



AAPA Harbors & Navigation Committee

How Will a NOAA Habitat Conservation Calculator Impact Your Port's Routine Maintenance?

Dena Horton, Government Relations Director
Pacific Northwest Waterways Association (PNWA)



Background/Timeline

2018 – NOAA Fisheries West Coast Region
Internal Guidance implemented

- Changed environmental baseline
- Increased mitigation requirements

NOAA Fisheries WCRO functional moratorium
 on permit actions for almost three years

- Develop Salish Sea Nearshore Programmatic Consultation
- Develop Conservation Calculator to determine mitigation requirements

2021 - New ASA-CW appointed to the Corps

NOAA 31 - 10 Fisheries and Aquaculture Effects of Structures in ESA Section 7 Consultation 04/2021

NMFS West Coast Region's (WCR) Guidance on Assessing the Effects of Structures in Endangered Species Act (ESA) Section 7 Consultation

As we carry out a consultation under ESA Section 7, this guidance will assist us in determining when the future impacts of a structure or its effects associated with its presence in the environment, separate from effects associated with its construction are considered "effects of the action."

General Principles

1. Determining the "effects of the action" will vary depending on the facts associated with a particular consultation. We should carefully consider all relevant factors when making this determination.
2. When considering the effects of replacement, maintenance, repair, or alteration of an existing structure, we should not assume that future impacts caused by the presence of the structure are net effects of the action on the basis that the structure is already in existence. In a formal consultation, the present and historical existence of structures in the action area should be analyzed as part of the environmental baseline. We also need to consider whether future impacts from a structure should be considered effects of the action. To do this, we consider whether the proposed action extends the useful life of a structure in a meaningful way. The action agency, soon-superseded, NOAA's General Counsel (GC), and your devolved ESA Section 7 coordinator may provide useful input on this point. If the proposed action extends the length of time the structure will exist into the future, then the future effects of the structure would likely need to be considered. In reaching this determination, consider the current condition of the structure; how much of it is being replaced, repaired, or strengthened; how long it would likely exist irrespective of the proposed action; and whether a prior consultation has addressed the effects of the structure (and, if so, for what time period).
3. The considerations under 22 may be relevant to an informal consultation as well. When an action to replace, maintain, repair, or alter a structure extends its life into the future, a letter of concurrence should discuss these effects in relation to any such effects are anticipated. Failure to adequately consider such effects may lead to an "inappropriate" and likely to adversely affect" conclusion. The proper approach will likely turn on the factual circumstances of the structure that is subject to consultation.

²² Effects of the action as defined by 50 CFR 402.12 refers to the direct and indirect effects of an action on the species or critical habitat, in addition to effects of the action that are considered to be indirect effects of the action. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities that may affect the species or critical habitat. Proposed Federal projects for the action area that have already started or commenced construction, and the impacts of such projects, actions, and other human activities, are not included in the baseline. Effects of the action are those effects that are not included in the baseline. The effects of the action are those effects that are not included in the baseline. The effects of the action are those effects that are not included in the baseline.



HOUSE OF REPRESENTATIVES
COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20515-0105

Congress of the United States
House of Representatives
Committee on Appropriations
Washington, DC 20515-0105

OFFICE OF THE ASSISTANT SECRETARY
FOR CIVIL WORKS
WASHINGTON, DC 20310

September 1, 2021

Rick Spinrad
Under Secretary of Commerce for Oceans and Atmosphere
National Oceanic and Atmospheric Administration
1401 Constitution Avenue NW, Room 5128
Washington, DC 20230

Jaime A. Pinkham
Acting Assistant Secretary of the Army, Civil Works
108 Army Pentagon
Washington, DC 20310

Brenda Mallory
Chair, Council on Environmental Quality
730 Jackson Place, NW
Washington, DC 20503

Dear Administrator Spinrad, Acting Assistant Secretary Pinkham and Chair Mallory:

We write today to request your immediate assistance resolving an interagency dispute which has essentially halted all maintenance of existing structures in, over, or near waterways across the West Coast. As we work to rebuild our economy, it is imperative that we minimize these kinds of bureaucratic delays that stifle economic activities and are so frustrating to our citizens.

Your agencies have an obligation to resolve this interagency conflict and end this permitting stalemate so that these critical infrastructure upgrades – which are necessary to address safety hazards, support healthy nearshore habitat, and promote economic growth – can resume.

To the best of our understanding, the basis for this interagency dispute is a disagreement between the National Marine Fisheries Service (NOAA Fisheries) and the U.S. Army Corps of Engineers (Corps) regarding interpretation and implementation of certain requirements under Section 7 of the Endangered Species Act (ESA), including the definition of environmental baseline and the



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)(j) joint agency memorandum. On July 9, 2021, NMFS WCR responded to this request explaining, among other things, that NMFS did not believe the 404(j) 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.

Change in Policy

2021 – House Appropriations Committee hearing held to seek answers on permitting challenges and a timeline for resolution

NOAA Fisheries interpretation of “discretion” in the 2019 Rule leads to agreement with Corps

January 2022 – Memorandum signed and rolled out nationally

- No public input or formal stakeholder process
- No financial impact analysis/agency coordination
- First time entities outside of West Coast involved in the process on this national policy



Memo between Corps and NOAA Fisheries

Adopts NOAA Fisheries resetting of the environmental baseline for ESA Section 7 consultations on maintenance projects

- Existing structure is no longer included in the baseline
- Mitigate for maintenance and for the “enduring effects” of the existence of the entire structure for the next 40-50 years
- Utilize Conservation Calculator tailored to the Puget Sound to determine mitigation required under programmatic consultation

Results in formal consultation for almost all maintenance projects and increased costs for modeling, consultants, and mitigation, etc.



Policy Process

August 22, 2026

Stephanie Ehinger
NOAA Fisheries
1009 College St. SE, Suite 210
Lacey, WA 98503



Re: PNWA Comments on the Puget Sound Nearshore Habitat Conservation Calculator

Dear Ms. Ehinger,

On behalf of the Pacific Northwest Waterways Association (PNWA), I would like to thank you for the July 29 presentation on the Puget Sound Nearshore Habitat Conservation Calculator background and details. It is clear you have invested a great deal of time and effort to the development of this tool. PNWA, as an advocacy organization, does not have the in-house scientific and technical expertise to review the scientific assumptions and technical elements of the Puget Sound Nearshore Habitat Conservation Calculator. However, we appreciate the opportunity to provide the following comments on the process for developing the calculator.

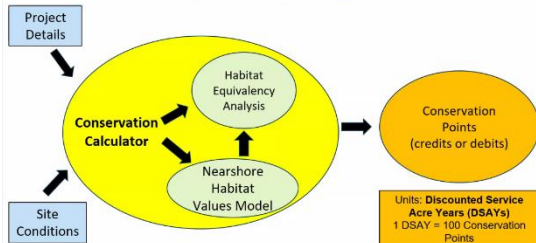
PNWA has over 150 members in Oregon, Washington and Idaho. These include ports, large companies, steamship operators, grain elevator operators, agricultural producers, electric utilities, irrigation districts, and union labor. Our association supports projects to advance and protect the region's navigation infrastructure, freight mobility, economic health, and the environment. We support the region's multi-modal transportation system, which provides safe, efficient, and reliable links to competitive domestic and world markets. Ensuring the regulatory process is timely and consistent, and that there is balance between the environment and commerce, is important to our membership.

The July 29 presentation slides noted multiple examples and photos of development. Given that the calculator was designed to most closely meet the needs of waterfront residential development including small boat ramps, floats, and sailboat docks, the calculator seems appropriate for such small scale shoreline development. However, the presentation did not provide examples of application to large industrial, terminal, or commercial fishing operations typically found at modern port facilities. Nor does the calculator have a feature for being scaled to appropriately fit that type of larger development. When applied to port facilities, the calculations are disproportionately large as a result of failing such a small framework and overlaying it on top of larger, industrial developed areas. PNWA would suggest development of an entirely separate calculator that would be more appropriate for use with larger industrial port infrastructure. At a previous public meeting, NOAA Fisheries Assistant Regional Administrator Kim Kratz indicated the agency was open to alternative models that were based on science and followed similar analysis. PNWA and its members stand ready to assist with

4234 NE Hallock Street, Suite 315
Portland, OR 97213

Telephone: 503-234-8550
Fax: 503-234-8555

The Conservation Calculator organizes inputs for two models: Habitat Equivalency Analysis and the NHVM



- NOAA Fisheries completed BiOp June 29, 2022 and USFWS completed BiOp July 29
- With 10 days notice, NOAA Fisheries held a public meeting to discuss science and technical issues regarding the Conservation Calculator on July 29, 2022.
- Comment letters submitted.
- Corps of Engineers has serious concerns with the assumptions and use of the calculator and also submitted comments.
- NOAA Fisheries has yet to submit the calculator and comments received to an independent peer review.



Salish Sea Nearshore Programmatic Consultation

Conservation offsets are required for the following activities:

- Utilities - New footings for relocated transmission lines
- Shoreline modification
- Expand or install a new in-water or overwater structure
- Repair or replace an existing structure
- Dredging for vessel access

The enduring adverse effects on nearshore habitat, from the activities must be offset with an equal (or greater) amount of conservation offsets (compared to project effects/debits).

For maintenance of existing structures:

SSNP assumes that *“nearly all repair or replacement projects covered by SSNP will extend the life of all or part of existing structures. Thus, the effects of the action include the impacts caused by the repaired or replaced structures during its newly extended life....*

Over and in water structures: 40-years

Shoreline stabilization (marine bulkheads): 50-years”



Salish Sea Nearshore Programmatic Consultation

Activities covered by SSNP:

- Culvert/bridge repair/replacement
- Relocating/repair of existing utilities
- Stormwater facilities/outfalls
- Shoreline modifications
- Expand or install a new in-water or overwater structure
- Repair or replace an existing structure
- Minor maintenance of an existing structure
- Repair, replace, expand or install a new aid to navigation, scientific measurement device, or tideland marker
- Dredging for vessel access
- Dredging and debris removal to maintain functionality of culverts, water intakes, or outfalls
- Habitat enhancement activities
- Set-back or removal of existing bulkheads, tidegates, berms, dikes, or levees
- Beach nourishment
- Sediment/Soil remediation



Salish Sea Nearshore Programmatic Consultation

Outlines design criteria for each of the project activities covered and general construction measures.

Annual limitations on activities in the ITS:

Limitation is for all of Puget Sound not per action or per port. Some examples (doubled for the first two years of SSNP):

- Dredging for vessel access – 34,000 cy (68,000/yr = 136,000 in 2 years)
- Pile driving – 1,400 can be repaired, replaced, or installed
- In-water/Over-water structures and vessel impacts – 220,000 linear feet installed new, repair, or replacement
- Shoreline modifications like bulkheads – 24,000 linear feet installed new, repair, or replacement
- Remediation – only 50 acres of area remediated annually

NOAA review and verification of stormwater management plan and stormwater information provided prior to the Corps authorizing or carrying out a project. NOAA may overlap with EPA/Ecology on stormwater.



Salish Sea Nearshore Programmatic Consultation and Conservation Calculator

Key Takeaway Messages from March 30, 2022 Meeting:

- Loss of another in-water work window.
- Almost all port maintenance projects are likely to require formal consultation.
- SSNP is voluntary and ports and others can seek individual consultation.
- Staffing capacity challenges remain an issue. Projects were essentially held hostage until the SSNP was completed – 100+ project backlog.
- For SSNP Consultation, NOAA Fisheries stated they would evaluate other models presented versus the Conservation Calculator as long as they are science based and follow similar analysis.
- Biggest challenge – the SSNP and Conservation Calculator provide no carry over of credits.
- An independent peer review of the Conservation Calculator would be conducted.



Salish Sea Nearshore Programmatic Consultation

Key Messages from July 29th Conservation Calculator Meeting:

- It will likely take 1-2 years to clear the backlog of projects.
- Make your project fit the SSNP and use the Conservation Calculator to get through the process as quickly as possible.
- There is no timeline for individual consultations due to “staffing capacity.”
- PNWA and other ports submitted written responses to Conservation Calculator meeting by August 26, 2022 deadline.

Challenges for Ports Using the SSNP:

- The framework is too small – based on waterfront residential.
- Likely to exceed annual activity limits allowed under the programmatic.
- Calculator generates untenable mitigation requirements and other costs for ports.
- Other logistical and timing challenges.
- Lack of timeline to address individual consultations.



Salish Sea Nearshore Programmatic Consultation

[Find A Species](#)[Fishing & Seafood](#)[Protecting Marine Life](#)[Environment](#)[Regions](#)[Resources & Services](#)[About Us](#)

RESOURCES

Puget Sound Nearshore Conservation Calculator

March 03, 2023

This conservation calculator assesses the value of nearshore habitat so that project proponents can gauge the impacts of their projects.

[File/Document](#)

[Tool/App](#) | [West Coast](#)

We are working with Puget Sound ports to optimize application of the calculator for port-specific infrastructure. The current calculator version may not be applicable to some port structures.

[View the Calculator User Guide \(Version 1.5\)](#)

[Change log \(Version 1.5\)](#)

Accessibility Disclaimer: This habitat tool is not currently in a format compliant with Section 508 Amendment to the Rehabilitation Act of 1973. If you need assistance with the habitat tool, please contact Lisa Abernathy at Lisa.Abernathy@noaa.gov, (206) 526-4742 to discuss your information needs.


More Information

- > [Puget Sound Nearshore Habitat Conservation Calculator](#)
- > [Workshops, Presentations, and Training Resources](#)
- > [Frequently Asked Questions](#)



Application of Memo Policy Nationwide

- NOAA SE Region - Rolling out ESA “frameworks” in 2023 for ESA section 7 consultation for species and critical habitat
- Applies to Texas, Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, Puerto Rico, and U.S. Virgin Islands
- NOAA will host ESA Section 7 training sessions, including information on the Consultation Frameworks in 2023
- Unclear when NOAA SE Region will develop and require calculator(s)



SOUTHEAST REGION FISHERY BULLETIN

NOAA FISHERIES

ISSUE DATE: October 12, 2022
FB22-063
CONTACT: Mary Wunderlich, 727-209-5985, Mary.Wunderlich@noaa.gov

Threatened and Endangered Species and Critical Habitat Consultation Frameworks

Key Message:

NOAA's Southeast Region is announcing the release of threatened and endangered species and critical habitat consultation frameworks to assist federal action agencies, or non-federal representatives, in section 7 consultations under the Endangered Species Act (ESA).

- The Consultation Frameworks provide information needed to consult on federal actions that may affect ESA-listed marine species and their designated critical habitat within the Southeast Region (Texas, Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, Puerto Rico, and U.S. Virgin Islands).
- The Consultation Frameworks summarize the best available information on species life history, behavior, and distribution; critical habitat; activities and potential routes of effect; and recommendations for integrating recovery considerations into section 7 consultation practices.
- NOAA's Southeast Region will be hosting section 7 training sessions, including information on the Consultation Frameworks in 2023. We will provide information for future training sessions on our website. For more information visit <https://www.fisheries.noaa.gov/southeast/consultations/consultation-frameworks>

Why did NOAA's Southeast Region develop the frameworks?

Multiple streamlining tools have been developed to support federal action agencies, or non-federal representatives, in conducting section 7 consultations under the ESA.

- The Consultation Frameworks will help facilitate section 7 consultation processes and provide information to minimize effects to listed species and critical habitats from a variety of federal actions.

Who Does this Apply To?

The Consultation Frameworks can assist federal action agencies, or non-federal representatives with information on ESA listed species and critical habitat in the Southeast Region.

For more information please visit:
<https://www.fisheries.noaa.gov/southeast/consultations/consultation-frameworks>.



PNWA Advocacy

- Advocacy for additional staffing capacity at NOAA NMFS and USFWS starting to see results:
- NOAA Pacific Salmon budget line – FY23 \$5M more
- NMFS Project Consultations - \$2M to address backlog of ESA consultations and called out the Pacific Northwest in the language specifically.
- Bipartisan Infrastructure Law and Inflation Reduction Act - \$40M for NOAA-NMFS to be implemented nationally *“to conduct more efficient, accurate, and timely reviews for planning, permitting and approval processes through the hiring and training of personnel, and the purchase of technical and scientific services and new equipment, and to improve agency transparency, accountability, and public engagement.”*



Advocacy

PNWA has met with Congressional staff, committee staff, and Members of Congress to request:

1. NOAA Fisheries and the Corps rescind the Memo and go through formal rulemaking process, OR work with ports to develop a programmatic consultation and use a mitigation tool that actually works for ports.
2. Supporting the Ports of Seattle and Tacoma HEA Plus (HEA+) alternative model to the Conservation Calculator.
3. Staffing capacity to process individual consultations, backlogs, etc.



Thank You – Questions?



Dena Horton, Government Relations Director

Pacific Northwest Waterways Association (PNWA)

Dena.Horton@pnwa.net

