

Enforceability Precepts *for* **Northeast Regional Fishery Management Councils**

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Developed by
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In Consultation and Coordination with
NOAA General Counsel Enforcement Section, Northeast
And
U.S. Coast Guard Districts One and Five

PREFACE

Fisheries are in a continual state of change and require Fishery Management Councils, NMFS Sustainable Fisheries, Protected Resources, and Habitat staffs to respond to these changes through development of Fishery Management Plans (FMPs) and their implementing regulations. To effectively support fisheries management, regulations must be easily accessible, easy for the regulated community to understand and comply with – and they must be enforceable. As it happens, many of the features that contribute to the enforceability of a regulation also contribute to the ease with which the regulated community can understand and comply with it. Enforcement and compliance checks often require interrupting fishing and landing operations so the gear and/or catch can be inspected. This interruption hampers industry operations. Enforcement operations and compliance checks attempt to minimize this interruption as much as practicable.

NMFS and the Fishery Management Councils must involve law enforcement personnel in the rulemaking process to ensure the enforceability of new regulations. In this document, law enforcement recommends a number of enforcement-focused elements for rule-makers to consider when proposing new or amended FMPs and implementing regulations.

The information contained herein is not intended to present an exhaustive list of considerations or a complete description of the techniques that law enforcement may employ in order to achieve acceptable levels of compliance in a specific regulatory program. Instead, this document provides general guidance as to the use of a variety of law enforcement tools and strategies to gain compliance with NOAA's laws and regulations.

GENERAL PRECEPTS

Simplify regulations.

Simple regulations are easier for the regulated community to understand and comply with. They are also more difficult to violate without being subject to enforcement action because violations of simple regulations are easier to detect and to prove. For example, a simple regulation such as “possession of an undersized fish on a commercial fishing vessel” is clear and difficult to misinterpret, and a violation would be straightforward to establish regardless of where the fish was taken, how it was harvested, or any other variable.

Conversely, complex regulations are more susceptible to confusion, misunderstandings, and multiple interpretations amongst law enforcement personnel and the regulated community which may undermine compliance and enforcement.

To the extent possible, there should be consistent definitions of terms between similar management measures, regulatory areas, and between federal and state waters. This facilitates both compliance and enforcement by minimizing the number of requirements that law enforcement and the regulated community need to remember.

Reduce the number of regulations.

Too many regulations frustrate industry as well as law enforcement. In addition to being burdensome, an overabundance of regulations may increase the possibility of honest errors and omissions which increase the workload of law enforcement personnel and may subject well-intentioned violators to enforcement action. To

avoid these problems, fishery managers should consolidate regulations, such as reporting requirements, whenever possible.

Account for and trace fishery products

Regulations that require improved documentation and labeling of fish and fish products would enable law enforcement to track such products back to the harvester and/or the initial purchaser and to intercept unlawful seafood product at various points between harvest and final sale for consumption.

Use a Vessel Monitoring Systems (VMS)

VMS is a tool used by law enforcement to focus patrol time on high priority areas. VMS does not replace at-sea enforcement by aircraft, vessels, and boarding teams, but rather complements these traditional surveillance platforms, thereby increasing the level of monitoring possible and, by extension levels of compliance as well. In addition to providing law enforcement with information regarding vessel positions and movements, VMS can also communicate information about the gear on board and the fish being targeted. Expanding the use of VMS in monitoring domestic fisheries will increase the efficiency of law enforcement operations by increasing the efficiency and effectiveness 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. They 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.

Appropriate Penalties

NOAA has a broad range of penalties and sanctions available to address violations of varying degrees of severity. For example, penalties for civil/administrative violations include verbal warnings, fix-it notices, written warnings, summary settlement fines, as well as monetary fines, permit sanctions / suspensions / revocations which are assessed by NOAA Office of the General Counsel Enforcement Section.

The Enforcement Section has developed, with input from various NOAA program offices, a *Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions*, available online at <http://www.gc.noaa.gov/enforce-office3.html>. The *Policy* assigns a penalty range to violations of the statutes administered by NOAA, based on the gravity of the violation and the degree of culpability of the violator. Use of the *Policy* helps to ensure that (1) civil administrative penalties and permit sanctions are assessed in accordance with the laws that NOAA enforces in a fair and consistent manner; (2) penalties and permit sanctions are appropriate for the gravity of the violation; (3) penalties and permit sanctions are sufficient to deter both individual violators and the regulated community as a whole from committing violations; (4) economic incentives for noncompliance are eliminated; and (5) compliance is expeditiously achieved and maintained to protect natural resources. The Enforcement Section constantly evaluates the *Policy*, to ensure that the civil fines and penalties assigned to each type of violation continue to be appropriate.

Cases may also be referred to the Department of Justice for criminal prosecution when a civil administrative penalty is not appropriate or where there is no civil administrative remedy. Cases appropriate for criminal referral include those involving multiple repeat offenders, offenders who conspire with others, or offenders who intentionally commit a serious offense. Criminal prosecution may result in a fine and/or other penalties including incarceration, if warranted. Civil and criminal forfeiture actions may also be brought in NOAA enforcement cases.

The NOAA Office of Law Enforcement (OLE) works with various NOAA and NMFS divisions, Fishery Management Councils, NOAA General Counsel, and the U.S. Department of Justice to set regional and national enforcement priorities. Those priorities are developed on an annual basis and are available online.

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 only be enforced through the monitoring of offloads are particularly resource intensive. Even with support from state law enforcement agencies, OLE will never have 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 pro-active. However, this is mitigated somewhat in fisheries where OLE can use electronic monitoring technologies such as VMS, electronic logbooks and pre-landing notifications to monitor remotely and improve directed tasking of available resources.

AT-SEA ENFORCEMENT

OLE relies heavily on the USCG and our state JEA partners for at-sea patrol, boarding, and inspection efforts. OLE uniformed officers work with these partners to provide effective at-sea enforcement of NOAA's regulations, particularly those involving area, gear, and prohibited species restrictions. OLE 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. Furthermore, OLE uses air support to cover large areas, photograph and video certain activities, and to direct other law enforcement assets to areas of concern.

Area Enforcement

When drafting time / area closure regulations consider the following:

- 1) Prohibiting a vessel from being inside an area at any time and for any reason is easier to enforce than allowing some fishing activities inside certain areas at certain times.
- 2) Allowing a vessel to transit a closed area is enforceable, but define the term "transiting" The definition must capture the idea that a vessel transiting is one that begins the transit at a point outside of the closed area and moves through the closed area to an end point outside of the closed area.

- 3) Allowing a vessel to transit through a closed area is more enforceable if the vessel operator must stow fishing gear and not have it available for use while the vessel is transiting.

Gear Enforcement

When drafting regulations involving restrictions on the use of fishing gear consider the following:

- 1) Prohibit possession of unauthorized gear on board or require that the prohibited gear be stowed so that it is not available for use.
- 2) Define the phrase “stowed and unavailable for use” so that the meaning of this phrase is clear.

Prohibited Species Enforcement

When drafting regulations that prohibit the catch of certain fish species consider the following:

- 1) Strictly prohibit the landing, possession, purchase and sale of the species of interest with no exceptions.
- 2) Unintentional incidental takes are handled with appropriate discretion of on-scene enforcement personnel.

PROVISION TYPES TO AVOID

Resource Intensive

Any new plan or regulation must take into consideration the enforcement resources of the OLE and the USCG in terms of maximum patrol and investigative effort. Nationwide, enforcement is spread thin, so directing effort toward enforcement of new regulations usually means decreasing or in some cases ceasing effort in other areas. Regulations that can be enforced through more than one means, or at more than one point during fishing operations, allow enforcement some flexibility in using available resources in the most efficient way possible.

Overly Complex Regulatory Schemes

Overly complex regulations may lead to misunderstandings on the part of industry regarding what is required and, consequently, to an increased level on noncompliance. Violations that result from an honest misunderstanding of very complex regulations make enforcement difficult in that honest confusion must be considered as a mitigating factor even though most prohibitions are strict liability.

Lack of Accountability Measures

Fishery regulations that do not allow for a complete accounting of fish from catch to final sale can lead to loopholes that allow illegally-harvested fish to enter the market, either commingled with, or as a substitute for, legal product. The only way to ensure that such commingling and product substitution does not occur is to be able to compare the product that enters the market at landing to what is processed and then to what is eventually sold.

MANAGEMENT MEASURES MATRIX

The matrix below is designed to help fishery managers and staff better understand the enforceability of the various kinds of management measures by indicating where and how they can be effectively enforced. It is not intended to address the merits of any particular regulation.

The matrix is followed by an analysis defining each management measure. The analysis outlines the enforcement advantages and disadvantages of the measure, and offers recommendations.

Fishery Management Measure Enforceability Matrix

Regulation Provision	Surveillance Aircraft/Ship/VMS	At-Sea Boarding	Dockside
Landing Limits	No	No	Yes
Possession Limits	No	Limited	Yes
Requiring Retention	No	Limited	No
Prohibited Species	No	Yes	Yes
Size Restrictions	No	Yes	Yes
Area Restrictions	Yes	Yes	No
Closed Seasons	Limited	Yes	Yes
Gear/Vessel Restrictions	Limited	Yes	Limited
Limited Access Programs	Limited	Yes	Yes
Recordkeeping/Reporting	No	Limited	Yes
Sectors/Catch Shares/LAPs	No	No	Limited

GENERAL ANALYSIS OF REGULATORY PROVISIONS

LANDING LIMITS

Goal:

To reduce retention/mortality by limiting the amount or percentage of a species landed. Landing limits can be used to regulate both directed and incidental effort.

Advantages:

- In the case of limits on the landing of non-target species, landing limits focus fishing efforts in areas that minimize bycatch if there is some penalty associated with excessive bycatch (i.e., the directed fishery will be closed as a result of reaching a bycatch trigger limit).

Disadvantages:

- This is a landing provision, and is not enforceable at sea.
- Effectiveness is directly proportional to dockside effort expended.
- When no enforcement is present to check landings, fishermen may falsify their landing reports or not report their landings at all. In the case of limits on the landing of non-target species, keep the directed fishery open.

Recommendations:

- Consider prohibitions which regulate areas, seasons, types of gear or types of operations to minimize bycatch.
- Regulations should consider industry best practices and other industry recommendations.
- Requiring segregation of catch at sea would facilitate enforcement.
- Regulations for catcher/processor vessels should prescribe that eventual landing limits shall not be exceeded while at sea. This allows for enforcement at sea as well as dockside. If enforcement is able to determine during an at-sea boarding that the vessel's trip limit is met, then law enforcement advises the vessel to return to port to preclude the operator from taking additional fish and thus obtain an economic advantage over those fishermen following the law.

POSSESSION LIMITS

Goal:

To reduce retention/mortality by limiting the amount or percentage of a species allowed on board a fishing vessel.

Advantages:

- This measure is similar to limiting amount/percentage landing, but allows for at sea enforcement.
- If enforcement determines during an at-sea boarding that the limit/percentage is met, then they can order the fishing vessel to return to port in order to preclude the operator from any further retention of fish.

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 fish hold at sea, etc.).

Recommendations:

- If possession is allowed where a certain amount of other fish is on board, the regulations should specify how much target species catch is required to justify retention of a particular amount of bycatch species. 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.
- Regulations should incorporate industry best practices and consider industry recommendations.
- Requiring segregation of catch at sea would facilitate enforcement.

PROHIBITED SPECIES

Goal:

To prohibit the retention of certain species aboard fishing vessels to reduce takes of a particular species.

Advantages:

- Violations are easier to document and enforce than regulations that allow retention up to a certain limit or a certain percentage of total catch.
- Allows for at-sea and dockside enforcement measures.
- Once fish are landed, detecting a violation for retention of prohibited species is easy if enforcement is present.

Disadvantages:

- Such regulations may create an incentive to hide prohibited species or to underreport takes and/or discards of prohibited species, especially if it doing so might prevent the closure of a fishery or prohibition on the use of a certain gear type.

Recommendations:

- Consider provisions which regulate types of gear or types of fishing operations to minimize bycatch of prohibited species.

REQUIRING RETENTION

Goal:

To require retention and reporting of all catch to ensure the optimum level of reporting of actual fish taken.

Advantages:

- Allows for enforcement during boardings or aerial, electronic monitoring, or other vessel surveillance as catch discards can be observed.
- 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:

- Not enforceable dockside.
- Limited enforceability at-sea without electronic monitoring of deck activities.
- Real time monitoring is required.
- May result in high grading and non-reporting of discards if not adequately monitored.
- Resource intensive regardless of monitoring type since electronic monitoring would need to be reviewed with NMFS staff.

Recommendations:

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

SIZE RESTRICTIONS**Goal:**

To ensure that fish below or above a specified size are not taken or possessed.

Advantages:

- Violations are easy to document and prosecute.

Disadvantages:

- Effectiveness is limited by the amount of processing allowed to be done at sea.
- Effectiveness is proportional to the effort expended in dockside checks and at-sea boardings and is resource intensive.
- May provide incentive to high-grade.
- May lead to under-reporting or non-reporting of fish taken.

Recommendations:

- Prohibit processing/filleting at sea for fisheries where size restrictions are used.
- Require measurements that include the head and tail.
- Clearly define how measurements are to be taken in the regulations.
- Require standardized measurement procedures, equipment, and techniques by state and federal agencies.
- Work with the States to achieve consistent regulations across state and federal boundaries.

AREA RESTRICTIONS**Goal:**

To ensure fishing does not occur in certain areas.

Advantages:

- Easy to monitor with VMS. However, even with VMS cueing, law enforcement must document the violation at-sea to gather sufficient evidence for prosecuting a violation.
- Easy to document a vessel's presence in the closed area by aircraft and vessel surveillance.

Disadvantages:

- Without VMS, law enforcement must increase its surveillance effort which is resource intensive.
- Depending on the fishery and gear type, violations of restriction on certain activities within a closed area regulations are difficult to document without an at-sea boarding,.

Recommendations:

- Clearly define areas. Use exact latitude/longitude and straight lines. Avoid simply stating distance offshore, center point and radius, or depth contours.
- Use regular shaped areas. In most situations, closed areas are easier to enforce if they are square or rectangle shaped, since such geometry allows for law enforcement to more easily determine whether a vessel is west/east, north/south of an indicated line, and therefore, in or outside of a closed area.
- Large closed areas are preferred in most situations. Small closed areas with open areas in between them provide a vessel the ability to quickly enter and exit a closed area to evade detection. However, if smaller closed areas result in more open fishing grounds, then fishermen may be less inclined to violate the closed area restriction.
- Temporary, short-term closures are difficult to enforce as NMFS must quickly communicate the closure to the fishing industry.
- If possible, close an area to all fishing activity.
- Limit grand-fathering and other exemptions.
- Where practical, close areas to all types of fishing as well as to transiting fishing vessels.
- If restriction includes prohibiting use of a particular gear type within a closed area, consider prohibiting possession of that gear within the closed area as well.
- If transit is allowed, require that a vessel operator must stow fishing gear and continuously transit through the closed area (i.e. no loitering/stopping).
- Include a requirement to notify law enforcement, if a vessel needs to stop/loiter in a closed area.
- Clearly define gear stowage and transiting requirements.

CLOSED SEASONS**Goal:**

To ensure the sustainability of a fish stock by prohibiting fishing during specific times of the year order.

Advantages:

- Possible violations can be inferred through the presence of a particular species in the market during a closed season if retention, possession, purchase and sale of such species is prohibited everywhere when the season is closed. This would prompt enforcement to investigate the origin of the fish and how it got to market.
- Violations can be detected through the appearance of fishing gear in the water that should otherwise not be there due to the closure (i.e. lobster pots present during a closure of a lobster season, etc.)

Disadvantages:

- Fisheries in which smaller vessels participate are more difficult to monitor.
- Small quantities of fish can be easy to hide in the market or sold outside of normal market channels or dealers when the season is closed.

- Fisheries with multiple gear types used to harvest the same species are especially difficult to enforce if only one gear type is closed or prohibited from use during a season.

Recommendations:

- Limit exemptions to the closed season, and define the date and time of the closure to the minute.
- 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 and gear may not be set prior to opening the closed area.

GEAR/VESSEL SIZE AND EFFICIENCY RESTRICTIONS

Goal:

Limits fishing effort by prohibiting specific gear types or gear modifications. Gear includes not only the primary methods and tools used to harvest the resource, but also includes secondary gear and vessel attributes including size, horsepower and other efficiency variables.

Advantages:

- None identified.

Disadvantages:

- Restrictions on how gear is deployed (e.g., soak time, set/trawl depth) are more difficult to enforce as the gear is difficult to inspect once it is deployed. For example, a limitation on the 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.

Recommendations:

- Prohibit possession of gear on board if it is not allowed for the targeted fishery.
- Work with the States to achieve consistency in gear restrictions across state and Federal boundaries.
- Require Federal and state enforcement officers to develop and use standard inspection procedures, measurement equipment, and techniques.

RECORDKEEPING AND REPORTING REQUIREMENTS

Goal:

Regulations that require fishermen to keep records of specified information on board the vessel facilitate enforcement of the regulations.

Advantages:

- At-sea boardings can verify the presence and use of logbooks and other records.
- Docksideside monitoring of fish landings can verify accuracy of estimated hail-in catch data.

Disadvantages:

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

- Estimates and hail-in weights are required, but must be defined or proven to be intentionally false or an unreasonable estimate in order to determine false reporting.

Recommendations:

- Regulations must identify the timeframes required for completing reports and entering data into logbooks (e.g. per set, daily, end of trip). This will allow enforcement to better determine whether to focus effort at-sea or shoreside.
- Require a standard logbook format for all federal fisheries.
- Require the use of electronic reports. Electronic reports can be used as a way to provide enforcement near real-time data before or during a boarding and it reduces reporting errors.
- Verify and validate reported information (through e-signature or two part verification) to ensure that it is accurate and reported by an identifiable person.

SECTORS/CATCH SHARES/LAPs

Goal:

Ensure timely and accurate reporting so that Sectors fish within their Annual Catch Entitlement (ACE) and Annual Catch Limits (ACL) are not exceeded. Sectors are very dependent on quota monitoring.

Advantages:

- Sectors/Sector Managers are responsible for ensuring that vessels within their sector do not exceed their ACE.
- Monitoring of fish landings is effective for ensuring accurate reporting by vessels and dealers.
- At-sea monitors (ASM) and observers record actual catch.

Disadvantages:

- Resource intensive to manage every fish landing.
- Possible incentive for illegal offloads in off hours and at obscure landing sites.
- Unique challenges in cross-checking landings against vessel/dealer reports, VMS data, at-sea monitor (ASM) reports, and electronic monitoring data. Requires significant comparative analysis.
- May result in possible observer interference because of ASM/Observer coverage requirements.

Recommendations:

- Require the use of weigh masters and fish landing windows.
- Require use dockside monitors with authority to conduct hold checks.
- Limit fishing to one broad stock area unless an ASM is onboard.
- VMS should be considered for all LAPs
- Uniform sector exemptions across all Sectors