



## Mid-Atlantic Fishery Management Council

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# MEMORANDUM

**Date:** July 27, 2023  
**To:** Council  
**From:** Brandon Muffley, Council staff  
**Subject:** Meeting Materials – Advance Notice of Public Rulemaking:  
Guidelines for National Standard 4, 8, and 9

On Thursday, August 10, 2023, the Mid-Atlantic Fishery Management Council (Council) will develop comments in response to the National Marine Fisheries Service (NMFS) Advanced Notice of Public Rulemaking (ANPR) regarding potential future changes to the guidelines for National Standards 4 (allocation), 8 (communities) and 9 (bycatch). The Council will review draft comments developed by staff and provide additional input and direction to be included in a comment letter for NMFS consideration.

Materials listed below are provided for Council consideration of this agenda item.

- Briefing Memo: Draft comments for Council consideration – *to be posted as supplemental material*
- May 9, 2023 Federal Register notice on ANPR request for comments on guideline National Standards 4, 8, and 9

## AGENCY:

National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

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## ACTION:

Advance notice of proposed rulemaking (ANPR); request for comments.

## SUMMARY:

NMFS is publishing this ANPR to alert the public of potential future adjustments the agency may make to the implementing guidelines for National Standards 4, 8, or 9, of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Several ongoing fishing management challenges, including changes in environmental conditions, shifting distributions of fish stocks, and equity and environmental justice considerations that affect fishing communities that are currently or have been historically dependent on the resource, suggest a need to revisit the guidelines to ensure they remain appropriate for current U.S. fisheries management. The intent of this notice is to provide the public with background on some of the specific issues under consideration, seek specific input, and provide a general opportunity for comment. NMFS will take public comment into consideration when it decides whether or not to propose changes to the guidelines for National Standards 4, 8, or 9.

## DATES:

Comments must be received by 5 p.m., local time, on September 12, 2023.

## ADDRESSES:

You may submit comments on this document, identified by “NOAA–HQ–2023–0060”, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal: [www.regulations.gov](http://www.regulations.gov). To submit comments via the e-Rulemaking Portal, first click the “submit a comment” icon, then enter “NOAA–HQ–2023–0060” in the keyword search. Locate the document you wish to comment on from the resulting list and click on the “Submit a Comment” icon on the right of that line.
- *Mail:* Wendy Morrison; National Marine Fisheries Service, NOAA; 1315 East-West Highway, Room 13436; Silver Spring, MD 20910.

*Instructions:* Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to another address or individual, or received after the end of the comment period, may not be considered. All comments received are part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

## FOR FURTHER INFORMATION CONTACT:

Wendy Morrison, Fisheries Policy Analyst, National Marine Fisheries Service, 301-427-8564.

## SUPPLEMENTARY INFORMATION:

### Background

Section 301(a) of the MSA contains 10 national standards for fishery conservation and management. Any fishery management plan (FMP) prepared under the MSA, and any regulation adopted under the MSA to implement any such plan, must be consistent with these national standards.

National Standard 4 (NS4) of the MSA states that conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (a) fair and equitable to all such fishermen; (b) reasonably calculated to promote conservation; and (c) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privilege.

National Standard 8 (NS8) states that conservation and management measures shall, consistent with the conservation requirements of the MSA (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that are consistent with the best scientific information available, in order to (a) provide for the sustained participation of such communities, and (b) to the extent practicable, minimize adverse economic impacts on such communities.

National Standard 9 (NS9) states 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.

Section 301(b) of the MSA requires that the Secretary of Commerce establish advisory guidelines, based on the national standards, to assist in the development of FMPs. These guidelines do not have the force and effect of law; however, the courts often give deference to the agency's interpretations in the guidelines. Guidelines for National Standards 4, 8, and 9 are codified at [50 CFR 600.325](#) (NS4), [600.345](#) (NS8), and [600.350](#) (NS9). NMFS last revised the NS4 Guidelines on May 1, 1998 ([63 FR 24212](#)), NS8 Guidelines on November 17, 2008 ([73 FR 67809](#)), and NS9 Guidelines on November 17, 2008 ([73 FR 67809](#)).

Since these guidelines were last revised, a number of fishery management challenges, including changes in environmental conditions and shifting distributions of fish stocks, suggest a need to revisit the guidelines to ensure they remain appropriate for current U.S. fisheries management. Recent Executive Orders (E.O.s), such as [E.O. 14008](#) on Tackling the Climate Crisis at Home and Abroad, and [E.O. 13985](#) on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, as well as relevant policy documents ( *e.g.*, NOAA fiscal year 2022–2026 Strategic Plan) highlight NMFS' commitment to plan for climate change impacts and to serve stakeholders equitably by engaging underserved communities in the science, conservation, and management of the nation's fisheries, consistent with existing law. NMFS strongly supports the need to further improve adaptability of our management processes in the context of changing environmental conditions and ensure equity and environmental justice (that is, equity applied to environmental laws, policies, and practices) within the fishery management process. As such, NMFS is soliciting input on potential future revisions to the National Standards 4, 8, and 9 Guidelines that would address recent fishery management challenges, bolster climate adaptability, and encourage equity and environmental justice within the fishery management process under the existing provisions of the MSA.

## Background on the National Standards

### National Standard 4

Allocation of fishing privileges under NS4 guidelines refers to the direct and deliberate distribution of the opportunity to participate in a fishery among user groups or individuals. See [50 CFR 600.325\(c\)\(1\)](#). Decisions regarding the allocation of fishery resources are often controversial and challenging. In general, increases to one group result in decreases to another, leading to allocation decisions being perceived as a “win” for some fishermen or fisheries and a “loss” for others. A 2012 report based on interviews with fishery stakeholders regarding allocation found that the concepts of fairness and equity are complicated and often vary depending on individual circumstances (Lapointe 2012 at <https://media.fisheries.noaa.gov/dam-migration/lapointe-allocation-report.pdf>). This report concluded that many stakeholders will continue to view allocations as unbalanced or unfair unless the outcomes are close to the positions they seek.

In addition to the existing NS4 guidelines, NMFS created an Allocation Policy (available at <https://media.fisheries.noaa.gov/dam-migration/O1-119.pdf>) in 2016 that requires the eight Regional Fishery Management Councils (Councils), and NMFS for Atlantic Highly Migratory Species (HMS), to identify a trigger for all fisheries that contain an allocation. The trigger could be based on time, public input, or an indicator. When a specified trigger is met, the Council or NMFS must assess if a revision to the allocation is needed. However, the Allocation Policy does not require Councils or NMFS to implement any changes to the allocation.

### National Standard 8

National Standard 8 requires that an FMP take into account the importance of fishery resources to fishing communities in order to provide for the sustained participation of—and minimize adverse economic impacts on—such communities. However, both NMFS guidance and court precedent establish that minimizing adverse impacts on communities must be considered secondary to the conservation requirements of the MSA. In short, actions meant to address the importance of fishery resources to affected fishing communities must not compromise the achievement of conservation requirements and goals of the FMP. As the current NS8 guidelines clarify: “All other things being equal, where two alternatives achieve similar conservation goals, the alternative that provides the greater potential for sustained participation of such communities and minimizes the adverse economic impacts on such communities would be the preferred alternative.”

### National Standard 9

Fishermen sometimes catch, and may discard, species they do not want, cannot sell, or are not allowed to keep, creating what we know as bycatch. Bycatch is a complex, global issue. The MSA defines bycatch as “fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. This term does not include fish released alive under a recreational catch and release fishery management program.” [16 U.S.C. 1802\(2\)](#). It also does not include incidental catch, or non-target catch, that is sold or kept for personal use. The MSA definition of “fish” does not include marine mammals and birds, thus bycatch of these animals is not included under this standard. NS9 requires that bycatch and bycatch mortality ( *e.g.*, unobserved mortality due to a direct encounter with fishing vessels and gear) shall be minimized to the extent practicable.

In considering potential revisions to the guidance for these three national standards, NMFS is seeking comment on the following issues, in particular (in no specific order).

## Tackling the Climate Crisis

The changing climate and oceans have significant impacts on the nation's valuable marine life and ecosystems, and the many communities and economies that depend on them. Scientists expect environmental changes such as warming oceans, rising sea levels, frequency and intensity of floods and droughts, and ocean acidification to increase with continued shifts in the planet's climate system. Changing ocean conditions are affecting the location and productivity of fish stocks and the fishing industry's interactions with bycatch, protected species, and other ocean users. Some fish stocks are becoming less productive and/or are moving out of range of the fishermen who catch them. These shifts can cause social, economic, and other impacts on fisheries and fishing-dependent communities. As a result, fishing industries and coastal businesses can face significant challenges in preparing for and adapting to these changing conditions. NMFS understands the importance of updating fisheries management to address current and anticipated needs and conditions, including dynamic stock conditions and changing ocean conditions. The issues associated with changing climate conditions that NMFS is requesting comment on in relation to National Standards 4, 8, and 9 are outlined below.

1. *National Standard 4*: Environmental changes are affecting, and will continue to affect, stock distributions and abundances, and have the potential to change the applicability of historical information and current regulations. Most allocations established by the Councils and NMFS are highly complex and supported by extensive analyses. Determinations of many, but not all, of the existing allocations have relied heavily on documented catch or landings during specific time periods. Considering documented catch in the development of allocations is important to help participants maintain access to resources they have been dependent upon, and to document compliance with statutory requirements. However, it is also important to consider the needs of other users, such as new fishermen who would like to enter a fishery, fishermen displaced from other fisheries, and/or existing fishermen who are catching new species in their historical fishing grounds.

NMFS is considering whether updates to the NS4 guidelines would 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. NMFS welcomes specific input on:

- (a) Approaches, consistent with other statutory requirements, for balancing consideration of anticipated or realized changes in stock distributions and/or overall fishery access for historical users, marginalized individuals who may have been inequitably excluded from historical allocations, and new users in such allocation decisions;
- (b) Whether revisions to the NS4 guidelines are needed to reinforce NMFS' Allocation Policy's requirement to complete periodic reviews of allocations; and
- (c) The types of documentation, analyses, and alternative approaches ( *e.g.*, spatial allocations between sectors or gears, mixes of historic use and dynamic allocation schemes) that should be considered when making such allocation decisions.

2. *National Standard 8*: Environmental changes are affecting, and will continue to affect, stock distributions and abundances, creating challenges for communities dependent on those resources. NMFS is requesting comments on options for updating the guidelines to NS8 to better account for these changes and to improve the ability of communities to adapt to these changing conditions.

3. *National Standard 9*: Environmental changes are affecting, and will continue to affect, the distributions of many marine resources, including target fish stocks, bycatch fish stocks and protected resources. This has and will continue to create challenges to maintaining economic viability of fisheries while also ensuring sustainable management of all marine resources. NMFS is requesting comments on options for updating the guidelines to NS9 to better account for and adapt to these changes.

## **Equity and Environmental Justice**

NMFS is committed to advancing equity and environmental justice, including equal treatment, opportunities, and environmental benefits for all people and communities, while building on continuing efforts and partnerships with underserved and underrepresented communities. For purposes of this document, consistent with [E.O. 13985](#), “underserved communities” refers to “populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civil life.” The issues associated with equity and environmental justice that NMFS is requesting comment on are outlined below.

1. *National Standard 4*: The existing NS4 guidelines provide limited guidance on what is meant by “fair” and “equitable”, in order to allow Councils and NMFS the flexibility to interpret these terms as needed within their circumstances given the variability in fisheries across the country. NMFS asserts it would be difficult to provide additional guidance on these terms that will be appropriate across the variety of social, economic, and ecological conditions of the eight Councils and Atlantic HMS.

NMFS requests specific input on:

(a) Approaches to improve consideration of underserved communities, previously excluded entrants, and new entrants in allocation decisions; and

(b) The types of documentation and analyses that should be considered to ensure such allocation decisions are fair and equitable. Commenters on this issue should bear in mind the requirements of MSA sections 303(b)(6) and 303A(c)(3)(B), (c)(4)(C), and (c)(5) that require consideration of current and past participation as well as other considerations when developing limited entry programs, Limited Access Privilege Programs (LAPPs), and initial allocations for LAPPs.

2. *National Standard 8*: NMFS is committed to serving stakeholders equitably by engaging underserved communities in the science, conservation, and management of the nation's fisheries. NMFS does not believe that the existing NS8 guidelines limit NMFS' or the Councils' ability to implement regulations and policies that address inequities or barriers to access for underserved communities. However, NMFS is considering removing language in the NS8 guidelines that states that NS8 “does not constitute a basis for allocating resources to a specific fishing community nor for providing preferential treatment based on residence in a fishing community.” This text may be unnecessary and confusing, given that NS8 does not specifically authorize, or prohibit, allocations to fishing communities. NMFS recognizes that allocations to a specific fishing community may be beneficial in some situations, if supported with appropriate rationale, and if NS8 is not the sole basis for making such allocations.

NMFS is also considering revising the definition of fishing community within the guidelines. The MSA defines a fishing community as “a community which is substantially dependent on or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs, and includes fishing vessel owners, operators, and crew and United

States fish processors that are based in such communities.” 16 U.S.C. 1802(17). The current NS8 guidelines add to the statutory definition by stating a fishing community is “a social or economic group whose members reside in a specific location and share a common dependency on commercial, recreational, or subsistence fishing or on directly related fisheries-dependent services and industries (for example, boatyards, ice suppliers, tackle shops).” 50 CFR 600.345(b)(3). Given the wide range of fishing community structures (including locations of fishing infrastructure and fishing-related economic activity) associated across the U.S. and its territories, NMFS is considering removing or revisiting the requirement for members to reside in a specific location. In addition, NMFS is also considering adjusting how the “fishing community” definition under the NS8 guidelines balances between dependency and engagement. As stocks decrease in abundance or shift distributions, communities will likely need to adapt. One option could be for a community to increase their resilience by decreasing their dependence on one or more particular stocks or fisheries ( *i.e.*, diversifying the fisheries that can be accessed). Thus, NMFS is considering revising the definition to shift from focusing on “dependence” to focusing on “engagement,” as both are included within the MSA definition. Shifting the focus of the definition of “fishing community” towards “engagement” could help provide that those communities that undertake engagement efforts that build up the community's economic resilience, while still being engaged with fisheries, could continue to be considered a “fishing community” under the NS8 guidelines. NMFS requests input on the definition of “fishing community” within the NS8 guidelines, including the use of “current and historical engagement” instead of or in addition to “dependence”.

Finally, NMFS welcomes suggestions on how to appropriately balance the requirement under NS8 for “sustained participation” of fishing communities and the need to improve consideration of (1) underserved communities currently or historically engaged with fisheries, (2) previously excluded entrants, (3) new entrants, and (4) communities with high levels of social or climate vulnerability. NMFS also welcomes input on appropriate measures of social and climate vulnerability for fishing communities.

3. *National Standard 9*: Conflict between fisheries and gears is common in fisheries management, via overlap in geographic areas fished or species caught. Relevant to NS9 is the situation where bycatch in one fishery has negative impacts on another fishery, usually via a restricting limit on total fishing mortality for a shared stock. For example, bycatch of one species in a fishery may reduce the amount of that species available to harvest in a target commercial fishery, recreational fishery, or subsistence fishery. The issue can be further complicated when one or more fisheries in conflict are important for underserved communities. NMFS welcomes input on how the NS9 guidelines could be modified to minimize bycatch mortality in a manner that is equitable across different fisheries and gear types. NMFS also welcomes comments on ways to better balance the needs of bycatch and target fisheries in a manner that is equitable across different fisheries and gear types, especially when one or more fisheries are important for underserved communities.

## **Other Relevant Management Challenges**

There are other fisheries and management issues relevant to National Standards 4, 8 and 9 that are not covered above. NMFS is requesting comment on two of these issues in particular, as described below.

1. *Practicability Standard*: NS9 requires bycatch and bycatch mortality be minimized “to the extent practicable”. NMFS asserts the discussion of practicability within the existing NS9 guidelines appropriately balances the various complexities of federal fisheries management. NMFS welcomes input on how the NS9 guidelines could be modified to further decrease bycatch or bycatch mortality of stocks. NMFS also welcomes input on other ways to improve the guidelines. For example,



NMFS welcomes input on whether the agency should consider: (1) adding provisions to address bycatch on an ecosystem level (as opposed to single species metrics), (2) implementing provisions for alternative performance-based standards, or (3) increasing provisions to document bycatch avoidance.

2. *Reducing Waste*: Some FMPs include management measures that prohibit retention of certain fish species or sizes to ensure fishermen are dis-incentivized from incidentally catching these fish. When these regulatory discards are required, they can lead to significant waste as fishermen are forced to discard (waste) usable catch. NMFS seeks input on revisions to the NS9 guidelines that could encourage provisions to incentivize reduction of waste, including use of innovations that decrease bycatch ( *e.g.*, gear innovations or adjustable area closures that avoid certain species or sizes of fish), decrease bycatch mortality ( *e.g.*, gear innovations that improve the health and survival of discards), or increase use while dis-incentivizing catch of overfished or low productivity stocks ( *e.g.*, allowing a fishery to retain and sell what would otherwise be required to be discarded either through purchasing quota share or other types of compensation; or allowing bycatch to be donated to food shelters so that it is not wasted but also does not lead to economic gains).

NMFS also acknowledges that other relevant management issues have arisen in litigation over the past years in addition to those discussed above. The agency will consider these issues when deciding whether to propose revisions to the NS4, 8, or 9 guidelines, but is not soliciting comment on them here.

## Public Comment

NMFS is soliciting comments on the issues and concepts outlined in this ANPR. NMFS invites comments to help determine the scope of issues to potentially be addressed in a subsequent revision to the National Standard guidelines for NS 4, 8, or 9 and to identify significant issues related to these national standards. NMFS is also seeking additional ideas to ensure that the National Standard 4, 8, and 9 guidelines remain relevant given current and emerging issues facing U.S. fisheries management. All written comments received by the due date will be considered in evaluating whether revisions to the guidelines or related policy documents are warranted. Additionally, NMFS has requested to present this ANPR to the various Regional Fishery Management Councils and the Atlantic HMS Advisory Panel during the public comment period. Please see the appropriate meeting notices on the Councils' and Atlantic HMS Advisory Panel's website for specific date and times. General meeting information is available below.

Atlantic HMS Advisory Panel May 9–11, 2023, <https://www.fisheries.noaa.gov/event/may-2023-hms-advisory-panel-meeting>.

Caribbean Fishery Management Council August 15–16, 2023, <https://www.caribbeanfmc.com/meeting-documents/2-uncategorised/426-august-15-16-2023>.

Gulf of Mexico Fishery Management Council June 5–8, 2023, <https://gulfcouncil.org/meetings/council/>.

Mid-Atlantic Fishery Management Council June 6–8, 2023, <https://www.mafmc.org/council-events/2023/june-council-meeting>.

New England Fishery Management Council June 27–29, <https://www.nefmc.org/calendar/june-2023-council-meeting>.

North Pacific Fishery Management Council June 8–11, 2023, <https://meetings.npfmc.org/Meeting/Details/2993>.



Pacific Fishery Management Council June 20–27, 2023, [https://www.pcouncil.org/council\\_meeting/june-2023-council-meeting/](https://www.pcouncil.org/council_meeting/june-2023-council-meeting/).

South Atlantic Fishery Management Council June 12–16, <https://safmc.net/events/june-2023-council-meeting/>.

Western Pacific Fishery Management Council June 26–30, 2023, <https://www.wpcouncil.org/public-meetings/>.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: May 9, 2023.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

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