



## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RTID 0648-XD392**

#### **Notice of Intent to Prepare an Environmental Impact Statement for Issuance of an Incidental Take Statement Under the Endangered Species Act for Salmon Fisheries in Southeast Alaska Subject to the Pacific Salmon Treaty**

**AGENCY:** National Marine Fisheries Service (NMFS), Alaska Regional Office (AKR), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; intent to prepare an environmental impact statement; request for written comments.

**SUMMARY:** NMFS announces its intent to prepare an Environmental Impact Statement (EIS), in accordance with the National Environmental Policy Act (NEPA), to analyze the impacts of alternatives related to NMFS's issuance of an incidental take statement (ITS) for species listed as threatened or endangered under the Endangered Species Act (ESA) affected by salmon fisheries in Southeast Alaska (SEAK) that are managed consistent with the provisions of the 2019 Pacific Salmon Treaty (PST) Agreement. Compliance with the ITS would exempt participants in these fisheries from the ESA's prohibition on take of threatened and endangered species. This notice is necessary to inform the public of NMFS's intent to prepare this EIS and to provide the public with an opportunity to provide input for NMFS's consideration.

**DATES:** NMFS requests comments concerning the scope of the analysis and identification of relevant information, studies, and analyses. All comments must be received by 11:59 p.m. Eastern Time on *[insert date 45 days after date of publication in the Federal Register]*.

**ADDRESSES:** You may submit comments on this document, identified by NOAA-NMFS-2023-0115, by any of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <https://www.regulations.gov> and enter NOAA-NMFS-2023-0115 in the Search box. Click on the “Comment” icon, complete the required fields, and enter or attach your comments.
- **Mail:** Submit written comments to Gretchen Harrington, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Susan Meyer. Mail comments to P.O. Box 21668, Juneau, AK 99802-1668.

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

**FOR FURTHER INFORMATION CONTACT:** Bridget Mansfield, (907) 586-7228, [Bridget.Mansfield@noaa.gov](mailto:Bridget.Mansfield@noaa.gov).

**SUPPLEMENTARY INFORMATION:**

**Pacific Salmon Treaty and SEAK Salmon Fishery Management**

The PST provides a framework for the management of salmon fisheries in the U.S. and Canada and regulates the salmon fisheries that occur in the ocean and inland waters of Oregon, Washington, British Columbia, the Yukon, and southeast Alaska, and the rivers that flow into these waters. The PST established fishing regimes that set upper limits on intercepting fisheries, defined as fisheries in one country that harvest salmon

originating in another country, and sometimes include provisions that apply to the management of the Parties' non-intercepting fisheries as well. The overall purpose of the regimes is to accomplish the conservation, production, and harvest allocation objectives set forth in the PST. These objectives are designed to prevent overfishing, provide for each country to benefit from production originating in its water, avoid undue disruption of existing fisheries, and reduce interceptions to the extent practicable.

Each Party to the PST must implement the fisheries management framework domestically. Fisheries in both Federal and state waters off of SEAK are managed consistent with the 2019 PST Agreement. For Federal fisheries occurring in the Exclusive Economic Zone (EEZ) off the coast of SEAK, the U.S. does this through implementation of provisions of the Magnuson-Stevens Fishery Conservation and Management Act and the Fishery Management Plan for the Salmon Fisheries in the EEZ off Alaska (FMP). The FMP, approved in 1979 (last amended in 2021), conserves and manages the Pacific salmon commercial and sport fisheries that occur in the U.S. EEZ off Alaska. The FMP establishes two management areas, the East Area and the West Area, with a border at Cape Suckling, and addresses commercial salmon fisheries in each area. In the East Area, the FMP delegates management of the commercial troll and sport salmon fisheries that occur in the EEZ to the State of Alaska and prohibits commercial salmon fishing with net gear in the EEZ.

NMFS does not manage the salmon fisheries that occur in state waters. The State of Alaska Department of Fish and Game (ADF&G) manages salmon troll, net, and sport fisheries subject to the PST's conservation, production, and harvest allocation objectives in state waters (internal waters and marine waters from shore to 3 nautical miles (approximately 6 kilometers) offshore) of SEAK. The SEAK commercial salmon fisheries occurring in state waters include troll, purse seine, drift gillnet, and set gillnet fisheries. The State's management of commercial and sport salmon fisheries, including

harvest monitoring, stock assessment, and transboundary river enhancement necessary to implement the 2019 PST Agreement, is partially funded through Federal grants dispersed by NOAA.

### **ESA Consultation and Litigation History**

In response to the 2019 PST Agreement, NMFS consulted under section 7 of the ESA on three actions—

- Delegation of management authority over salmon fisheries in the SEAK EEZ to the State of Alaska on the basis of new information regarding the effects of the action and the contemporary status of impacted ESA-listed species,
- Federal funding through grants to the State of Alaska for the State's management of commercial and sport salmon fisheries and transboundary river enhancement necessary to implement the 2019 PST Agreement, and
- Federal funding of a conservation program to support critical Puget Sound Chinook stocks and Southern Resident Killer Whales (SRKW) related to the 2019 PST Agreement, one component of which included funding of a prey increase program for Southern Resident Killer Whales (SRKW).

In 2019, NMFS completed the consultation and issued the 2019 Biological Opinion (BiOp) and ITS. In the BiOp, NMFS concluded that the actions were not likely to jeopardize the continued existence of any of the ESA-listed species and that the actions were not likely to destroy or adversely modify designated critical habitat for any of the listed species. NMFS also issued an ITS that exempted take of ESA-listed species incidental to the prosecution of the SEAK fisheries.

In 2020, the Wild Fish Conservancy (WFC), a 501(c)3 nonprofit organization, filed a lawsuit in the U.S. District Court for the Western District of Washington challenging the 2019 BiOp (*Wild Fish Conservancy v. Quan*, No. 2:20-CV-417-RAJ-MLP (W.D. Wash.)). WFC alleged NMFS violated the ESA and NEPA. On August 8,

2022, the district court found that NMFS violated both the ESA and NEPA (*Wild Fish Conservancy v. Quan*, No. 2:20-CV-417-RAJ-MLP, 2021 WL 8445587 (W.D. Wash. Sept. 27, 2021), report and recommendation adopted, No. 2:20-CV-417-RAJ, 2022 WL 3155784 (W.D. Wash. Aug. 8, 2022)). With respect to the ESA, the court determined the prey increase program lacked specificity and deadlines or otherwise enforceable obligations and was not subject to agency control or reasonably certain to occur. The court also concluded that NMFS failed to evaluate the effects of the prey increase program on ESA-listed Chinook salmon.

With respect to NEPA, the court concluded NMFS failed to conduct NEPA analyses for the issuance of the ITS exempting take of ESA-listed species associated with the SEAK salmon fisheries considered in the 2019 BiOp. The court also concluded that NMFS failed to conduct adequate NEPA analysis for the adoption of the prey increase program. The court remanded to the agency to address its conclusions regarding the ESA and NEPA deficiencies.

As part of its effort to address the court's orders on remand, NMFS intends to conduct an ESA Section 7 consultation and prepare two EISs. The EIS described in this Notice of Intent would respond specifically to the court order with respect to the stated failure to prepare an analysis pursuant to NEPA for the issuance of the ITS for the SEAK salmon fisheries. This EIS will analyze the effects of a reasonable range of alternatives for the issuance of an ITS to exempt otherwise prohibited take of ESA-listed species in the SEAK salmon fisheries under the 2019 PST Agreement. NMFS is also preparing a separate EIS for the expenditure of Federal funding to provide additional prey for SRKW (88 FR 54301, August 10, 2023).

### **Preliminary Purpose and Need Statement**

The proposed action is the issuance of the ITS under the ESA, per the court orders in *Wild Fish Conservancy v. Quan* directing the agency to conduct NEPA analysis for the

issuance of the ITS. The purpose of issuing the ITS in a BiOp is to exempt incidental take of ESA-listed species associated with the SEAK salmon fisheries subject to provisions of the 2019 PST Agreement to the level or amount as specified in the ITS, provided the take occurs in compliance with the ITS. NMFS issues an ITS when NMFS concludes that an action and associated incidental take of ESA-listed species would not violate ESA Section 7.

Under Section 7 of the ESA, NMFS as the action agency must consult to ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of designated critical habitat (16 U.S.C. 1536(a)(2)). As a result of that consultation, NMFS as the consulting agency must prepare a BiOp detailing how the agency action affects ESA-listed species and designated critical habitat under its jurisdiction (16 U.S.C. 1536(b)(3)). If NMFS as the consulting agency concludes, among other things, that the agency action and any associated incidental take is not likely to jeopardize the continued existence of any ESA-listed species, NMFS must issue an ITS. Compliance with the ITS exempts the incidental take that is reasonably certain to occur (16 U.S.C. 1536(b)(4); 50 CFR 402.14) from prohibitions under Section 9 of the ESA. The ITS specifies, among other requirements: the impact of such incidental taking on the listed species and limits on that incidental take; measures considered necessary or appropriate to minimize the impact of such take; terms and conditions (including reporting requirements) that implement the specified measures; and measures needed to comply with the Marine Mammal Protection Act, if applicable.

When NMFS issues a BiOp and ITS in its role as the consulting agency, the ITS is not a permit or authorization or otherwise a major Federal action that triggers the requirement to comply with NEPA. As set forth in section 7(o) of the ESA, compliance with an ITS provides an exemption from the ESA's take prohibition (16 U.S.C. 1536(o)).

There are instances, such as this one, when NMFS is both the consulting agency and the action agency (prior decision to delegate management of fisheries in the EEZ and disbursement of Federal funding). In those instances, NMFS as the action agency must comply with NEPA for the underlying Federal actions, but NMFS does not separately have to comply with NEPA for the issuance of the BiOp and the ITS since the issuance of a BiOp and ITS does not constitute a “major Federal action.” *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 644–45 (9th Cir. 2014). However, because the district court concluded that NMFS must comply with NEPA in issuing this ITS, we intend to prepare this EIS to respond to the court’s orders.

### **Preliminary Alternatives**

NMFS will evaluate a reasonable range of alternatives regarding the proposed issuance of the ITS for ESA-listed species associated with the SEAK salmon fisheries subject to provisions of the 2019 PST Agreement. Possible alternatives could be constructed from one or more of the following draft alternatives in addition to those developed through the public scoping:

*Alternative 1: Status Quo, no action.*

Alternative 1 is the status quo ITS from the 2019 BiOp. With this ITS, the EIS would assume that the SEAK salmon fisheries subject to the 2019 PST Agreement would continue to be prosecuted under the 2019 PST Agreement and existing fishery management measures. This alternative would not comply with the court’s orders, because the court identified flaws with the 2019 BiOp.

*Alternative 2: Issuance of a New ITS with a New BiOp.*

Under Alternative 2, NMFS would develop a new BiOp to respond to the court’s finding that the 2019 BiOp did not comply with the ESA; the new BiOp would contain an ITS, consistent with the requirements of 16 U.S.C. 1536, that includes the level of take

that NMFS determines is reasonably certain to occur for each ESA-listed species considered in the BiOp.

With this ITS, the EIS would assume that the SEAK salmon fisheries subject to the 2019 PST Agreement would continue to be prosecuted under the 2019 PST Agreement and fishery management measures consistent with any reasonable and prudent measures and terms and conditions included in the new ITS.

*Alternative 3: NMFS would not issue an ITS.*

Under Alternative 3, NMFS would not develop a new BiOp and any incidental taking of listed species by the SEAK salmon fisheries would not be exempt from the ESA's prohibition of such take. The EIS would therefore assume that the SEAK salmon fisheries under the 2019 PST Agreement would not be prosecuted.

This Alternative is presented exclusively for analytical purposes consistent with the requirements of NEPA and implementing regulations that NMFS analyze a range of alternatives. It is not consistent with the purpose and need of the action. Under the ESA, NMFS as the consulting agency is obligated at the conclusion of any consultation to (1) prepare a BiOp detailing how the agency action affects listed species and their designated critical habitat (16 U.S.C. 1536(b)(3)); and (2) issue an ITS for take that is reasonably certain to occur incidental to the action (16 U.S.C. 1536(b)(4)) if NMFS concludes, among other things, that the agency action and any incidental take is not likely to jeopardize the continued existence of any listed species (16 U.S.C. 1536(b)(4); 50 CFR 402.14(g)(7)). Therefore, NMFS fully intends to comply with the ESA and the court's orders by conducting a new consultation and issuing a BiOp and ITS for the Federal actions associated with the SEAK salmon fisheries.

### **Issues and Expected Impacts to be Analyzed**

The EIS will analyze a reasonable range of alternatives developed through the scoping process and their likely impacts on ESA-listed species, marine resources, and

participants in the SEAK salmon fisheries subject to the 2019 PST Agreement. Those fisheries include the sport salmon fisheries and the commercial salmon troll, purse seine, drift gillnet, and set gillnet fisheries. Marine resources, in addition to ESA-listed species, that may be impacted by the alternatives include non ESA-listed salmon, other finfish, marine mammals, seabirds, and habitat. The EIS will consider any socio-economic impacts of the alternatives.

The ESA-listed species designated in an ITS, on which the impacts of the proposed action would be analyzed in the EIS, could include ESA-listed Chinook salmon: Puget Sound, Lower Columbia River, Upper Willamette River, and Snake River fall-run Evolutionary Significant Units (ESUs, all threatened); Steller sea lions, western Distinct Population Segment (DPS) (endangered); humpback whale, Mexico DPS (threatened); killer whale, southern resident DPS (SRKW) (endangered); and their designated critical habitats.

Salmon fisheries in SEAK may have effects on non-listed salmon. Some of these salmon may be prey resources for SRKW, thus the fisheries may affect SRKW through the catch of non-ESA-listed salmon. Fishing gear interactions occur in the SEAK salmon fisheries that may affect the Mexico DPS of humpback whales and the western DPS of Steller sea lions.

### **Schedule for the Decision-Making Process**

NMFS intends to prepare the EIS concurrently with the new BiOP. NMFS anticipates issuing a Record of Decision before November 2024.

### **Public Involvement**

Scoping is an early and open process for determining the scope of issues to be addressed in an EIS and for identifying the significant issues related to the proposed action (40 CFR 1501.9). An EIS is a detailed statement on a proposed agency action, but it does not mandate particular results or substantive outcomes, as the purpose and

function of NEPA is satisfied if the agency considered relevant environmental information and the public has been informed regarding the decision-making process (40 CFR 1500.1(a)).

A principal objective of the scoping and public involvement process is to identify a range of reasonable management alternatives that, with adequate analysis in an EIS, will delineate critical issues and provide a clear basis for distinguishing among those alternatives and informing the selection of a preferred alternative. Through this notice, NMFS is notifying the public that an EIS and a decision-making process for this proposed action have been initiated, so that interested or affected people may participate and contribute to the final decision.

NMFS is seeking written public comments on the scope of issues, including potential impacts, information, analyses, and alternatives that should be considered. Written comments should be as specific as possible to be the most helpful. Written comments received during the scoping process, including the names and addresses of those submitting them, will be considered part of the public record of this proposal and will be available for public inspection. Written comments will be accepted at the address above (see **ADDRESSES**).

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

Dated: September 28, 2023.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries,

National Marine Fisheries Service.