



NMFS Issues Highly Anticipated Salish Sea Nearshore Programmatic Biological Opinion

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[Rachael Lipinski](#) and [Tyson Kade](#)

On June 29, 2022, the National Marine Fisheries Service (“NMFS”) published the highly anticipated [Salish Sea Nearshore Programmatic Biological Opinion](#) (“SSNP”) and Incidental Take Statement (“ITS”). The intent of the SSNP is to streamline Endangered Species Act (“ESA”) and Essential Fish Habitat (“EFH”) consultation processes for a range of activities requiring authorization from the Army Corps of Engineers (“Corps”). The SSNP’s coverage includes 14 activity categories that generally involve: (1) construction of new in-water and overwater structures, (2) expansion of existing in-water and overwater structures, and (3) repair and replacement of in-water and overwater structures. The SSNP is available for immediate use by applicants with projects requiring a Corps permit in the defined Salish Sea geographic location, within the bounds of the specifically outlined actions, and meeting the criteria outlined in the opinion.

What activities are covered by the SSNP?

The SSNP is applicable to certain activities in the Salish Sea, extending into estuaries up to the highest point of saltwater influence, that require Corps permits under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. Covered activities include repair, maintenance, and installation of culverts, bridges, utilities, stormwater facilities and outfalls; shoreline modifications; installation, repair, replacement of navigation aids, scientific measurement devices, tideland markers, buoys, and maintenance of in-water or overwater structures (including, piers, ramps, floats, and boat ramps); maintenance dredging; and habitat enhancement activities that impact nearshore areas of the Salish Sea and result in effects to ESA listed resources.

The SSNP does *not* cover activities that result in a long-term loss of nearshore habitat function to ESA listed species and their designated critical habitat. To be included, proponents of these activities are required to include conservation measures to offset long-term impacts on the quality of nearshore habitat in the Salish Sea. The SSNP includes NMFS’ [Puget Sound Nearshore Habitat Conservation Calculator](#) (“Conservation Calculator”) that allows for the assessment of habitat impacts and benefits and the calculation of conservation offsets.

How are impacts analyzed under the SSNP?

The SSNP includes a set of activity categories and specifies project design criteria (“PDC”) for those activities that, when implemented: (1) help avoid and minimize adverse effects of activities that fall in the covered categories on listed species and their critical habitat; (2) provide parameters for eligible activities and their effects to enable the agencies to provide an analysis of the effects of these activities that is predictable and foreseeable; and (3) ensure that activities, authorized or carried out under SSNP, either individually or in total, do not jeopardize the continued existence of species listed under the ESA, or adversely modify their designated critical habitat.

Notably, for the repair or replacement of existing structures, the SSNP applies the recent [Joint Memorandum](#) from NMFS and the Corps (see VNF alert [here](#)) to determine which effects are part of the environmental baseline and which effects are attributed to the action. In the SSNP, NMFS generally assumes that the structures to be repaired or replaced could have existed (without the proposed repair or replacement) and would have caused the same type of effects for an additional 10 years, and that any effects that the structure would have caused during that 10-year time period will be considered part of the environmental baseline. Additionally, NMFS concludes that nearly all repair or replacement projects will extend the life of all or part of existing structures, and that accordingly, the effects of the action include the impacts caused by the repaired or replaced structures during its newly extended life. In the SSNP, NMFS assumes the proposed action will extend the life of the structure, or the part of the structure being repaired or replaced, by 40-years for overwater and in-water structures and by 50 years for shoreline stabilization (such as marine bulkheads).

What avoidance, minimization, or conservation measures are required?

The SSNP requires that covered activities comply with a comprehensive suite of general construction measures (“GCM”) that, when combined with the PDCs, will reduce the impacts of these activities to nearshore habitat functions for ESA listed species and their designated critical habitat. In addition, for certain activity categories that result in an enduring loss of nearshore habitat quality, conservation offsets are required to compensate for the permanent loss of habitat quality. The SSNP provides several options for conservation offsets, including: enhanced avoidance and minimization design features; within-basin applicant-responsible habitat improvements; funding a local habitat restoration sponsor to support a within-basin restoration project; and purchasing conservation credits from a NMFS-approved conservation bank, in-lieu fee program, and/or crediting provider. The SSNP also recognizes that some restoration activities may generate conservation offsets, such as pile removal, riparian planting, removal of shoreline armoring, derelict vessel removal, or removal of overwater structures. By requiring these offsets, the SSNP incorporates a no-net loss approach to maintaining habitat forming process and nearshore habitat quality.

What incidental take is authorized?

The SSNP includes the following incidental take statement that provides several surrogate measures for the anticipated incidental take of Puget Sound Chinook salmon, Hood Canal summer-run chum salmon, Puget Sound steelhead, Puget Sound/Georgia Basin yelloweye rockfish, Puget Sound/Georgia Basin bocaccio, and Southern Resident Killer Whales.

Incidental Take Pathway	Amount or Extent of Incidental Take
Listed ESA Salmonids captured annually (number salvaged)	10,000 juvenile salmon, steelhead, and rockfish (capture of rockfish is likely to be uncommon) annually.
Pile Driving	Annually 1,400 piles would be repaired, replaced, installed. In addition, in the first two years of SSNP implementation, we expect 2,800 piles to be repaired, replaced, or installed annually. In total, we expected no more than 5,600 piles to be repaired, replaced, installed during the first two years of SSNP implementation.
Entrainment, injury, or death from dredging operations (cubic yards)	≤ 34,000 cubic yards of volume of material dredged for vessel access and ≤ 500 cubic yards of volume material dredged for functionality of culverts, intakes, and outfalls annually. In the first two years of SSNP implementation, we expect up to 68,000 cubic yards of volume of material to be dredged for vessel access and ≤ 1,000 cubic yards of volume material dredged for functionality annually. In total, we expect no more than 136,000 cubic yards of volume of material to be dredged for vessel access and ≤ 2,000 cubic yards of volume material dredged for functionality during the first two years of SSNP implementation.
Harm caused by shoreline modification (bulkhead, etc.)	24,000 linear feet repair, replaced, installed (new) annually. Up to 48,000 linear feet repair, replaced, installed (new) annually during the first two years of SSNP implementation. In total, we expect no more than 98,000 linear feet of shoreline modification will be repaired, replaced, installed during the first two years of SSNP implementation.

Visible suspended sediment (turbidity) and small amounts of contaminants released during in-water construction and dredging	Turbidity levels shall not exceed 5 nephelometric turbidity units (NTUs) more than background turbidity when the background turbidity is 50 NTUs (monitored and reported to NMFS and the Corps) or less, or there shall not be more than a 10 percent increase in turbidity when the background turbidity is more than 50 NTUs.
Stormwater management	NMFS review and verification of stormwater management plan and stormwater information provided prior to the Corps authorizing or carrying out a project
Harm due to the presence of in-water and over-water structures and vessel impacts	220,000 square feet of in-or over-water structure from new, repair, or replacement annually. Up to 440,000 square feet of in-or over-water structure from new, repair, or replacement annually during the first two years of SSNP implementation. In those first two years, we expect a total of no more than 880,000 square feet of in-or over-water structure will be repaired, replaced, or constructed (new).
Harm caused by resuspension of contaminants during sediment remediation	50 acres of area remediated annually. There are no sediment remediation projects in the group of pending consultations, so no additional extent of take is predicted.

Any permittee also must comply with the terms and conditions that implement several reasonable and prudent measures regarding minimization of incidental take and monitoring and reporting obligations.

Implications

The SSNP should be a helpful tool for many eligible projects and will streamline the consultation process for project proponents and the federal agencies. Applicants seeking Corps authorization can follow the SSNP design criteria, allowing them to take advantage of the SSNP programmatic consultation. To utilize the SSNP, applicants must submit a completed JARPA or ENG to the Corps, as well as other documentation outlined in the SSNP. The Corps website provides Lists of Requirements for each type of activity covered by the SSNP. Applicants with currently pending ESA consultation requests do not need to submit any materials at this time. If applicants do not want to or are unable to follow the SSNP criteria, their proposed actions will be evaluated as an individual ESA consultation and will undergo a project-specific analysis.

For More Information

Van Ness Feldman closely monitors and counsels clients on the Endangered Species Act and other regulatory developments. If you would like more information about the SSNP, or on other ESA compliance issues, please contact [Tyson Kade](#), [Duncan Greene](#), [Jenna Mandell-Rice](#), [Erin Anderson](#), [Rachael Lipinski](#) or any member of the firm's Environmental practice in Seattle, WA at (206) 623-9372, or in Washington D.C. at (202) 298-1800.

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