



MEMORANDUM BETWEEN THE DEPARTMENT OF THE ARMY (CIVIL WORKS) AND THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

1. Purpose. This memorandum resolves for the Department of the Army's Civil Works program and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) (the agencies) how the agencies evaluate the effects of projects involving existing structures on listed species and designated critical habitat in Endangered Species Act Section 7 consultations.

2. Background. The issue of how to evaluate the impacts of projects that involve existing structures under section 7 of the Endangered Species Act (ESA) implicates work on both existing U.S. Army Corps of Engineers (Corps) Civil Works projects as well as the Corps' Regulatory Program review of a project proponent's request for discharges or work associated with existing structures.

On May 17, 2021, the Corps submitted a notification to the NMFS West Coast Region (WCR) to initiate an elevation of Policy Issues Regarding National Marine Fisheries Service West Coast Region's Guidance for Assessing the Effects of Structures in Endangered Species Act Section 7 Consultation under the Clean Water Act 404(q) joint agency memorandum. On July 9, 2021, NMFS WCR responded to this request explaining, among other things, that NMFS did not believe the 404(q) elevation process was the appropriate tool to resolve the issues raised.

On September 1, 2021, both agencies and the Council on Environmental Quality (CEQ) received a request from the House Subcommittee on Commerce, Justice, Science, and Related Agencies and the Committee on Appropriations asking the agencies and CEQ to resolve the dispute.

Recent discussions between NMFS and the Office of the Assistant Secretary of the Army (Civil Works) have resulted in the mutual understanding of the legal and policy issues as documented within this memorandum.¹

¹ This document is not a rule, regulation, or policy guidance. The discussion it contains may not apply to a particular situation based upon the individual facts and circumstances. It does not change or substitute for any law, regulation, or any other legally binding requirement and is not legally enforceable. It does not impose any new or additional requirements on action agencies, applicants, or NMFS and does not alter the existing requirements relative to ESA section 7(a)(2) consultations.

3. Legal Considerations.

a. In April 2018, NMFS WCR issued internal Guidance (Guidance) that laid out principles for making determinations about effects under section 7 of the ESA involving existing structures. The internal, non-binding Guidance was intended to enhance consistency across the West Coast Region in applying the section 7 regulations² and help NMFS section 7 biologists determine when the future impacts of a structure are to be considered “effects of the action” in an ESA section 7 consultation. The Guidance did not undergo Office of Management and Budget or Office of Information and Regulatory Affairs (OIRA) or formal public review.³

b. In August of 2019, the Services published a [final rule](#) updating the ESA section 7 implementing regulations. 84 Fed. Reg. 44976 (August 27, 2019). Among other things, the regulations modified the definition of the term “effects of the action” and added a stand-alone definition of “environmental baseline.” See 50 C.F.R. § 402.02. The rule clarified various aspects of how agencies and the Services evaluate effects associated with existing agency facilities—including how the issue of agency discretion and authority may, or may not, impact such analyses. Although the discussions included in this memorandum cite to the 2019 ESA regulations and preamble language, the substance and outcome of this memorandum would be the same under the previous version of the ESA regulations as well.⁴

The 2019 regulations include a “but for” and “reasonably certain to occur” two-part test to determine the effects, or “consequences” of an action. “A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to

² In October 2020, NMFS issued a Report to Congress on The National Marine Fisheries Service’s Consistent Application of Endangered Species Act Regulations and Implementation of Guidance For Conducting Effects Analyses on Existing Structures that reviewed the 2018 Guidance, along with similar guidance around the country. That review concluded that the WCR 2018 Guidance was consistent with NMFS’s national ESA approach (both before and after the 2019 ESA regulations).

³ In issuing the Guidance in April 2018, NMFS evaluated whether such review was necessary and determined that such process was not required. Following the issuance on October 9, 2018, of Executive Order (EO) 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents, NMFS re-evaluated the Guidance and again determined that the Guidance did not meet the definition of a significant guidance document and therefore took no further action with respect to the already issued Guidance.

⁴ The 2019 amendments were intended to clarify, not change, the scope of an effects analysis. See, e.g., 84 Fed. Reg. 44976-78 (“The Services do not intend for these regulatory changes to alter how we analyze the effects of a proposed action.”); 44989 (“As discussed throughout this rule and in the proposed rule, the Service’s overall approach to “effects of the action” has been retained.”); 44990 (explaining the “but for” “approach is, in application, consistent with the prior regulatory definition, and the Services accordingly anticipate the scope of their effects analyses will stay the same”); 44991-92 (“With the revisions we are making in this final rule and as discussed elsewhere in this rule, there will not be a shift in the scope of the effects we consider under our new definition of “effects of the action.”).

occur.” See 84 Fed. Reg. 44976, 45016, 45018 (Aug. 27, 2019); 50 C.F.R. § 402.02;⁵ 50 C.F.R. § 402.17.⁶

The 2019 regulation defined “environmental baseline” as “the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. The consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency’s discretion to modify are part of the environmental baseline.” 84 Fed. Reg. 45016, 50 C.F.R § 402.02.

The preamble to the 2019 rule discusses the definition of environmental baseline and how the extent of an agency’s discretion should be used to determine whether consequences are part of the environmental baseline or caused by the action (84 Fed. Reg. 44978-79):

[W]e added a sentence [to the environmental baseline definition] to clarify that the consequences of ongoing agency activities or existing agency facilities that are not within the agency’s discretion to modify are included in the environmental baseline. [That] sentence is specifically intended to help clarify environmental baseline issues that

⁵ 50 C.F.R. § 402.02 defines “effects of the action” as “all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action. (See § 402.17).”

⁶ 50 C.F.R. § 402.17. Other Provisions: (a) *Activities that are reasonably certain to occur.* A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Factors to consider when evaluating whether activities caused by the proposed action (but not part of the proposed action) or activities reviewed under cumulative effects are reasonably certain to occur include, but are not limited to:

- (1) Past experiences with activities that have resulted from actions that are similar in scope, nature, and magnitude to the proposed action;
- (2) Existing plans for the activity; and
- (3) Any remaining economic, administrative, and legal requirements necessary for the activity to go forward.

(b) Consequences caused by the proposed action. To be considered an effect of a proposed action, a consequence must be caused by the proposed action (*i.e.*, the consequence would not occur but for the proposed action and is reasonably certain to occur). A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Considerations for determining that a consequence to the species or critical habitat is not caused by the proposed action include, but are not limited to:

- (1) The consequence is so remote in time from the action under consultation that it is not reasonably certain to occur; or
- (2) The consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur; or
- (3) The consequence is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur.

have caused confusion in the past, particularly with regard to impacts from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify.

We added this third sentence because we concluded that it was necessary to explicitly answer the question as to whether ongoing consequences of past or ongoing activities or facilities should be attributed to the environmental baseline or to the effects of the action under consultation when the agency has no discretion to modify either those activities or facilities. The Courts and the Services have concluded that, in general, ongoing consequences attributable to ongoing activities and the existence of agency facilities are part of the environmental baseline when the action agency has no discretion to modify them. With respect to existing facilities, such as a dam, courts have recognized that effects from the existence of the dam can properly be considered a past and present impact included in the environmental baseline, particularly when the Federal agency lacks discretion to modify the dam. See, e.g., *Friends of River v. Nat'l Marine Fisheries Serv.*, 293 F. Supp. 3d 1151, 1166 (E.D. Cal. 2018).

With respect to agency authority in the context of a discretionary agency action, the preamble to the 2019 rule clarified that, consistent with the statutory purpose of the ESA, the effects of the discretionary action are not limited to those effects or activities over which a federal agency exerts legal authority or control: "The Services decline to limit the 'effects of the action' to only those effects or activities over which the Federal agency exerts legal authority or control. Once in consultation, all consequences caused by the proposed action, including the consequences of activities caused by the proposed action, must be considered...provided those activities would not occur but for the proposed action under consultation, and both the activities and the consequences to the listed species or designated critical habitat are reasonably certain to occur. Where this causation standard is met, the action agency has a substantive duty under the statute to ensure the effects of its discretionary action are not likely to jeopardize a listed species or destroy or adversely modify its critical habitat." 84 Fed. Reg. 44990 (<https://www.federalregister.gov/d/2019-17517/p-145>).

c. The Corps interprets its project authorities to require that constructed Civil Works projects be operated and maintained in such a manner that the projects continue to serve their Congressionally authorized purposes, subject to appropriations and budgeting principles. Only Congressional action to change the authorization or de-authorize an existing Civil Works project can alter or terminate this responsibility. However, the manner in which operation, maintenance, repair, replacement, and rehabilitation is performed is often discretionary and subject to ESA section 7 consultation. Examples of discretionary actions include, for example, changing the timing and frequency of how the Corps operates a fish passage facility and adjusting the timing of in-water construction to comply with an in-water work window to reduce impacts on ESA-listed species.

d. Corps regulatory permits authorizing the construction of structures, including fill, typically authorize the permitted structures to exist indefinitely with no expiration date cited. 33 C.F.R § 325.6. Pursuant to general condition 2 at 33 C.F.R. Part 325, Appendix A, and Nationwide Permit General Condition Number 14, permittees are required to maintain the authorized structure or fill in "good condition." If the work required to maintain the structure in good condition involves a new discharge or new structure or work that affects navigable waters, the entity responsible for the structure is required to obtain a separate permit authorization for the

discharge, structure, or work that facilitates the maintenance work.⁷ “Maintenance” in and of itself is not an activity subject to regulation under Corps regulatory authority. A decision on the permit application for the discharge, structure, or work that facilitates maintenance would not affect an underlying, prior permit that authorized the existence of the structure for an indefinite duration. The decision on the permit facilitating maintenance is not a decision on whether the structure should continue to exist, but a decision on whether to authorize the specific work proposed. The authorization of the existence of the structure can only be changed through a separate process to modify or revoke that prior permit. 33 C.F.R § 325.7. If the Corps were to deny a permit application for the discharge associated with the work to facilitate the maintenance of an existing, permitted structure, such a denial would not revoke or otherwise affect a prior authorization for the structure to exist, nor would the denial modify the requirement to maintain the structure in good condition.

4. Resolution. The Corps recognizes that it has an obligation to request ESA consultation on discretionary federal actions it undertakes or authorizes involving the repair, replacement, maintenance, or modification of existing structures if the activities it proposes to undertake or permit may affect listed species or designated critical habitat.

a. Corps Civil Works Projects. In the case of existing Civil Works projects, the Corps typically lacks the discretion to cease to maintain or operate these Congressionally authorized agency projects or facilities. Only Congressional action can alter or terminate this responsibility. Within each consultation initiation package, the Corps will clearly define the action, describe the Congressional authorization providing for the construction of the project and requiring its continued operation, and specifically set forth the limits to its discretion over the continued existence of the project. NMFS will individually defer to the Corps’ case-specific and supported interpretation of any limits to its discretion on a project-by-project basis.

When the Corps lacks the discretion to modify (or cease to operate and maintain) a previously authorized structure, the effects stemming from the existence of that structure into the future would be considered part of the environmental baseline. However, generally any short-term effects of the action (e.g., construction impacts), as well as any other parts of the action over which the Corps retains discretion (e.g., manner and timing of maintenance or operations) would be evaluated and included in the effects of the action analysis. See 84 Fed. Reg. 44979 (explaining that consultations will evaluate the future effects of all discretionary operations, even those operations that the federal agency proposes to keep the same).

b. Corps Regulatory Program. By contrast, the Corps acknowledges, consistent with Section 3.d above, that it has the discretion to decide whether to issue (or deny) a regulatory permit to replace, repair, maintain, or otherwise modify existing structures, and that in deciding whether to grant such a permit, it will consider the impacts of its decision on ESA-listed species and critical habitat. See, e.g., 33 C.F.R. § 325.2(b)(5) (review of permit applications pursuant to section 7 of the ESA); 40 C.F.R. Part 230.10(b)(3) (Corps 404(b)(1) Guidelines requiring that permits for dredge or fill may not be issued if it would jeopardize the continued existence of species listed as endangered or threatened or result in the likelihood of the destruction or

⁷ Under section 10 of the Rivers and Harbors Act of 1899, the Corps has authority to regulate “structures and/or work in or affecting navigable waters of the United States. 33 C.F.R § 322.3(a). Under section 404 of the Clean Water Act, the Corps has authority to regulate “discharges of dredged or fill material.” 33 C.F.R § 323.3(a). If there is a structure or work in or affecting the navigable waters or a discharge of dredged or fill material that serves the purpose of facilitating maintenance work, the Corps will evaluate the effects of the maintenance work when making a permit decision.

adverse modification of a habitat designated as critical); and 33 C.F.R. § 320.4 (Corps public interest review applies to all applications for Department of the Army permits and requires an evaluation of the proposed activity to determine whether issuance of the permit is contrary to the public interest where expected benefits are balanced against reasonably foreseeable detriments. One such factor of consideration is 'Fish and Wildlife.').

Because the Corps has discretion to issue regulatory permits, future effects stemming from the existing structure are not always considered part of the environmental baseline. Instead, the agencies will evaluate, as an effect of the action, what consequences would not occur but for the action and are reasonably certain to occur.

To evaluate whether the future effects from an existing structure should be considered a consequence of the action, the agencies will consider whether the maintenance, repair, replacement, or modification activity may cause effects that occur later in time or outside of the immediate area involved in the action, and whether the action may extend the impacts of the existing structure into the future. In reaching this determination, the agencies will consider various factors, including the current condition of the structure, how long it would likely exist irrespective of the action, and how much of it is being replaced, repaired, or strengthened, as well as whether a prior consultation has addressed the effects of the structure (and, if so, for what time period). The agencies acknowledge that not all maintenance-type activities would result in the structure having future effects that would be considered a consequence of the maintenance-type action.

If the applicant seeking a Corps' regulatory permit is another federal agency, and that federal agency lacks the discretion to modify or cease to maintain or operate an existing agency structure or facility, then the extent of the federal agency applicant's discretion should be used to define the action. Similar to Corps' Civil Works projects, the federal agency applicant should clearly define the action, describe the Congressional authorization providing for the construction of the project and requiring its continued operation, and specifically set forth the limits to the federal agency applicant's discretion over the continued existence of the project. This information should be included in the consultation initiation package. NMFS will individually defer to the federal agency applicant's case-specific and supported interpretation of any limits to its discretion on a project-by-project basis.

The agencies agree that provisions of a reasonable and prudent alternative (RPA) or reasonable and prudent measures and terms and conditions in an incidental take statement (ITS) that address activities that are completely outside the Corps' authority should be assigned solely to applicants. See, e.g., 84 Fed. Reg. 44990 ("When the Services write an incidental take statement for a biological opinion, under section 7(b)(4)(iv) of the Act they can assign responsibility of specific terms and conditions of the incidental take statement to the federal agency, the applicant, or both."). The Corps will include as a condition of the Corps permit the ITS or RPA when required under a Section 7 consultation.

5. Expiration Date. This memorandum is effective immediately and will remain in effect until it is amended, superseded, or revoked, whichever occurs first, upon written agreement from both agencies.



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