

REGULATORY IMPACTS TO MAINTENANCE PROJECT

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) with no public or stakeholder outreach in advance. On January 6, 2022, the Corps and the Services held a briefing which 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 in advance of implementation, 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. It is also not clear what level of economic impact analysis was performed. When the Memorandum was questioned as Administrative Rulemaking, NOAA Fisheries and U.S. Fish & Wildlife quickly proposed a rule in June 2023 and provided just 60 days for comment. This new ESA Section 7 agency coordination rule was finalized and went into effect May 6, 2024.

Process

The agencies noted in the final rulemaking process they dismissed virtually all public comment and finalized the rule essentially as proposed. Puget Sound is currently the only region in the country with a programmatic consultation and calculator using this new rule. However, most port maintenance projects exceed the limits of the program and would require individual consultation instead. However, NOAA Fisheries West Coast Region cannot provide a timeline for processing individual consultations 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 the development of conservation calculators and programmatic permitting tools nationwide while permit backlogs continue 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 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 project costs to increase 5% to 30% and some 50% or more.
- Delayed or denied dredge and fill permits - Potential draft restrictions at port berths and marinas.
- Uncertainty – The pandemic already introduced a higher degree of unpredictability and supply chain vulnerability. Customers may forego investments in U.S. ports and do business in Canada or Mexico and rail or truck goods into the U.S. where needed and exacerbate Harbor Maintenance Tax diversion.

Solutions Requested

Congress should enact language to define the environmental baseline for maintenance projects as inclusive of existing structures and current effects of those structures. Also, language should be included in the FY2025 appropriations to direct regulatory agencies to increase staffing capacity and consultation tools that work for ports and public infrastructure.

