NATIONAL WATERWAYS CONFERENCE

Dedicated to a greater understanding of the widespread public benefits of our nation's water resources infrastructure.

August 20, 2023

Submitted via Federal eRulemaking Portals (*https://www.regulations.gov*) to:
Docket Nos. FWS–HQ–ES–2023–0018, FWS–HQ–ES–2021–0104, and FWS–HQ–ES–2021–0107

Public Comments Processing
Attn: FWS–HQ–ES–2023–0018
U.S. Fish & Wildlife Service, MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041–3803

Public Comments Processing
Attn: FWS–HQ–ES–2021–0104
U.S. Fish & Wildlife Service, MS: JAO/3W
5275 Leesburg Pike
Falls Church, VA 22041–3803

Public Comments Processing
Attn: FWS–HQ–ES–2021–0104
National Marine Fisheries Service
Office of Protected Resources
1315 East-West Highway
Silver Spring, MD 20910

Public Comments Processing
Attn: FWS–HQ–ES–2021–0107
U.S. Fish & Wildlife Service, MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041–3803

Public Comments Processing
Attn: FWS–HQ–ES–2021–0107
National Marine Fisheries Service
Office of Protected Resources
1315 East-West Highway
Silver Spring, MD 20910

RE: Comments on Three Services Proposed Rulemakings Regarding Endangered and Threatened Wildlife and Plants: Protective Regulations Pertaining to Endangered and Threatened Wildlife and Plants (Docket No. FWS–HQ–ES–2023–0018); Revision of Consultation Regulations for Interagency Cooperation (Docket No. FWS–HQ–ES–2021–0104 and NMFS–230607–0143); and Listing Endangered and Threatened Species and Designating Critical Habitat (Docket No. FWS–HQ–ES–2021–0107 and 230607–0142)

Dear Mss. Galst, Dobrzynski, and Somma and Mr. Aubrey:

On behalf of the National Waterways Conference ("NWC"), we are providing comments on the three notices of proposed rulemaking recently issued by the Fish & Wildlife Service and National Marine Fisheries Service (collectively, the "Services") regarding "Endangered and Threatened Wildlife and Plants": "Regulations Pertaining to Endangered and Threatened Wildlife and Plants" (Docket No. FWS–HQ–ES–2023–0018); "Revision of Regulations for Interagency Cooperation" (Docket No. FWS–HQ–ES–2021–0104 and NMFS–230607–0143); and "Listing Endangered and Threatened Species and Designating Critical Habitat" (Docket No. FWS–HQ–

ES–2021–0107 and 230607–0142). These three proposals, which would make numerous revisions to the Services' regulations that implement the Endangered Species Act of 1973, as amended (the "ESA") [16 U.S.C. Chapter 35 ("Endangered Species")], were published in the Federal Register on June 22, 2023. [*See* 88 Fed. Reg. at 40742, 40753, and 40764, respectively.]

We thank the Services for this opportunity to provide comments on these three rulemakings involving proposed revisions to the Services' regulations concerning the protection of endangered and threatened species under the Endangered Species Act (ESA).

A. ABOUT THE NATIONAL WATERWAYS CONFERENCE.

NWC was established in 1960 and is dedicated to a greater understanding of the wider public benefits of our Nation's water resources infrastructure. Our mission is to effect common sense policies and programs, recognizing the public value of our Nation's water resources and their contribution to public safety, a competitive economy, national security, environmental quality, and energy conservation.

NWC's membership is diverse and includes the full spectrum of non-Federal water resources stakeholders, including flood control associations, levee boards, waterways shippers and carriers, agricultural interests, industry and regional associations, hydropower producers, port authorities, shipyards, dredging contractors, regional water supply districts, engineering consultants, and state and local governments.

Many of these members are non-Federal sponsors of U.S. Army Corps of Engineers (USACE) civil works projects, and own and maintain a wide variety of water resources infrastructure. (Non-Federal sponsors are non-Federal entities (including state, county, local, or tribal governments, flood control districts, port authorities, or other agencies) who are interested in joining with the USACE to participate in civil works projects, including cost sharing and execution of work in those projects. These non-Federal entities provide assurances or execute a binding agreement with the USACE for the provision of items of local cooperation for the USACE water resources projects, including, as applicable, resources for investigations, construction, and operation and maintenance of the projects. [*See* 33 CFR § 203.15 for a definition of "Non-Federal Sponsor."])

As owners and operators of water-related infrastructure, non-Federal sponsors are subject to environmental permitting to build new, and maintain existing, water resources infrastructure projects, and hence are directly impacted by Federal policy changes impacting permitting. Compliance with each of these proposed revisions to the ESA's regulatory programs results in otherwise lawful activities triggering additional ESA regulatory and permitting requirements. As a result, these members stand to be directly impacted by the Services' proposals to revise these ESA rules.

B. COMMENTS ON THE THREE PROPOSED RULEMAKINGS REGARDING ENDANGERED AND THREATENED WILDLIFE AND PLANTS.

The Services' proposals primarily focus on reversing several components of the ESA regulations that the Services promulgated in 2019, including the implementation of Section 4 (listing of species as threatened or endangered and the designation of critical habitat), Section 4(d) (application of the "take" prohibitions to threatened species), and Section 7 (consultation procedures).

The three proposals that the Services published on June 22, 2023 would revise and tighten numerous aspects of those Services' ESA regulations. There are some areas of substantial concern that arose during our review of the proposed regulations. We offer the following comments in hopes that these will be addressed as the Services proceed with finalizing these rules.

(1) NWC Supports Reasonable Revisions to the Proposed ESA Rules to Improve the Identification of Conservation Measures that Most Efficiently Conserve Listed Species and Their Habitat.

NWC supports the ESA's goal of the conservation of species. At the same time, the Services' proposals have the potential to adversely impact the development and maintenance of water resources and other infrastructure projects all around our Nation. Our inland waterways and ports serve as vital avenues to connect American agriculture, mining, manufacturing, and other economic interests to the world and to import goods that benefit American consumers.

Water resources infrastructure projects also provide important flood protection, water supply, hydropower, and recreation services, and serve as the backbone of our Nation's economic and social activities. We urge the Services to seek every opportunity to harmonize ongoing economic, social, and recreational activities with the conservation of threatened and endangered species and their habitat.

Our members understand the obligation to comply with regulatory requirements and to obtain all necessary permits and authorizations. At the same time, there are limits on what they can bear. Many are concerned that the proposed ESA regulations, as currently outlined, threaten to disrupt the timely development and completion of these projects and their ongoing maintenance, thereby endangering the stability of our communities and the strength of our Nation's economy.

The proposed rules come against a backdrop of the Services already imposing a heavy burden on Federal permittees to conduct additional studies, assessments, and consultations with regulatory agencies to ensure compliance with ESA requirements.

As an example, the Puget Sound region is providing a preview of how this policy will not work on the ground. The Services implemented environmental baseline changes and compensatory mitigation for maintenance and maintenance dredging prior to rulemaking, and the result was catastrophic delays, missed construction and fish windows, cost increases, and other adverse impacts, leading to a huge project backlog and massive uncertainty.

For instance, in recent years, maintenance project costs, which are typically funded by public dollars, have increased an additional 5-30% in the Puget Sound region due to additional consultants, studies, and further compensatory mitigation imposed as a result of changes to regional ESA policies. [*See attached* 2023 NWC Policy Brief, *ASACW/NOAA Policy Adds Costs and Delays for Waterway Projects; also available at https://waterways.org/wordpress2/wp-content/uploads/2022/04/USACE-NOAA-memo-Fact-Sheet_FINALv3-APRIL-2022.pdf*.] This was followed by implementation of the Memorandum between the Corps and NOAA changing the environmental baseline, instituting compensatory mitigation for maintenance, and applying this policy nationwide, essentially implementing the proposed rule on interagency cooperation for ESA Section 7 prior to formal rulemaking. As a result, maintenance permitting times in the Puget Sound region have increased from approximately 3-9 months to 1-3 years as a result of increased formal consultation requirements being imposed on project sponsors. [*See id.*] The Puget Sound region is essentially the "beta test" of the proposed regulation. The Pacific Northwest Waterways Association (PNWA) is a member of NWC, and we support the comments offered by PNWA on August 18, 2023, on the Services' proposed regulation changes for interagency cooperation under ESA Section 7.

Cost increases and delays resulting from the new rules would hinder the timely implementation and completion of projects and disrupt crucial construction and maintenance activities. This is not sustainable and, over time, will drive away the public agencies and private companies that ultimately pay for many of the conservation measures sought by the Services through the processes for Section 7 consultations and Section 10 permits.

Recommendations: *NWC is a member of the National Endangered Species Act Reform Coalition ("NESARC"), and we support the comments offered by NESARC on the Services' proposed regulations on listing and critical habitat designations under Section 4, protective rules under Section 4(d), and interagency cooperation under Section 7.*

We emphasize and add to the following points:

Protective Regulations (FWS-HQ-ES-2023-0018): The Services propose to eliminate by regulation one of the rare opportunities Congress provided in the statute to regulate with greater flexibility and consideration of economic effects. We support NESARC's comments in this area and urge the Services to seek every opportunity to identify measures that can conserve threatened species in a manner that is more likely to gain the support of those subject to the economic limits and consequences that can accompany more stringent restrictions.

Interagency Consultations (FWS-HQ-ES-2021-0104): We support the inclusion of reasonable language in the definition of "effects of the action" to ensure that regulators see a clear signal that consequences to be accounted for in consultation are those that are not unduly remote from the proposed action in time, geographic area, or causal effect. We share NESARC's concern for the Services' discussion of the removal of "ongoing" and the addition of "Federal" in the definition of "environmental baseline" to avoid confusion about what is and is not in the baseline. The baseline should simply reflect conditions as they exist today. The effect of excluding existing structures or operations from the baseline is essentially to add them to the proposed action for purposes of environmental analysis. That amounts to a change in the proposed action that is more than minor, which would violate § 402.14(i)(2) of the Services' regulations if used as the basis for reasonable and prudent measures. [See 50 C.F.R. § 402.14(i)(2): "(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes."] The baseline is not determined as a function of Federal agencies' discretion, nor does it exclude existing structures or activities on the basis of being non-Federal. A party repairing an existing dock or pier, for example, can mitigate for that project's effects but should not have to mitigate for the long past decision to site the structure there in the first place, particularly where the structure will continue to exist in some condition whether or not necessary repairs are conducted.

Listing and Critical Habitat (FWS-HQ-ES-2021-0107): NWC members are proud supporters of water-based conservation and recreation. At the same time, as regulated entities, we understand how frustrating it feels when regulators seek to impose mitigation obligations of questionable efficacy and at considerable cost, when those writing the rules to do so do not understand the operations they seek to restrict. To that end, the proposal to delete a reference to "economic or other impacts" in § 424.11(b) is disappointing. Obviously, the Services remain under their conservation obligations whether or not that language remains in the regulations. To remove it, however, sends a clear signal to field offices that they are free to completely ignore operational constraints and costs. If the Services do not even consider such things, they are very likely to miss opportunities to identify alternative, effective measures that are more efficient or feasible. This can only lead to a sense of mistrust on the part of the regulated community. In the listing process and otherwise, we encourage the Services to enhance and not diminish or limit their consideration of the real-world consequences of their regulatory decisions.

(2) The Services Are Ignoring the Costs and Economic Impacts Associated with Regulatory Decisions Made Under These Rules.

It is especially concerning how the Services misunderstand the costs and economic impacts associated with regulatory decisions made under these rules. This is well-illustrated, as mentioned above, by the Services' proposal to restore the regulatory condition that a species listing determination is to be made "without reference to possible economic or other impacts of such determination." [*See* Proposed 50 CFR § 424.11(b).] (The purpose of the revision is

supposedly to clarify and affirm that economic and any other impacts that might result from a listing decision must not be considered when making listing, reclassification, and delisting determinations, even though this is already specified in the statute. [*See* 16 U.S.C. § 1533(b)(1).])

However, such a proposed change to the rules is unwarranted because the Services can -- and should – collect, analyze, disclose, and use cost and other economic impact data so that the Services can have a more pragmatic understanding of the impacts of their regulatory decisions, instead of simply regulating in a vacuum.

There is no statutory prohibition on the Services collecting, analyzing, disclosing, and using cost and other economic information. In fact, the Services even acknowledge, in the proposed rule, that they can evaluate "economic data and information *relevant to understanding the threats* to the species that must be assessed under the statutory factors," [*see* Proposed Rule at 40,766 (emphasis in original)]. Also, the Services are to "tak[e] into consideration the economic impact," and any other relevant impact, of specifying any particular area as critical habitat. [*See* 16 U.S.C. § 1533(b)(2).]

Other benefits also can accrue to developing information on costs and economic/other impacts associated with a species listing, for example, for supporting related land and other resource utilization and management decisions. Further, the Services have a responsibility to comply with the requirements for regulatory planning, coordination, and review specified in Executive Order 12866 and related directives, including an economic analysis of the proposed rules and mandates specified in OMB Circular A-4. Hence, it is entirely appropriate and necessary for the Services to collect, analyze, and disclose cost and other economic impact data pertaining to these proposed rules.

If the Services believe that it is permissible to consider economic information relevant to threats, and they are to do so in connection with critical habitat, it is also permissible and appropriate for the Services to identify (while not specifically relying on) economic and other impacts associated with the listing. The Services' failure to do so here illustrates their apparent disregard for the potential impacts that these regulations, and decisions made under them, would have on infrastructure projects and our communities.

Recommendations: *We strongly believe the Services need to reevaluate the proposed rules and conduct economic impact analyses of the proposals, to determine the impacts the proposals would have on the regulated community, including on the costs associated with the development and maintenance of water resources and other infrastructure projects.*

The importance of considering the input of non-Federal sponsors, who are often subdivisions of state and local governments, cannot be overstated. Executive Order 13132 recognizes the significance of cooperative federalism and encourages meaningful consultation with state and

local authorities in matters that affect them. Nevertheless, the Services have ignored the federalism effects of these proposed rules and determined to not consult with non-Federal governmental entities. [See 88 Fed. Reg. at 40750, 40762, and 40773 ("Federalism (E.O. 13132)").]

*The Services need to engage in a more robust and transparent dialogue with non-Federal sponsors to understand their concerns and develop regulations that are workable and beneficial for all parties involved. This should include the Services reaching out to, and consulting directly with, non-Federal sponsors of projects and the communities they help to protect so these rules can be developed cooperatively, using objective criteria and approaches, instead of in a subjective "top-down," Services-driven process, as has been done to date. Such outreach needs to be conducted in conformance with the requirements of the Administrative Procedure Act [*5 U.S.C.§ *551 et seq.] and the Information Quality Act [§ 515 of P.L. 106-554] in the further evaluation of and proposed revisions to the proposed rules.*

Additionally, although the Services have characterized the proposed rulemakings a "significant regulatory action" as defined by Executive Order (EO) 12866 and related EOs [see 88 Fed. Reg. at 40748, 40760, and 40771 ("Regulatory Planning and Review—Executive Orders 12866, E.O. 13563, and 14094")], we believe the Services did not meet their agency coordination and financial impact analysis responsibilities under these EOs. The Services' significant regulatory actions would impose increased financial burdens on infrastructure projects and their non-Federal sponsors around the Nation, and cause further delays in Federal permitting of these projects and their maintenance activities over these significant regulatory action policy changes.

Therefore, the Services need to hold these proposed rulemakings in abeyance for further development and implement a formal, transparent process for proposing a significant regulatory action, taking into account the expected impacts of these rules. This process must comply with the requirements for regulatory planning, coordination, and review specified in Executive Order 12866 and related directives, including an economic analysis of the proposed rules and mandates specified in OMB Circular A-4. This should include taking into consideration the input, concerns, and recommendations received from non-Federal stakeholders and conducting regulatory and economic impact analyses of the impacts the proposed rules would have on stakeholders, including small entities.

Such analyses would provide the Services with a "reality check" on, and further sensitize them to, the costs and economic impacts associated with regulatory decisions made under these rules. As part of this, the Services need to consider ways of revising the proposed rules to lower their cost impacts while still maintaining their protections. The Services need to justify the changes and their costs.

Otherwise, these rules will be created in a vacuum and will not be workable in the real world because they will not have gained the acceptance and support of the impacted stakeholders, and their impacts will be unacceptably widespread and significant.

Further, the Services should reconsider their proposal to restore the regulatory condition that a species listing determination is to be made "without reference to possible economic or other impacts of such determination." For the reasons discussed above, such a proposed change to the rules is unwarranted.

Finally, as discussed further below, the Services need to conduct a regulatory flexibility analysis of the economic and other impacts that the rule would have on small entities.

(3) <u>The Services Are Improperly Certifying the Proposed Rule Under the Regulatory Flexibility Act.</u>

(a) <u>The Proposed Rules Would Directly and Significantly Impact Small Entities.</u>

As already noted above, the Services concede that their proposed rules are "significant" for purposes of Executive Order 12,866. *[See 88 Fed. Reg. at 40748, 40760, and 40771 ("Regulatory Planning and Review—Executive Orders 12866, E.O. 13563, and 14094").]* Nevertheless, the Services' notices of proposed rulemaking certify that these proposed regulations would *not* have a significant economic effect on a substantial number of small entities, and that a regulatory flexibility analysis is not required under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act of 1996; 5 U.S.C. § 601 *et seq*.) ("RFA"). [*See* 88 Fed. Reg. at 40749, 40761, and 40772 ("*Regulatory Flexibility Act*").] The Services argue that the rules do not affect small entities, on the theory that they only govern the Services themselves.[1] This position is simply not credible.

For example, the existing ESA rules establish procedures to identify and, therefore, consider the economic impacts of proposed actions of the Services. As we noted above, this allows for the identification of the most efficient (*i.e*., least unnecessarily costly) means to fulfill the Services' mission of conservation. However, the Services propose to do away with those procedures. That absolutely directly impacts the small entities that will carry the brunt of agency actions imposing any mitigation obligations that are more costly than necessary to achieve conservation.

[1] *See* 88 Fed. Reg. at 40749 (The Services claim that the proposed rules would not have a significant economic impact on a substantial number of small entities because "the only potential entities directly affected by this proposed regulation change are not small entities, including any small businesses, small organizations, or small governments"; "The changes in this proposed rule are instructive regulations and do not directly affect small entities"); *see* 88 Fed. Reg. at 40761 ("Federal agencies would be the only entities directly affected by this proposed rule, and they are not considered to be small entities under SBA's size standards. No other entities would be directly affected by this proposed rule"); and *see* 88 Fed. Reg. at 40772 ("NMFS and FWS are the only entities that would be directly affected by this proposed rule because we are the only entities that list species or designate critical habitat.").

As another example, proposed changes to existing regulations to define the environmental baseline indicate the baseline will exclude certain existing structures and ongoing activities. That, in turn, will lead the Services to impose reasonable and prudent alternatives and incidental take statements that require a Federal permittee to bear the cost of mitigating circumstances and actions beyond the scope of the proposed action. That absolutely impacts small entities.

The Services cannot take the position that its actions, which are necessarily the product of its regulations, do not affect non-Federal third parties. That position is contrary to Supreme Court precedent. For example, in *Bennett v. Spear* [117 S.Ct. 1154 (1997)], the Supreme Court held that economically impacted entities had legal standing to challenge a biological opinion prepared by the U.S. Fish & Wildlife Service, notwithstanding the fact that the biological opinion's effect was indirect. *Bennett v. Spear* was a waterway case. The plaintiffs were irrigation districts served by the Klamath Project, which was operated by the Bureau of Reclamation. The U.S. Fish & Wildlife Service argued that the districts were not injured by its actions because it was the Bureau's operation of the project that caused the injury. The Supreme Court rejected that contention. "By the Government's own account, while the Service's Biological Opinion theoretically serves an 'advisory function,' in reality it has a powerful coercive effect on the action agency." [*See id. at* 1164 (internal citation omitted)]. Because the biological opinion caused the Bureau to reduce the delivery of water, the Service's action directly impacted the rural irrigation districts served by the Klamath Project. [*Id. at* 1159, 1164.]

Putting a label of internal "instructive regulations" or similar characterizations on these ESA regulation cannot change the fundamental fact that the Services' *actions* are the product of their *regulations*. The Services have not proposed to issue an internal guidance manual. They are proposing to amend the regulations. As the Supreme Court has observed, whether directly or indirectly, those actions impact regulated entities, including those that are small entities for purposes of the RFA.

(b) <u>The Services Failed to Conduct a Regulatory Flexibility Analysis Under the RFA.</u>

There are many regional, county, local, and tribal governments, flood control districts, port authorities, and other agencies around the Nation that are considered small entities, and are also non-Federal sponsors of USACE projects.[2] As part of a rulemaking process, agencies, including the Services, are required to prepare and make available for public comment a regulatory flexibility analysis, which shall describe the impact of the proposed rule on small entities [*see generally* 5 U.S.C. §§ 603, 604], unless the agencies can "certify" that the proposed rule does not

[2] Under the RFA, "small entities" are defined as small businesses, small organizations, and small governmental jurisdictions. [*See* 5 U.S.C. § 601(6) (Definition of "Small Entity").] "Small governmental jurisdictions" are defined as "governments of cities, counties, towns, townships, villages, school districts, or special districts," with a population of less than 50,000. [*See* 5 U.S.C. § 601(5) (Definition of "Small Governmental Jurisdictions").] This encompasses many stakeholders and NWC members, including those who are non-Federal sponsors of USACE projects, as small entities.

have a Significant Economic Impact on a Substantial Number of Small Entities ("SISNOSE"). [*See* 5 U.S.C. § 605(b).]

To certify a proposed rule, Federal agencies must provide the "factual basis" for the certification that the rule does not impact small entities. [*See* 5 U.S.C. § 605(b); *see also* Small Business Administration (SBA), Office of Advocacy, *A Guide for Gov't Agencies: How to Comply with the Regulatory Flexibility Act*, (May 2012)(*available at* https://advocacy.sba.gov/resources/the-regulatory-flexibility-act/a-guide-for-government-agencies-how-to-comply-with-the-regulatory-flexibility-act/)(*hereinafter*, "SBA RFA Guide"), at 12-13.] This means that "at minimum, a certification should contain a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification." [*See* SBA RFA Guide, at 13.]

Hence, agencies, including the Services, are expected to conduct a "threshold" analysis, which can offer important insights into the nature of regulatory impacts. [*See* SBA RFA Guide, at 11-13.] As part of this threshold analysis, agencies "are expected to make reasonable efforts to acquire quantitative or other information to support analysis of the rules" under the RFA. [*See id.; see also* 5 U.S.C. § 607.] This necessitates agencies to engage in outreach requirements and analyses that the Administrative Procedure Act and the RFA mandate for all new rules that affect small businesses.

Under the RFA's regulatory flexibility analysis and SISNOSE processes, Federal agencies are expected to identify areas where proposed rules may economically impact a significant number of small entities and consider regulatory alternatives that will lessen the burden on these entities, if the information the agencies acquire indicate that there will be a significant economic impact on a substantial number of small entities (and the agencies, therefore, are unable to certify that the proposed rules do not significantly impact small entities). [*See* 5 U.S.C. §§ 603, 604.] However, the Services have done none of this.

As discussed earlier, the Services' proposals, if promulgated, would directly and significantly impact small entities, including by modifying existing permitting requirements for small entities, likely resulting in increased compliance costs and delays for projects involving these small entities. The Services, however, have failed, but need to conduct a regulatory flexibility analysis (or any analysis of impacts to small entities), as required by the RFA.

In light of this, it is inaccurate and misleading for the Services to merely suggest that "The changes in this proposed rule are instructive regulations and do not directly affect small entities" [*see, e.g.,* 88 Fed. Reg. at 40749]; "will not affect our determinations as to whether proposed actions are likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat" [see 88 Fed. Reg. at 40761]; and "No external entities, including any small businesses, small organizations, or small governments, will experience any direct economic impacts from this proposed rule." [See 88 Fed. Reg. at 40772.]

Recommendations: *Because the proposed rules will modify existing permitting requirements for the ESA, likely resulting in increased compliance costs and delays for projects involving small entities, and will therefore likely directly impose significant impacts on a substantial number of small entities, the Services needs to hold these proposed rulemakings in abeyance for further development and prepare an analysis of impacts to small entities as required by the RFA.*

These efforts should include acquiring quantitative and other information by providing notification and outreach to small entities, conducting open meetings or public hearings concerning the rules for small entities, and considering alternative approaches for reducing impacts on small entities, prior to preparing anything further for the rules on these issues. Doing so would make for better rules, as envisioned by the RFA.

In conclusion, we urge the Services to carefully consider the potential adverse impacts of the proposed ESA regulations on water resource infrastructure projects and maintenance. While protecting endangered species is undeniably important, it must be done in a way that does not hinder the ability of non-Federal sponsors to construct and maintain vital infrastructure. By thoroughly vetting the proposals, engaging with non-Federal sponsors, and assessing the economic implications, the Services can ensure that the regulations achieve their intended goals without compromising the safety of our communities and the strength of our economy.

Thank you for the opportunity to provide comments on the proposed rule, and hope that the Services will address our comments as they proceed with this rulemaking process. NWC looks forward to continued involvement in the discussions about reasonable and appropriate measures under the ESA, and remains hopeful that the Services will make well-informed decisions that consider the broader implications for our nation's water resources infrastructure for the Nation.

For more information or questions, please contact me at (202) 203-4795 or by email at julie@waterways.org.

Sincerely,

Julie A. Ufner
President and CEO
National Waterways Conference

Attachment: 2023 NWC Policy Brief, *ASACW/NOAA Policy Adds Costs and Delays for Waterway Projects*.

cc: Shannon A. Estenoz
Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior

Richard Spinrad
Under Secretary of Commerce for Oceans and Atmosphere, NOAA Administrator, National Oceanic and Atmospheric Administration

NATIONAL WATERWAYS CONFERENCE

Since 1960

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.

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.

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

Rev. April. 2023

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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