



CITY OF
Saint Paul
ALASKA

September 11, 2023

Secretary Gina Raimondo
Attn: Wendy Morrison
U.S. Department of Commerce
1401 Constitution Ave NW, Room 13436
Washington, DC 20230

Re: Revisions to MSA National Standards 4, 8, and 9 Guidelines

Dear Secretary Raimondo:

We are writing on behalf of the City of Saint Paul, a mostly Unangan/Aleut community located in the central Bering Sea and Central Bering Sea Fishermen's Association, the Community Development Quota (CDQ) entity for Saint Paul Island, to express our support for proposed revisions to guidelines for National Standards (NS) 4, 8, and 9 of the Magnuson-Stevens Act (MSA).

1. Impacts of Climate Change on Saint Paul:

As a remote, indigenous community dependent on the Bering Sea's resources, Saint Paul Island is on the frontlines of the climate change crisis. Our community's infrastructure is being increasingly undermined by atypically powerful storms, shifting ice and weather patterns, and rising sea levels.

More importantly, Saint Paul Island's economic viability and cultural survival as a distinct Unangan community is threatened by climate change, as the resources it has historically depended on, both for subsistence and commercial use – fur seals, seabirds, halibut and crab – are in decline, or in the case of crab – snow and Bristol Bay Red King – closed. As an underserved community that is still dealing with the legacy of slavery to the fur seal harvest, first under Russian and then American rule, Saint Paul Island is ill-equipped to withstand these challenges without a legal and regulatory framework that manages fisheries based on the realities of the current era.

The NS provide an important framework for fisheries management bodies and stakeholders. On the whole, since their adoption in 2006, the NS have worked effectively, providing guidance to regional Councils on how to balance often competing and conflicting priorities. Over time, however, the NS have come to be interpreted in a manner that reflects the priorities of large industrial fisheries, which are well represented on Council bodies, and the realities of a previous era, to the point that policies meant to ensure equity in fishing allocations or provide for the sustained participation of small fishing communities, are often trumped by economic and profit considerations.

Moreover, all too often, as fisheries have declined and some have been restricted or closed, the burdens of conservation have fallen disproportionately on the shoulders of fishermen and small boat fleets based in remote coastal communities, many of them Alaska Native/Native American,

as bycatch usage has effectively taken priority over the directed fisheries for those bycatch species. This trend has been magnified by the lack of diverse representation of underserved communities and tribal entities on Council bodies.

The sad irony of this situation is clear to see: Saint Paul Island is located amidst one of the world's most profitable commercial fisheries and yet it faces potential extinction from a lack of access to these resources, as well as from resource declines. Saint Paul Island's predicament is shared by numerous other small communities that are populated mostly by indigenous and/or underserved populations. This state of affairs is inequitable, violates federal trust responsibilities¹ towards aboriginal Americans, and is contrary to the Biden Administration's pledge to support underserved communities through a comprehensive Equity and Environmental Justice Strategy (EEJ) and other initiatives. More importantly, it demonstrates that the weighting of the various NS required under the MSA, as well as the NS guidelines themselves, needs recalibrating.

Updating the NS 4, 8, and 9 guidelines would also be responsive to Executive Orders by the Administration to advance racial equity and support for underserved communities through the federal government, and to strengthen tribal consultation and nation-to-nation relationships. As is stated in the first Executive Order: *"advancing [racial] equity requires a systematic approach to embedding fairness in decision-making processes, executive departments and agencies"* and *"to recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity."*²

Fairness must be embedded in the NS guidelines to redress inequities in current policies.

2. Climate Change, Fisheries Management, and the National Standards:

Climate change and its impacts are clearly an existential threat to the United States and the world. It will affect every aspect of our lives: how and where we live, how we build, how we grow food, and yes, how we manage our fisheries.

U.S. Secretary of Defense, Lloyd Austin stated in 2021 that:

*"[w]e face all kinds of threats in our line of work, but few of them truly deserve to be called existential. The climate crisis does," adding that "climate change is making the world more unsafe and we need to act."*³

¹ Bureau of Indian Affairs re Trust Responsibility:
<https://www.bia.gov/faqs/what-federal-indian-trust-responsibility>

² Executive Orders:
<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>

<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>

³ Secretary Austin comments: <https://www.defense.gov/News/News-Stories/Article/Article/2582051/defense-secretary-calls-climate-change-an-existential-threat/>

More recently, United Nations Secretary General, Antonio Guterres affirmed that:

“[f]or the entire planet, it is a disaster. Climate change is here. It is terrifying. And it is just the beginning. The era of global warming has ended; the era of global boiling has arrived. The air is unbreathable. The heat is unbearable. And the level of fossil fuel profits and climate inaction is unacceptable. Leaders must lead. No more hesitancy. No more excuses. No more waiting for others to move first.”⁴

Nationwide, fishery stakeholders and managers are grappling with the challenges of climate change and their disproportionate impact on underserved and minority stakeholders and communities. The emerging national consensus and direction is that fishery stakeholders and managers need to be flexible, adaptable, and able to diversify to contend with the instabilities and resource shifts inherent in this new global era.

To do so, stakeholders and managers need the tools – including the regulatory flexibility, the ability to implement decisions expeditiously, and the financial support – to achieve these objectives. The City of Saint Paul and CBSFA believe that updating the NS guidelines will provide Councils and stakeholders with additional tools. It will also provide greater clarity on how to consider future fishery-management actions to account for the effects of climate change and how these intersect with equity and environmental justice (EEJ) concerns.

Congress mandated through the MSA that the Secretary of Commerce develop guidelines for each National Standard to assist in the development of fishery management plans. The Secretary has the authority to update NS guidelines periodically to confront the realities and challenges that fishery stakeholders and regional Councils are facing in the 21st Century. In 2016, for example, the Secretary undertook an effort to update the guidelines to NS 1, 3, and 7. What follows are our comments and recommendations regarding NS 4, 8, and 9 guidelines.

3. Recommendations regarding proposed NS Guideline Revisions:

The Advanced Notice of Proposed Rulemaking (ANPR) requests feedback on NS 4, 8, and 9 guidelines and focuses on two current challenges: 1) climate-related impacts on fisheries; and 2) promoting equity and environmental justice (EEJ) in fisheries. More specifically, the ANPR requests input on how, or whether, these guidelines should be updated to be more responsive to the issues and problems resulting from each of these challenges, and how to improve consideration of underserved/underrepresented communities.

To be clear, Saint Paul Island’s responses to this request come from the standpoint of a historically underserved and underrepresented Alaska Native community. The NS guidelines use the terms “*treaty Indians and aboriginal Americans*” to refer to some of the original inhabitants of the United States and its territories. While our comments will attempt to use the terms “*treaty Indians and aboriginal Americans*” with respect to proposed edits and additions to the

⁴ UN Secretary General: <https://www.un.org/sg/en/content/sg/speeches/2023-07-27/secretary-generals-opening-remarks-press-conference-climate>

guidelines, it will use the terms Alaska Natives, Native Americans, Indigenous Americans, or tribal nations in the narrative. The interchangeable use of these terms are not meant to be exclusive of other original populations such as Native Hawaiians, Polynesians, Samoans, Micronesians, and other Pacific Islanders in the Pacific region, as well as historically underserved populations on the mainland coastal United States such as the Gullahs, or in the Caribbean territories of Puerto Rico and the Virgin Islands, that have been in existence since prior to the establishment of the United States in 1776 and the adoption of the Constitution in 1789.

A. NS General Revisions:

In this regard, one of our first recommendations is that the guidelines as a whole would benefit from a definition or clarification of the terms “*treaty Indians and aboriginal Americans*” and the populations these terms encompass. This could be achieved either under the definitional section of the NS General guidelines in the introduction, or in the alternative under NS 4.

The NS General guidelines would also benefit from definition of climate change. There are a few references to “environmental factors” or “climatic conditions” throughout the guidelines, but climate change is not mentioned directly. It should be defined up front in the context of impacts on oceans, marine life, fishery resources, fishermen, and coastal communities, and embedded throughout the guidelines, including NS 4, 8, and 9.

In addition, a long disregarded but important source of science and information in fisheries management, Local and Traditional Knowledge (LTK), should be defined up front under the General guidelines and its inputs and usage embedded throughout the various guidelines. Its long overdue recognition is also an important EEJ issue, as the possessors of these sources of knowledge are overwhelmingly from underserved and underrepresented communities and have long been ignored, to the detriment of better fisheries management. Most appropriately this would be done under NS 2, but since the guidelines to this standard are not being reviewed, then under General.

Similarly, General guidelines *Section (c)(1) Stocks that require conservation and management* would benefit from consideration of the following additional factors (***bolded***):

(#) The stock is important to the economic and cultural survival of treaty Indian or aboriginal American fishermen, communities, or tribal nations.

(#) Local and Traditional Knowledge sources indicate that the stock or fishery, or certain habitats are important to a community, tribe, or regional economy

These factors would be responsive to EEJ issues. And:

(#) The stock is in decline due to climate change and requires enhanced levels of conservation and management, including habitat protections.

Which would be responsive to climate change-related impacts.

B. NS 4 Recommendations:

NS 4 requires that when:

“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.”

The reality is that, historically, allocations have not always been fair and equitable, especially towards racial minorities and underserved communities, including aboriginal Americans.

On this matter, the current NMFS guidelines on NS 4 advise that:

“[w]here relevant, judicial guidance and government policy concerning the rights of treaty Indians and aboriginal Americans must be considered in determining whether an allocation is fair and equitable.”

However, under the watch of regional Councils, Native Americans and their communities have been progressively excluded or have lost access to the resources they depend on, and as a result have continued to decline. Many of these are communities and tribal nations with unique languages and cultures that are in the process of becoming extinct. These trends have been exacerbated by the impacts of climate change on the fishery resources these Native communities tenuously depend on.

These developments, moreover, violate the federal Indian trust responsibility. This responsibility is a legally enforceable fiduciary obligation on the part of the US government to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages concerning the health, safety, and welfare of their citizens. This trust responsibility is derived from the sovereign status granted by the US Constitution to Indian tribes and has been affirmed by a number of Supreme Court cases. These responsibilities are further enshrined by the recognition of a government (federal) to government (tribal) relationship between the US and the federally recognized tribal nations.

- (i) NS 4 Recommendations regarding “Treaty Indians and Aboriginal Americans:”

Given our greater understanding in recent years of how federal policies including regional Council actions may affect Native Americans, we recommend greater clarity on what these rights are, what federal obligations are to Native Americans in the context of providing for their safety and welfare in fisheries management, and what regional Councils must do to protect them, and balance their needs with those of other fishery stakeholders.

It must be noted that notwithstanding the importance of the trust responsibility and the separate realm in which federal and tribal relations operate under the US constitutional and jurisprudential framework, there are only two references in all of the guidelines regarding the need to consider the rights of treaty Indians and aboriginal Americans. These references are found in NS 4 itself, and briefly in NS 1. The reference in the NS 4 guidelines is brief and provides little guidance on what the “rights of treaty Indians and aboriginal Americans” are in relation to fishery allocative decisions.

We recommend, therefore, that the language in the NS 4 guidelines concerning the “*rights of treaty Indians and aboriginal Americans*” be separated under a new *Section (3)(i)(C) Factors in Making Allocations – Fairness and Equity*, and that greater guidance be provided on these rights in the context of allocations of fishing privileges and the federal Indian trust responsibility. Clearly, allocative decisions that lead to the continued loss of participation and decline of Native Americans, even in the context of tightened quotas due to stock declines, contravene these rights.

(ii) NS 4 Recommendations regarding Communities:

We also believe that NS 4 guidelines would benefit from language providing fishing communities and tribal nations with fairness and equity in the allocations process. In remote and isolated locations such as Saint Paul Island, fishermen are often inseparable and indistinguishable from the communities they live in, and the tribal nations they are members of. Allocative tools that empower such communities, such as Community Quota Entities (CQEs), Regional Fishery Associations (RFAs) or the CDQ Program are often the resident fishermen’s first and last line of defense. Given the magnitude of the challenges and the associated costs, individual fishermen are often unable to protect their stake in the fisheries. However, in concert with other fishermen, and under their communities’ or tribal nation’s protective umbrella, they are better able to defend themselves.

We therefore recommend that under NS 4 guidelines *Section (3)(i) Factors in Making Allocations – Fairness and Equity*, provisions be added that consider the importance of allocative measures to Native and non-Native fishing communities and tribal nations, as tools for responding to the impacts of climate change and EEJ concerns.

The language we recommend under a new Section (3)(i) could read as follows: ***“allocations of fishing privileges shall not adversely impact participants in other fisheries. Councils should weight the interests of a directed fishery or communities that participate in directed fisheries over the interests of a fishery that harvests another fishery’s target stock as a non-target stock. If the directed fishermen or communities are members of federally recognized tribes, then Councils shall in addition consider judicial guidance and government policy concerning the rights of treaty Indians and aboriginal Americans in determining whether an allocation is fair and equitable.”***

(iii) NS 4 Recommendations regarding Community Allocations and the Connection to NS 8:

NS 4 states that “...[i]f it becomes necessary to allocate or assign fishing privileges among various U.S. fishermen, such allocation shall be: (1) Fair and equitable to all such fishermen. (2) Reasonably calculated to promote conservation. (3) Carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

A recent action by the NPFMC allocated fishery resources to two underserved, mainly minority communities, and in one instance, a primarily Alaska Native community. The industrial groundfish sector sued NMFS and was successful in overturning the Council’s decision, which had been over a decade in the making. The judge’s decision contended that the action allocating

to communities relied on guideline language for NS 4, requiring that it be “reasonably calculated to promote conservation.” And because the court found that the Council/NMFS had not adequately demonstrated that the allocative action promoted conservation, it vacated the rule, and remanded it to the agency for reconsideration.

In this example, NS 4 guidelines language worked to contravene the clear objective of NS 8 to require Councils to provide for the sustained participation of communities. This was a clear signal to the federal fisheries management system – the Agency and the Council – that the National Standards guidelines, in particular for NS 4 and NS 8, need to be revised, clarified and coordinated to prevent just this kind of contravention from happening in the future. How can regional Councils operate successfully if one National Standard guideline can be interpreted to outweigh the requirements of another National Standard?

We recommend therefore that the NS4 guidelines be updated to allow Councils to make allocations to communities in a manner consistent with their responsibilities under NS8. If a set of alternatives equally address conservation considerations, the Council should select the alternatives that most successfully minimize impacts to fishing communities, in particular underserved communities and ones that are tribally based.

More broadly, the outcome of the abovementioned case does nothing to address NOAA’s own commitment to environmental and social justice. The fact is that many Native communities are facing decline and extinction, when they have thrived and existed in balance with surrounding fishery resources for thousands of years, and even into the recent historical period. The status quo does not adequately address the larger economic and social costs to a state and the nation when communities fail and their residents, akin to displaced persons and climate change refugees in other parts of the world, end up in larger urban areas unable to adapt.

C. NS 8 Guideline Recommendations:

(i) NS 8 on Treaty Indian and Aboriginal American Communities:

Another way to address the concerns expressed under NS 4 but focused on the sustained participation of Native communities, is through the NS 8 guidelines. There is no mention in these of the unique constitutional and legal standing of Native American fisheries-dependent communities, and the heightened consideration these are entitled to vis-à-vis other communities in allocative and other fisheries management decisions. In the case of a Native American community, the current NS 8 requirements, to provide for the sustained participation of that community and minimize adverse impacts on it, should require additional consideration of the trust responsibility, relevant treaty rights, and the fact that in most instances, tribal communities and nations are unique entities, culturally and linguistically, whose decline and loss does irreparable harm to the nation.

We would recommend, therefore, that NS 8 guidelines *Section (b)(1) General* should include the following language or something similar (**bolded**): “*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. **Where the fishing community***”

is a treaty Indian or aboriginal American community, the FMP should discuss the rights that are affected, and highlight the precedence that these rights have from a legal perspective.”

In addition, a new *Section (b)(5)* could be added defining the terms ***“treaty Indian and aboriginal Americans,”*** as well as the terms ***“tribal governments or nations.”***

Finally, *Section (c)(3) Analysis*, should include the following: ***“Where the fishing community is a treaty Indian or aboriginal American community, the analysis should provide the best available data on the tribal affiliations of these communities, the relevant treaty rights or federal responsibilities, applicable Local and Traditional Knowledge (LTK), as well as the positive and negative social, economic, and cultural impacts of alternative management measures, including on subsistence and ceremonial uses.”***

(ii) NS 8 Recommendations on the Definition of Fishing Community:

On this matter, Saint Paul does not dispute the obstacles that have historically affected other underserved communities and minority groups engaged in fisheries, such as the Hispanic, Asian, or 2SLGBTQI+ American communities. However, the problems and fixes for these communities, are different than those of traditionally-defined communities such as Saint Paul with defined geographic boundaries, and very unique histories and cultures. Many of the fixes for these non-geographic communities, whether better working or pay conditions, or non-discriminatory policies, fall outside the realm of the NS. It truly is an apples and oranges comparison.

Recent Council actions, however, have included discussions in which the needs of different underserved communities were perceived as being in conflict with each other, or that one group is more worthy of protection and consideration than another. Councils and stakeholders would benefit from guidance on how to sort through these issues, and balance the different considerations, as well as the legal protections applicable to each group.

Regardless, we support the definition of “fishing community” as one that is geographically-based and circumscribed to specific boundaries as is commonly and widely understood for communities to have. The sense of community that Saint Paul and other Native and non-Native communities have is very much tied to a specific location endowed with unique natural resources and geographic features, which in turn influence the economy, languages and cultures of these communities.

If NOAA decides to broaden the meaning of “fishing community” then it will likely be necessary to differentiate between traditionally defined geographically-based communities and broadly defined ones that are centered around common interests or activities. It will also likely be necessary to establish a hierarchy of communities in which the concerns of some communities are more important than those of others, who because they are not tied geographically, are more flexible and able to adapt to changing conditions.

(iii) NS 8 Dependence or Engagement:

How to appropriately balance requirements for sustained participation of fishing communities with the need to improve consideration of changing fisheries conditions due to climate change is a difficult discussion.

Saint Paul Island understands that after fisheries have changed or migrated in response to a changing climate, and communities that were once engaged in a fishery have potentially been stranded, or left behind, at some point that community's classification as being dependent on a particular fishery changes too, as new facts are created in the waters. In addition, new species to which communities elsewhere have a historic, cultural, or economic interest, may migrate into new waters, creating opportunities for the recipient communities.

In the case of Saint Paul Island, for example, for the past thirty plus years, the community has been set up to process crab. Saint Paul Island's economy is largely monoculture and dependent largely on the Bering Sea snow crab fishery, and it will remain highly dependent on this classification into the future for various purposes, including applying for federal assistance, or to protect important community protection elements of the Crab Rationalization Program. As the CDQ entity for Saint Paul Island, CBSFA is heavily invested in Bering Sea crab quota, owns and operates crab fishing vessels, and is economically tied to the management and restoration of the crab resource. CBSFA has further maximized these crab assets on behalf of the community by bringing quota to Saint Paul Island for processing.

Saint Paul Island is therefore both highly dependent and engaged with the crab fisheries that have been shut down in recent years, and in the community's psyche and mindset this will continue for many years. Like other communities, Saint Paul Island's sense of self and its culture, are deeply informed by the community's historic interaction with certain species such as fur seals, halibut, and crab among these.

Telling a community that it is no longer officially considered engaged or dependent on a particular fishery, particularly a Native one, based on certain numeric or chronological criteria, entails a challenging effort at social/cultural engineering. It may be a bad example, but it would be akin to telling Americans that they can no longer drink coffee for breakfast or eat turkey at Thanksgiving, a holiday associated with this bird for centuries.

From an economic perspective, if providing for that community's sustained participation remains a consideration, it would also require assisting the community to access new fishery resources, many of which are already rationalized, and therefore unavailable, and developing the necessary infrastructure to engage with new migrating fisheries.

To improve a community's ability to adapt to changing climate conditions a number of tools could be considered, most of which are outside the scope of the NS guidelines being reviewed, including:

- Enhanced habitat protections in areas adjacent to communities through a genuine and more flexible Essential Fish Habitat process, where community and LKTK input is sought on areas that are sensitive and important nurseries and feeding grounds;

- Improved forecasting regarding variations in fish stocks year to year, to improve planning and predictability; and
- Increased use of tools such as community quotas with fish quotas set aside for individual communities in order to surmount obstacles regarding access to rationalized fisheries by small boat fisheries.

D. NS 9 Guideline Recommendations

Another pathway for responding to climate change and EEJ issues is through revisions to NS 9 guidelines. Historic directed fisheries, including those on which *treaty Indian and aboriginal American* communities depend, should be prioritized over bycatch fisheries to allow for more equitable allocations and provide for sustained community participation.

For starters, there is no mention of the need to consider “*treaty Indian or aboriginal American rights*” (NS4) under these guidelines. The NS 9 directive to “*minimize bycatch to the extent practicable*” should not trump these rights, the trust responsibility, and the responsibilities towards tribal members and governments at stake in the government-to-government relationship. Participants in fisheries that result in bycatch of species harvested in other directed fisheries are still accruing incomes and in many instances, multimillion-dollar revenues. In several Alaskan fisheries, this reality has come at the expense of the sustained participation of Native communities, who are unable to fish, or whose allocative and subsistence rights are severely limited, or denied even, impacting their welfare, safety, and existence.

We would recommend, therefore, that the following language or something similar be inserted as a consideration in the guidelines under Section “(d) *Minimizing bycatch or bycatch mortality*: ...[i]n their evaluation, the Councils must consider the net benefits to the Nation, which include, but are not limited to: ***Negative impacts on treaty Indians and aboriginal Americans.***”

Furthermore, the following section of the NS 9 guidelines -- (3) *Select measures that, to the extent practicable, will minimize bycatch and bycatch mortality*, should include as a factor a new subsection (***K***) ***Effects on the treaty rights of Indians and aboriginal Americans.***

E. Conclusion:

To conclude, the City of Saint Paul and CBSFA applaud NOAA Fisheries’ initiative to update the NS 4, 8, and 9 guidelines.

The United States and the rest of the planet are undergoing enormous challenges due to climate change, which tend to disproportionately impact underserved and underrepresented populations. Whether it is massive fires wiping out coastal communities such as Lahaina in Maui, red algae events in the Gulf of Mexico, or more powerful hurricanes, storms and floods fed by warmer temperatures, the impacts are real and indisputable. National security experts agree that climate change and its impacts on our populations and natural resources are one of the biggest threats to humanity. Our nations laws and guidelines designed in the previous century must be adjusted to reflect these new realities.

In the words of our third President, Thomas Jefferson, author of the U.S. Declaration of Independence and the U.S. Constitution:

“I am not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes

more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.”

Sincerely,



Phillip A. Zavadil

Phillip Lestenkof

City Manager, City of Saint Paul

President, Central Bering Sea Fishermen’s Association