



## 2023 NWC POLICY BRIEF

### ASACW/NOAA Policy Adds Costs and Delays for Waterway Projects

**ACTION NEEDED:** The National Oceanic and Atmospheric Administration (NOAA) and the U.S. Army Corps of Engineers (Corp) should rescind the 2018 NOAA Fisheries guidance and pursue a formal and transparent rulemaking process. NWC recommends 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 water and waterways infrastructure needs.

**BACKGROUND:** On January 5, 2022, the Assistant Secretary of the Army (Civil Works) and NOAA's National Marine Fisheries Service (NMFS) (the agencies) signed a joint memorandum (Memorandum) governing the Endangered Species Act (ESA) review of proposed maintenance and other projects involving existing waterway structures (docks, piers, bulkheads, dams, levees, bridges, etc.). This guidance applies if the project requires a federal permit, including those required under Clean Water Act Section 404 for dredge and fill and Rivers and Harbors Act Section 10 for structures in navigable waters. It applies nationwide.

This change has introduced tremendous delays, cost increases, and massive uncertainty in the Pacific Northwest, where the policy originated.

**CHANGES THE ENVIRONMENTAL BASELINE:** Agencies measure the environmental effects of a proposed action against the "baseline," which is current conditions. Existing structures are included in the baseline because their impacts occur without regard to the proposal. The agency memorandum, however, removes existing structures from the baseline in some circumstances.

This leads to two problems. First, the permit applicant has to mitigate for actions they did not cause, namely, ongoing impacts of an existing structure. Second, it makes the analysis more complex, which drives up cost and processing time. The agencies do not have the staff and resources to handle the increased workload. That results in unacceptable delays as permit applicants wait for the agencies to take action.

**INADEQUATE PROCESS:** The agencies claim that the policy is not a "rule, regulation or policy guidance" and is "not legally enforceable." However, permit applicants must comply with the

#### *Genesis of the Memorandum*

The Memorandum is based on an April 2018 NOAA NMFS West Coast Region internal guidance. Even after four years of efforts to improve implementation, approvals of Section 404 and Section 10 permits have significantly slowed:

- Virtually all maintenance projects must undergo formal consultation,
- There are significant project delays due to formal consultation and lack of regulatory staffing capacity, and
- Maintenance project costs have increased 5 - 30% due to additional consultants, studies, and further compensatory mitigation.

As a result, in the Puget Sound region alone, over 100 vital public safety and public good maintenance projects continue to be delayed since 2018.

Memorandum to obtain a federal permit and approval under the ESA. The agencies developed the memorandum in secret without stakeholder participation. This is contrary to the intent of the Administrative Procedure Act, which requires a notice and comment process when a policy change has the effect of a new rule. The agencies are missing a valuable opportunity to engage with nonfederal sponsors and others who are directly impacted by these policy changes. Greater collaboration with stakeholders would improve mutual understanding and hopefully lead to updates that are more workable for both the agencies and the regulated community.

**IMPACT TO STAKEHOLDERS:** Based on what is happening in the Puget Sound region, costs for maintenance projects, which are typically funded by public dollars, will skyrocket, and/or projects will be deferred. Below is a chart that shows the before and after impacts:

IMPACT OF 2018 NOAA NMFS REGIONAL GUIDANCE ON PROJECTS		
	Prior to 2018 Guidance	After 2018 Guidance
Maintenance Permits	Informal ESA consultation, received permits in 3-9 months	Formal ESA consultation, process takes 1-3 years to obtain permit
Existing Structures	Counted as part of the environmental baseline	No longer counts as part of the environmental baseline
Compensatory Mitigation	Only required for maintenance action only	Compensatory mitigation required for both the construction action AND the ongoing existence of the structure
Consultants/Studies	Minimal funds needed for consultants and studies	Additional studies and consultants needed to meet new requirements

**KEY TALKING POINTS:**

- **Nonfederal sponsors and stakeholders invest significant funding** in water infrastructure to protect public safety and strengthen our national, regional, and local economies.
- **As owners and operators of water-related infrastructure, nonfederal sponsors are directly impacted by federal policy changes** and are not just another stakeholder in this discussion.
- **The memorandum will significantly change how we operate and maintain public safety and public good water infrastructure nationally** by increasing costs and delaying maintenance.
- **To date there have been no viable opportunities to engage with the agencies on the Memorandum.** There has been no meaningful stakeholder engagement.
- **The policy applies nationwide even though tools to implement it have not been developed.** It took over a year for NOAA to develop a conservation calculator tool specifically for Puget Sound, Washington, but the calculator currently does not work for port projects. Without a clear mechanism for applying this policy, implementation will be slow, subjective, and arbitrary.

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