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Permitting Shoreline Development in Puget Sound

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NAVIGATING NMFS REQUIREMENTS IN PUGET SOUND

1. Why this is important for the shellfish industry
2. What caused the change in NMFS regulations
3. What the new NMFS regulations mean
4. The advantages and disadvantages of the new regulations
5. Strategies to effectively navigate them

WHY IS THIS IMPORTANT

- New NMFS regulations will significantly affect the timeframe and cost for *any* shoreline or overwater development in Puget Sound
- Affects piers, docks, bulkheads, piling and mooring installation, processing facilities, dredging, etc. Applies to both new projects and maintenance projects.
- *Could* apply to things like FLUPSYs and in-water dikes
- *Could* be a framework used in other geographic areas with heightened endangered species concerns, particularly salmonids

BACKGROUND

- By 2019, NMFS had a 2-3 year backlog of requests for consultation on permits for nearshore projects in Puget Sound. Because of potential impacts to salmon and Southern Resident Killer Whales (SRKW), NMFS concluded all projects required formal consultation.
- After years of discussion, Corps and NMFS could not agree on a framework for the programmatic consultation, evaluation of impacts, and mitigation requirements
- NMFS decided to batch together 39 applications (submitted between 2017 and 2020) for which consultation was outstanding and evaluate together their impacts on listed species and designated critical habitat

NMFS JEOPARDY OPINION PART 1

- NMFS issued a blanket Biological Opinion for all 39 projects in November 2020
- NMFS drafted an Incidental Take Statement (ITS) identifying the impact of any incidental taking, as well as a jeopardy analysis, which evaluated whether the take would threaten the survival of the species
- The jeopardy analysis concluded that the 39 nearshore projects were likely to jeopardize the continued existence of Puget Sound Chinook salmon and SRKW and adversely modify their critical habitats
- NMFS used a new impact and mitigation calculator to determine that only 2 of the 39 projects provided sufficient mitigation. The permit applicants had relied on a previous impact and mitigation calculator routinely used by both the Corps and Washington Department of Fish and Wildlife.
- For the remaining 37 projects NMFS required either additional mitigation, including project modifications, on-site or off-site mitigation, or purchase of mitigation credits from an NMFS-approved conservation bank, in-lieu fee program, and/or crediting provider

NMFS MITIGATION CALCULATOR

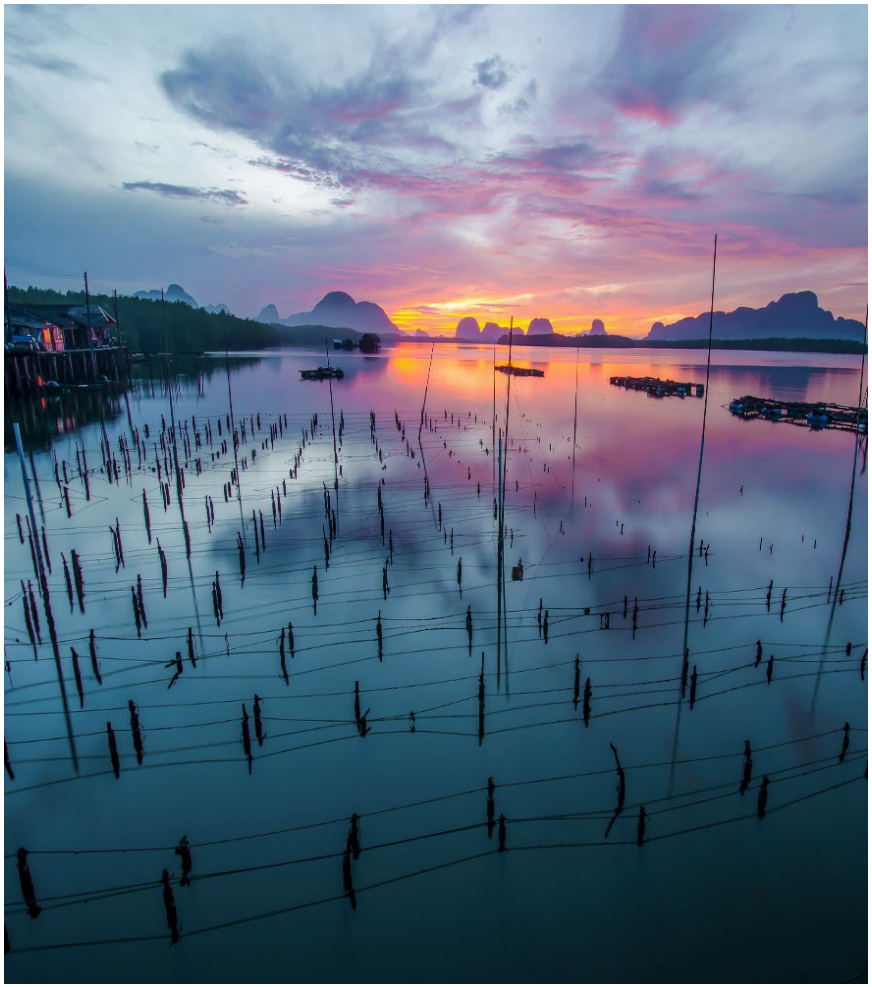
- Applicants must account for the impacts of an existing structure over its useful life
  - Departure from previous impact and mitigation calculators, which considered existing structures part of environmental baseline
  - Useful life of structures assumed to be 40 years
  - These impacts are considered on top of any project-specific impacts
- Dramatically increases the cost of mitigation for maintenance projects
- NMFS will allow applicants to fulfill mitigation obligations by purchasing compensatory conservation credits from third parties, but it is unclear if enough credits are available or affordable
- Additional mitigation strategies proposed by NMFS may require additional work beyond that described in the initial application, raising concerns by the Corps that mitigation would require additional Corps authorization

NMFS JEOPARDY OPINION PART 1 - KEY ISSUES

1. Created delays in project review and approval
2. The cost of mitigation can far exceed the cost of the project creating a disincentive to repair failing structures
3. The formula used by NMFS to calculate mitigation credits has been a moving target, changes with little or no notice, and lacks a clear scientific basis

NMFS JEOPARDY OPINION PART 2 – THE SSNP

- June 2022 – NMFS releases the Salish Sea Nearshore Programmatic Consultation Biological Opinion
- Intended to programmatically deal with Salish Sea nearshore and in-water projects (similar to shellfish aquaculture Biological Opinion)
- Largely replaces previous jeopardy opinion framework
- Updates mitigation calculator
- Includes new BMPs



SSNP ADVANTAGES

1. Quicker timeframe – as little as 2-4 weeks for review and approval
2. Should reduce NMFS backlog for other consultations
3. Provides general impact/mitigation assumptions in calculator that can be utilized by applicants

SSNP DISADVANTAGES

1. Assumptions in conversion and mitigation calculator are not site-specific and may be incorrect
2. In most cases, the new version of the calculator has resulted in greater mitigation requirements, sometimes increasing mitigation costs by over 200%
3. If changes to calculator are required, it can delay review and approval times
4. If applicants choose not to use the SSNP, NMFS review and approval can take years
5. No current framework to “bank” credits for future use
6. Can significantly increase costs of emergency repair work

STRATEGIES ON HOW TO PROCEED

- Do not rely upon NMFS' initial calculations or their analysis – hire someone familiar with the calculator that can do a site-specific analysis
- Plan early and prepare for delays – coordinate with local permitting efforts and Corps permits
- Plan to use SSNP unless you have more than 12-18 months lead time or an already-approved HEA

STRATEGIES FOR HOW TO PROCEED

- Carefully check for changes in the calculator – NMFS will usually let you use the version that was utilized upon submission of your application
- Long-term planning – consider any off-site mitigation possibilities, potential credit banking (if it becomes available) and/or partnership with other applicant's projects
- Consider Tribal coordination
- Project design – consider what is absolutely necessary (every SF counts!)
- Incorporate mitigation costs into upfront project financing considerations

QUESTIONS

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