

REGULATORY IMPACTS TO 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 considered 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 would be required for the continued existence of a project, on top of mitigation for the maintenance activity. NOAA Fisheries has not indicated if they will adapt their Puget Sound nearshore habitat conservation calculator tool for other regions leading to inconsistent application of environmental regulation. Existing port infrastructure will 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 Services 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 Memorandum. It is also not clear what level of economic impact analysis was performed. When the Memorandum was questioned as Administrative Rulemaking, the Services quickly proposed a rule in June 2023 and provided just 60 days for comment. The ESA Section 7 Interagency Cooperation rule was finalized and went into effect May 6, 2024. A revised Interagency Cooperation rule is anticipated in 2026.

Process

The Services noted in the 2024 final rulemaking process that 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 under the 2024 rule. However, most port maintenance projects exceed the limits of the programmatic permit 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 Services lack staffing capacity. Limited staffing is likely to be directed to create conservation calculators and programmatic permitting tools nationwide while permit backlogs continue to grow. More lawsuits over basic maintenance are 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. Some mitigation costs exceed the costs of the project itself.
- Delayed or denied dredge and fill permits - Potential draft restrictions at port berths and marinas.
- Uncertainty – 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

The Corps and NOAA should rescind the Memorandum as inconsistent with statutory text of the Endangered Species Act (ESA) and the 2026 proposed rule. PNWA is pleased the Services are proposing Interagency Cooperation rule revisions to return to the previous definitions of "environmental baseline" and "effects of the action". Congress should enact ESA amendment language to clearly define the environmental baseline as inclusive of existing structures and current and future effects of those structures. Also, language should be included in appropriations to direct regulatory agencies to increase staffing capacity and consultation tools that work for ports and public infrastructure.