



NORTH PACIFIC FISHERY MANAGEMENT COUNCIL

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August 21, 2023

Wendy Morrison
National Marine Fisheries Service, NOAA
1315 East-West Highway, Room 13436
Silver Spring, MD 20910
Via www.regulations.gov

Dear Ms. Morrison:

On behalf of the North Pacific Fishery Management Council (Council), I am providing comments on the Advance Notice of Proposed Rulemaking (ANPR) for potential changes to the NMFS guidelines for National Standards 4, 8, and 9.

First, the Council is deeply disappointed in the agency's decision not to extend the comment period despite our prior letter requesting an extension, a letter from the Council Coordinating Committee, and requests for extension made individually by the State of Alaska and requests from other Regional Fishery Management Councils (RFMC). We believe that the guidelines are much too important and durable in nature to be modified in a rushed process, and therefore providing meaningful and informed input prior to agency development of the proposed rule is critically important. Nevertheless, to meet the comment deadline, we offer the following initial comments based on our limited opportunity to consider the complexity of the issues and potential implications and our lack of opportunity to have another Council meeting to hear from the public prior to the comment deadline.

Overall, the Council does not support revisions to the guidelines, particularly if the agency continues to rely on timelines that do not support full participation and thoughtful review by the RFMCs. The agency has not provided the Council with reason to believe that the existing guidelines are no longer appropriate for current U.S. fisheries management or that they do not provide the appropriate level of guidance for Councils to address the concerns raised in the ANPR regarding changes in environmental conditions and equity and environmental justice. Further, the types of revisions described in the ANPR have the potential to undermine the flexibility and adaptability of the management process that is so critical to address ongoing and new challenges, many of which are described in the ANPR. If NMFS decides to propose changes to the guidelines, it must provide sufficient opportunity for affected Councils and fishery participants to evaluate the impacts of the potential revisions and provide informed recommendations. Our remaining comments are directed at addressing the specific issues raised in the ANPR.

National Standard 4: The ANPR accurately notes that existing allocations have relied heavily on catches during specific time periods, primarily to accommodate for dependence on the resource and active participation, two key considerations from the Magnuson-Stevens Act. The ANPR suggests that revisions to the NS4 guidelines could help encourage allocation decisions that balance the needs of different user groups when creating and updating allocations, including for stocks that are shifting, or have shifted, their distribution as a result of changes in the ecosystem. One of the primary issues resulting from changing stock distributions is ensuring that those fishermen, processors, and communities historically dependent on and active in the fishery continue to have access to the resource. Shifting distributions or population levels as a result of climate effects can have significant distributional affects among states, fishing sectors, processors, and communities and is one of the critical issues facing most, if not every, regional council.

However, this issue does not seem to be the focus of NOAA's ANPR and the Council has not identified additional guidance that could 'encourage allocation decisions that balance the needs of different user groups' beyond what is already provided via the statutory language itself, the existing NS4 guidance, NOAA's allocation policy, and the existing allocation review process.

The Council has developed many allocation programs that have been found by the agency to be fair and equitable and provide adequate consideration of the needs of other users including new fishermen, and underserved communities. For example, the Council originally developed the Western Alaska Community Development Quota (CDQ) program in 1992. This program allocates a portion of the crab, halibut, and groundfish fisheries TACs in the Bering Sea and Aleutian Islands (BSAI) to 'CDQ groups' representing 65 communities across coastal Western Alaska. The allocations incorporated under the CDQ Program have been expanded several times since 1992. The purpose of the CDQ program is to alleviate poverty and provide social and economic benefits derived from Federal fisheries to address concerns about marginalized users in remote coastal communities that had not had an opportunity to participate and invest in the development of the Bering Sea fisheries. This program was subsequently included in the Magnuson-Stevens Act.

Community Quota Entities were later developed to address concerns about small, marginalized communities in the Gulf of Alaska (GOA) and provide additional opportunities for fishermen in these communities to enter the halibut and sablefish fisheries. There are also numerous LAPPs in the North Pacific (e.g., Halibut/Sablefish IFQ program, Amendment 80 C/P trawl cooperatives, AFA pollock cooperatives, GOA rockfish cooperatives, the Bering Sea/ Aleutian Islands Crab Rationalization Program, and a newly developed Bering Sea Pacific cod trawl program) all of which have different purposes and objectives but that allow transference of fishing privileges or quota and must be regularly reviewed by the Council under the Magnuson-Stevens Act. The other allocations in the North Pacific include the Halibut Catch Share program and the BSAI and GOA Pacific cod allocations, all of which have been subject to extensive allocation reviews as required by the NMFS Allocation Policy Directive. There is no further detailed guidance we can identify that would help Councils better balance all of the National Standards, including NS4, given the extensive factors Councils already are required to address and given the very different fisheries across the Nation.

Changes in stock distribution and abundances have already occurred for several species in the North Pacific, and the existing guidance has proven sufficiently flexible to allow Councils to consider different environmental variables and data sources to facilitate both the specifications process and management changes in these and other programs. Please be clear, it is not the national standard guidance that is the limiting factor in the Councils' abilities to react and adapt to changing conditions. In fact, if the Council is required to revisit existing allocations in response to revised NS4 guidance, it is a certainty that the resulting allocation controversies will severely constrain the Council's ability to react and adapt to changing conditions. If NOAA is interested in assisting Councils in this regard, we would be very willing to engage in that discussion as an individual Council and/or within the Council Coordinating Committee. We recommend that NMFS could best assist fisheries management by 1) ensuring core surveys and stock assessments are continued and adapted to accommodate changing conditions and 2) focusing management resources on implementing actions recommended by Councils in a timely manner.

A few additional key points to consider regarding NS4 guidance:

- The ANPR suggests that the guidelines could be revised to encourage allocation decisions that balance fishery access among historical users, marginalized individuals who may have been inequitably excluded from historical allocations, and new users. The existing NS4 guidelines already specify that the Councils should consider other factors relative to FMP objectives, including economic and social consequences, dependence on the fishery by present participants and coastal communities, and the opportunity for new participants to enter the fishery. Therefore, it is unclear how NMFS would improve the current guidelines to help Councils operationalize a requirement to broaden the scope of “problems” it is trying to solve with an allocation without undermining the Magnuson-Stevens Act and FMP objectives for the current fishery.
- At present, allocations are not fixed in perpetuity. The existing NMFS Allocation Policy requires that Councils periodically assess whether revisions to allocations may be needed and provides the Council current opportunities to consider the potential impacts of environmental changes on these programs. The entire purpose of the allocation policy as stated by NOAA was to provide a mechanism to ensure fisheries allocations are periodically evaluated to remain relevant to current conditions. Additional guidance is unnecessary to address this key issue for regional councils.
- Furthermore, allocations made to individuals or cooperatives under a Limited Access Privilege Program (LAPP) are already required to be reviewed frequently, and under the MSA, Councils must consider approaches to provide for new entrants. The agency also has issued separate *Guidance for Conducting Review of Catch Share Programs* (NMFS Procedure 01-121-01, April 13, 2017); should we assume the agency plans to revisit this document if the NS4 guidance is revised and comment accordingly?
- It is inappropriate for NMFS to consider revisions to National Standard 4 guidelines to “reinforce” NMFS’ Allocation Policy requirements as cited on 88 FR 30936; rather agency policy should be revised to be consistent with the National Standards and implementation guidelines. As specified in Section 301(b) of the Magnuson-Stevens Act, the guidelines assist Councils in the development of fishery management plans and must be based on the National Standards. The NMFS Allocation Policy is not a component of the National Standards, and it would be inappropriate and misleading to include any direction related to the policy in the guidelines.
- NMFS should not revise the guidelines to specify types of information and analyses to consider when making allocation decisions. These topics are more than adequately covered by the requirements for implementing National Standard 2 and applicable law requiring environmental and economic analyses for Council actions. Developing additional requirements in the guidelines would create duplicative and potentially conflicting requirements for Councils to develop management actions.
- The ANPR introduction lists recent Executive Orders related to Equity and Environmental Justice (EEJ) as a basis to revisit guidance language. The Council questions whether NMFS assumes that all Executive Orders pertaining to EEJ apply to all FMP amendments. This is inconsistent with the 1994 Environmental Justice Executive Order specifying that Environmental Justice impacts must be considered for actions with potentially significant impacts, i.e., an EIS versus an EA. Overall, the need for changes to the guidance itself is unclear relative to the EEJ objectives.

The agency's recent EEJ Strategy appears to be a more meaningful and clear mechanism to prioritize equitable treatment and meaningful involvement of underserved communities.

- The revised guidelines should not require any new periodic reviews of various programs. The Councils already spend enormous amounts of time and resources to complete mandatory 5-year EFH reviews, 5 and 7-year LAPP reviews, and 10-year allocation reviews, leaving less time and resources to adapt to changing environmental conditions and address other pressing fishery management needs.

National Standard 8: The Council agrees with the ANPR that the existing NS8 guidelines do not limit NMFS' or the Councils' ability to implement regulations or policies that address inequities or barriers to access for underserved communities. We also agree with the ANPR statement that the NS8 does not specifically authorize, or prohibit, allocations to fishing communities. While we do not believe that clarification of this point requires a revision to the guidelines, if NMFS moves forward with revisions, then we support removing the existing language that NS8 "does not constitute a basis for allocating resources to a specific community nor for providing preferential treatment based on residence in a fishing community" rather than attempting to add clarifying language that may have unintended consequences and create further confusion.

The Council disagrees with the proposal to revise the NS8 definition of fishing community. For purposes of fisheries management, a community is place-based in a specific geographic location. This is consistent with the MSA definition of fishing community, and with how we have treated North Pacific fishing communities in our analysis of impacts. Additionally, there are significant data and analytical challenges if community is defined as a population with shared characteristics rather than place-based. Our analyses currently provide demographic and other information about impacted populations with shared characteristics, which are typically referred to as 'sectors'. The understanding and treatment of these populations in impact analyses is extremely important but does not lead us to support re-defining those populations as 'communities' given the open-ended and ambiguous nature of attempting to analyze any potential grouping. This change would also serve to detract focus from populations and place-based communities affected by a Council action, and potentially broaden the definition of community to an extent it becomes meaningless.

NMFS is requesting input on the use of "current and historical engagement" instead of or in addition to "dependence", however the agency provides no clarity on its interpretation of engagement or how "dependence" should be balanced against "engagement." There are clearly communities whose "dependence" on a fishery will lessen solely as a result of changing stock populations or distributions due to changing ocean conditions. There is also substantial fisheries infrastructure in North Pacific communities that may not be "dependent" on fisheries (e.g., Seattle). While these definitions fall well within the actual language of NS8 which require Councils take into account the importance of fishery resources to fishing communities, until there is better clarity on how the agency intends to rebalance dependency and engagement, we suggest the guidelines continue to include both.

National Standard 9: In describing the background for NS9, the ANPR states that "NS9 requires that bycatch and bycatch mortality (e.g., unobserved mortality due to direct encounter with fishing vessels and gear) shall be minimized to the extent practicable." This statement is incorrect in several aspects. First, NS9 requires that bycatch must be minimized to the extent practicable, and the mortality of such bycatch shall be minimized to the extent that bycatch cannot be avoided. The word 'and' used in the ANPR implies that avoiding bycatch and minimizing mortality are equal aspects of NS9.

However, a clear reading of NS9 indicates that the first priority is to minimize bycatch, and minimizing bycatch mortality is a secondary priority when bycatch cannot be avoided. This must be clarified in the ANPR.

Although the NS9 guidelines note there is a priority to avoiding bycatch, the focus is on “bycatch species” (600.350(d)), which is incorrect. By definition, bycatch means any fish discarded for economic (e.g., non-marketable fish, too small to process) or regulatory reasons (e.g., bycatch limits, retention limits, size limits). Bycatch is not specific to individual fish species; all species of fish, whether targeted or not, can be within the definition of bycatch. For example, in the North Pacific federal fisheries, pollock is both the most discarded and the most retained species. The prioritization of bycatch and bycatch mortality in NS9 more accurately provides direction that fisheries should be managed in such a way that the fisheries target fish that will be retained to the extent practicable, rather than discarded.

Neither the NS9 definition nor the definition of bycatch includes “unobserved fishing mortality”. Unobserved fishing mortality due to encounters with fishing gear is not bycatch. The MSA defines bycatch as follows: “*The term "bycatch" means fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. Such term does not include fish released alive under a recreational catch and release fishery management program.*” If Congress intended unobserved fishing mortality to be considered as bycatch it would have included it in the MSA definition of bycatch. The word “harvested”, as in “...harvested in a fishery...”, clearly means fish that are caught and does not include other types of mortality. This concept is borne out through the definitions contained in 600.305(e)(5) and 600.310(f)(1)(i) where catch is defined as “*the total quantity of fish, measured in weight or numbers of fish, taken in commercial, recreational, subsistence, tribal, and other fisheries. Catch includes fish that are retained for any purpose, as well as mortality of fish that are discarded.*” Although unobserved fishing mortality is referenced in the current guidelines for NS9, it is not considered anywhere in the MSA or in the remaining National Standard guidelines. Further, because unobserved fishing mortality cannot be currently measured or even accurately estimated for any fishery in the U.S., it becomes a ripe target for litigation. Simply adding “unobserved fishing mortality” to the NS guidelines was a regulatory overreach by the agency, and this term should be deleted from any future guidelines for NS9.

The Council is acutely aware of and concerned with the impacts that bycatch can have on underserved communities, as noted in the ANPR. The Council has a long history of managing to minimize bycatch of resources, particularly those that are important to underserved communities, including resources critically important for subsistence and cultural needs of Alaska Native peoples living in remote communities. Bycatch limits for Chinook salmon were first implemented in 1982 and have become further restrictive and effective over time with changes to the fisheries and changes in the abundance of salmon stocks. Similarly, bycatch of herring, crab, and halibut has been minimized to the extent practicable, limits for which have been reviewed and reduced on a continuing basis, while still achieving optimum yield from the fisheries. The Council continues to focus on actions to minimize bycatch to the extent practicable in a manner that is equitable across different fisheries and gear types, especially for resources that are important for underserved communities. These efforts have been adaptable under existing guidelines, and it is very challenging to understand what further guidance could be provided that would accommodate all of the possible scenarios and conditions that every regional council faces.

The existing guidance provides direction for Councils to consider underserved communities and the social, cultural, and non-consumptive impacts of actions. It would not be appropriate and cause a great deal of confusion and likely litigation if the NS9 guidelines were to establish equity requirements for

bycatch management, particularly if the bycatch species is not managed by the Council (e.g., Pacific halibut, Pacific salmon).

It seems implausible that NMFS could develop new guidelines to promote equity in bycatch management without pushing Councils beyond what the MSA requires. Councils currently balance potential conservation benefits and impacts on all users, including underserved communities, with potential harms to fishery participants, fishery-dependent communities, and the ability to achieve optimum yield for the Nation.

Some of the issues mentioned in the ANPR relative to NS9 raise a number of questions and concerns. For example, the ANPR mentions considering bycatch on an ecosystem level. All bycatch in the North Pacific is accounted for in the stock assessments and where applicable, accrues towards the annual catch limits. It is unclear how Councils would take a separate approach to ecosystem consideration or ecosystem impacts of bycatch. These impacts are already evaluated as part of the total removals of fish from the ecosystem within the stock assessments and Ecosystem Status Reports. The ANPR reference to alternative performance-based standards also raises questions about what this is, how it would meet the definition and intent of NS9, and how might standards be applied and monitored. In the North Pacific, performance standards are used in some contractual agreements among LAPP participants to minimize bycatch, which provides flexibility for the fleet to adjust to annual conditions and ecosystem changes, rather than having standards be static in regulations.

National Standard 9 of the MSA requires that “conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.” The word “practicable” includes social and economic tradeoffs in policy decision making regarding management measures to reduce bycatch. Without the practicability clause, there is no standard against which the appropriate level of minimization can be evaluated. The Council agrees with NMFS that discussions of practicability within the existing NS9 guidelines appropriately balance the various complexities of federal fisheries management. If additional approaches are described in further drafts, the Council will provide more detailed input.

Lastly, while several recent NOAA policies are cited in the ANPR, the new 2023 National Seafood Strategy was not mentioned. The agency should be considering its strategy for supporting a domestic U.S. seafood economy in all aspects of guidance, especially given the strategy’s stated focus on enhancing the resilience of the seafood sector in the face of climate change and other stressors. There are very severe stressors in U.S. fisheries right now outside of the direct control of fishery management, including those that are climate-driven, but also relative to workforce, global market access, and fair trade. In the North Pacific, where much of the coastal economy is fishery-dependent, it heightens the need to keep the pending implementation of the National Seafood Strategy at the forefront of our thinking, in order to be aligned with NOAA’s stated goal of supporting a thriving domestic U.S. seafood economy and enhancing the resilience of the seafood sector. Note that our comments on the draft strategy also emphasized that NMFS should assist the Councils and industry in developing alternative management approaches and incentives to increase retention and utilization of wild seafood and reduce discards.

Conclusion

In sum, we believe that major revisions of the guidelines are not needed at this time, and we respectfully request that NOAA consider whether implementing guideline changes creates additional value for the Nation’s fisheries at a time when we have so many pressing needs and insufficient resources to address those needs. We agree the challenges cited for the change (environmental conditions, shifting stocks, and environmental justice considerations) are important and relevant. But the agency needs to address whether

alternative mechanisms (e.g., policies, procedures, research plans), including those it has very recently finalized, are more productive and meaningful to ensure climate adaptability and encourage equity. Overall, modifying the guidelines should not be used as a mechanism to require policy and management changes that are only appropriately made through MSA amendments or reauthorization.

The Council's June meeting occurred two weeks after the ANPR was released, and our next meeting is not until after the comment deadline, in early October. Because these comments were developed with very limited opportunity for input, the NPFMC may provide additional comments following our October meeting. Thank you for considering our comments.

Sincerely,



Bill Tweit
Vice Chair and Acting Chair

Enclosure(s)

cc: Ms. Janet Coit
Ms. Kelly Denit
Regional Fishery Management Councils