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: Limits fishing effort by prohibiting specific gear types or gear modifications. Gear is meant to include not only the primary methods and tools to harvest the resource, but also includes the vessels, horsepower, and other such variables. Certain regulatory gear may be required to minimize catch of non-target species and/or protect certain marine species (i.e., pelagic vs non-pelagic trawls or seabird avoidance gear).

Advantages:

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

Disadvantages:

- Restrictions on gear employment (i.e., soak time, 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 intensive when it may require multiple checks at sea and is intrusive, as it will require the gear to be inspected while at sea, possibly impacting the vessel's fishing operations and fostering ill feelings 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.

ITQS/IFQS

Definition: Individual Quota Programs. These delineate a specific amount of particular fish species to be allocated to an individual, a particular vessel, a processor, or a community.

Advantages:

- IQs are often praised for their safety benefits. By allowing a fisherman a set quota to be caught over a long period of time the fisherman is able to choose when to fish rather than being forced – to fish during bad weather based on arbitrarily determined time periods (derby fisheries).
- Once an IQ is met, enforcement can treat additional fish above the allowed quota as prohibited species catch.

Disadvantages:

- Manpower intensive for enforcement purposes. Spreads out fishing effort across time and space. Instead of specific fishing seasons to monitor, a fishery may last nearly year round, and possibly require more assets for the extended season. In addition, fishermen are able to travel greater distances during an extended season, also requiring more enforcement efforts to provide adequate coverage.
- 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 IQ account. That is beneficial to enforcement, to the fisherman, and to the RAM Division. Electronic reporting has also proven to decrease errors in reporting.
- VMS should be required in IQ fisheries. This allows NMFS and Coast Guard enforcement to ensure vessels are fishing where they are authorized, and it also allows NMFS and Coast Guard to deploy their enforcement personnel, vessels, and aircrafts where fishing and offload activity is taking place.
- If at-sea quota debiting is allowed, the use of certified scales, observers, and video monitoring should be considered to ensure accuracy.

RECORDINGKEEPING 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 requirement for catch or effort information.

Advantages:

- At-sea boarding can verify the presence and use of logbooks and other records and 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 logbook data (per set, daily, end of trip). By specifically describing the time requirement, the type of enforcement required (at-sea, dockside) can be better determined.
- Standard logbook format for all federal fisheries.
- Use of electronic reports can simplify data collection that can be used by enforcement. Electronic reports can be used as a way to provide enforcement near real-time data before or during a boarding. Electronic reporting has also proven to greatly reduce reporting errors.

PERMITS

Definition: Document which indicates allowable gear type, fishing areas, and/or species which are allowed to be retained onboard a specific vessel or to a specific party.

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 them, or when a permit is turned in and then re-issued, creates a system where mistakes can be made and fishermen may not have the patience to wait for accurate permits to be processed before fishing or may even capitalize on such mistakes.

Recommendations:

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

SIZE RESTRICTIONS

Definition: Possession of 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.
- High-grading (fishing after trip limit is met and keep a high-grade (in most cases – larger fish and discard a lesser grade fish) can occur.

Recommendations:

- Prohibit processing/filleting at sea. Measurement should include head and tail intact.
- Standard measurement procedures, equipment, and technique by state and federal agencies.
- Maintain same regulations across state and federal boundaries.