

REGULATORY—MAINTENANCE PROJECTS



Issue—On January 5, 2022, the NOAA Administrator and the Assistant Secretary of the Army for Civil Works signed a joint resolution Memorandum. The Corps agreed to adopt NOAA Fisheries' new environmental baseline interpretation which no longer considers the existing structure as part of the environment when determining the effects on listed species of dock repairs, piling replacements, and other routine port maintenance. Significant compensatory mitigation will now be required for the continued existence of a project, on top of mitigation required for the maintenance activity itself. NOAA Fisheries has not indicated if they will adapt the nearshore habitat conservation calculator tool from the Puget Sound for other regions of the country leading to inconsistent application of environmental regulation. Existing port infrastructure will now be more difficult and costly to maintain, even if the purpose of the structure and its environmental footprint do not change.

Lack of Transparency—This Memorandum is based on 2018 internal guidance implemented by NOAA Fisheries West Coast Region Office (WCRO). The agency briefing held on January 6, 2022 was the first time many ports, state and municipal government entities, utilities, associations, and businesses outside of the west coast had any notice the regional internal guidance would be applied nationwide. The agencies have acknowledged they did not pursue formal rulemaking, did not follow the Office of Management and Budget (OMB) interagency review process, and no national stakeholder input was gathered in advance of the agreement.

Process—The agencies noted in the Memorandum the agreement is not legally enforceable and is not a rule, regulation, or policy guidance. However, in order to obtain a maintenance permit, applicants will have to abide by this new process or they will not be fully covered under the ESA for the maintenance work performed. This guidance outlined in the Memorandum is functionally being applied as if it were a rule. As an alternative to the programmatic consultation, if ports wish to pursue individual consultation, NOAA Fisheries West Coast Region cannot provide a timeline for processing the permit due to the existing permit backlog and the agency's lack of staffing capacity.

Impacts to Ports—Impacts could include:

- Project delays – Formal consultation takes more time and the agencies already lack staffing capacity. Limited agency staffing is likely to be redirected to development of conservation calculators and programmatic permitting tools nationwide while permit backlogs continues to grow. More lawsuits over basic maintenance are also likely.
- Maintenance deferral – Workplace safety, potential loss of jobs, and potential infrastructure failure.
- Degraded environment – Infrastructure failure could release of toxic materials into water environments or delay maintenance projects intended to remove toxic materials.
- Higher costs – More consultants, additional modeling and studies, development of biological opinions, and higher mitigation costs. Some ports anticipate maintenance projects to cost 5% to 30% more.
- Delayed or denied dredge and fill permits - Potential draft restrictions at port berths and marinas.
- Uncertainty – Covid-19 has already introduced a higher degree of unpredictability and supply chain vulnerability. Customers may forego U.S. ports investments and do business in Canada or Mexico and rail or truck goods into the U.S. where needed.

Solutions Requested—NOAA and the Corps should rescind the 2018 NOAA Fisheries WCRO guidance and the resolution Memorandum and pursue a formal and transparent rulemaking process. PNWA is requesting that Congress include language in a relevant legislative vehicle to define the environmental baseline for maintenance projects as inclusive of existing structures. At a minimum, language should be included in the FY2024 appropriations bill to direct the agencies to develop a programmatic consultation and mitigation tool that works for ports and other public infrastructure needs. For more information, contact Dena Horton at dena.horton@pnwa.net or 503-234-8553.

