



## Shifting Baselines: New Guidance from Army Corps and NMFS on ESA Compliance for Work on Existing Structures

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On January 5, 2022, the United States Army Corps of Engineers (the Corps) and the National Marine Fisheries Services (NMFS) (together, the Agencies) issued [a joint memorandum](#) addressing the Agencies' process for evaluating the environmental effects of projects involving existing structures (such as docks, piers, or dams) on listed species and designated critical habitat in Endangered Species Act (ESA) Section 7 consultations (the Memorandum). Building off existing NMFS regional guidance, the Memorandum, applicable nationwide, purports to resolve uncertainty in how the Agencies characterize and analyze projects involving the maintenance, repair, replacement, or modification of an existing structure in their Section 7 consultations.

The Memorandum implicates a range of activities related to existing structures, including work on Corps Civil Works projects, fill permits issued under Section 404 of the Clean Water Act, and permits authorizing work on existing structures and work in navigable waters under Section 10 of the Rivers and Harbors Act. The Agencies attempt to add clarity to their approach for evaluating the future impacts of an existing structure as "effects of the action" or as part of the "environmental baseline" in an ESA Section 7 consultation. With respect to Corps-permitted projects, the Memorandum states that future effects from existing structures are not always considered as part of the "environmental baseline," and that the Agencies will consider whether subsequent activities will cause effects that occur later in time or outside of the immediate area involved in the action, and whether the action could prolong the impacts of the existing structure into the future.

### Background

#### Overview of ESA Section 7

Section 7 of the ESA requires federal agencies, when carrying out, authorizing, or funding an action, to engage in consultation with the U.S. Fish and Wildlife Service (USFWS) or NMFS (collectively, the Services)—depending on the species—to ensure that their actions do not jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2).

This interagency consultation process is guided by joint regulations issued by the Services at 50 C.F.R. Part 402. In a 2019 final rule, the previous Administration revised how the Services are to consider the "effects of the action" for purposes of evaluating jeopardy or adverse modification of critical habitat, eliminating the distinction between "direct" and "indirect" effects. 84 Fed. Reg. 44976 (August 27, 2019). In its place, the Services adopted a two-part test where the consequences of a proposed action must be analyzed as an effect when they (1) would not occur "but for" the proposed action; and (2) are "reasonably certain to occur." 84 Fed. Reg. 44976, 45016 (codified at 40 C.F.R. § 402.02). The Services further clarified that "[e]ffects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action." *Id.* In addition, the 2019 rule carved out a stand-alone definition for "environmental baseline" (previously included in the definition of "effects of the action"), which states that 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." 50 C.F.R. § 402.02. These changes are further detailed in our [prior alert](#).

As part of its review of the previous Administration's regulatory actions, the Biden Administration has indicated that it plans to propose further revisions to the regulations promulgated by this 2019 final rule. Notably, however, the Memorandum claims that "the substance and outcome of this [M]emorandum would be the same" under the pre-2019 ESA regulations.

## NMFS West Coast Region's 2018 Guidance on Assessing the Effects of Existing Structures in ESA Section 7 Consultations

In 2018, the NMFS West Coast Region (WCR) issued internal guidance (2018 Guidance) on ESA Section 7 consultations for work on existing structures. That 2018 Guidance provided that when considering the effects of "replacement, maintenance, repair, or alteration of an *existing* structure," the Section 7 consultation would "need to consider whether *future* impacts from a structure should be considered effects of the action." To do so, the 2018 Guidance states that the consultation would "consider whether the proposed action extends the useful life of the structure in a meaningful way." "Meaningful" is described as "synonymous with significant, relevant, important, or consequential." The 2018 Guidance considered maintenance to be those activities that were minor repairs and did not extend the life of the structure in a meaningful way, and therefore the future impacts from the structure were not considered to be effects of the action.

### The Memorandum

Similar to the 2018 Guidance, the Memorandum outlines how the Agencies, during an ESA Section 7 consultation, will evaluate impacts of projects involving existing structures on ESA listed species and their critical habitat. The Memorandum recognizes that the Corps is obligated to request ESA consultation on discretionary federal actions it undertakes or authorizes that involve the maintenance, repair, replacement, or modification of existing structures, if the activities would adversely affect listed species or designated critical habitat. Specifically, the Memorandum addresses two categories of activities: (1) Corps Civil Works projects and (2) projects requiring Corps permits under the Corps' regulatory program.

#### Corps Civil Works Projects

With regard to Corps Civil Works projects, the Memorandum recognizes that an existing structure can cause two different types of impacts: the long-term effects that result from the "the existence" of the structure (i.e., the fact that the structure is physically present), and the short-term effects that result from actions taken to maintain the structure.

In addressing the first type of impact, the Memorandum states that the Corps does not have discretion to cease to maintain or operate Congressionally authorized projects or facilities, and therefore the effects of such a structure existing in the future would be considered part of the environmental baseline, rather than the effects of the action. In addressing the second type of impact, the Memorandum states that short-term effects (e.g., construction impacts) and other parts of the action involving Corps discretion (e.g., manner and timing of maintenance or operations) would "generally" be included and evaluated in the effects analysis.

The Memorandum states that NMFS "will individually defer to the Corps' case-specific and supported interpretation of any limits to its discretion on a project-by-project basis," suggesting that in some cases NMFS may disagree with the Corps' interpretation.

#### Projects Requiring Corps Permits Under the Corps' Regulatory Program

With regard to projects requiring Corps permits, the Corps acknowledges that it has discretion to issue or deny a regulatory permit to maintain, repair, replace, or otherwise modify an existing structure, 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. Accordingly, the Agencies will evaluate whether the future impacts of a project involving an existing structure should be considered effects of the action by determining what consequences would not occur "but for" the action and are "reasonably certain" to occur. To do so, the Agencies will consider whether the action may cause effects that occur later in time or outside of the immediate area, and whether the action may extend the impacts of the existing structure into the future. The Memorandum identifies various factors to be considered in making this determination, including the current condition of the structure, how long the structure would exist irrespective of the action, and the context of the action.

The Agencies acknowledge that not all "maintenance-type" activities would result in the structure having future effects. However, there remains uncertainty as to what the scope of "maintenance-type" activities are, and whether they could include some repair, or even replacement, activities. Unlike the 2018 Guidance, the Memorandum does not specifically categorize whether an activity is maintenance, repair, replacement, or alteration of an existing structure. However, both documents consider the same

question—whether the activity will extend the life of the existing structure in a meaningful way—to determine if the future impacts of the structure should be part of the baseline or the effects of the action.

The Memorandum also recognizes that if a permit is sought by another federal agency that lacks discretion to modify, cease to maintain, or operate an existing agency structure or facility, the agency should outline this lack of discretion in the consultation initiation package. As with the Corps, NMFS will defer to the federal agency applicant’s supported interpretation of any limits to its discretion on a project-by-project basis.

## Implications

This Memorandum represents a nationwide expansion of the Agencies’ approach to how they assess the effects associated with existing structures in ESA Section 7 consultations. While the Memorandum takes a similar approach to the 2018 Guidance, that guidance was limited to the West Coast and was NMFS’s interpretation rather than both NMFS and the Corps’ interpretation. This Memorandum’s nationwide applicability will have far reaching implications for private project owners.

Notably, by shifting certain effects of existing structures from baseline to the effects of action, NMFS will be able to include Reasonable and Prudent Measures or Reasonable and Prudent Alternatives that are broader in scope, with correspondingly greater impacts to private project proponents. These could impact project economics and design, scope of avoidance/minimization measures, and feasibility.

The Memorandum states that private project owners may be required to maintain an existing structure, noting that some existing Corps permits require an owner maintain the structure in “good condition.” The Memorandum states that “maintenance” in and of itself is not subject to the Corps’ jurisdiction. However, if the maintenance involves a discharge into or otherwise affects navigable waters, then the owner would be required to obtain a new permit. The Memorandum takes the position that this new permit would not technically be an evaluation of whether the project should exist, but rather whether the Corps should authorize the specific maintenance. As a practical matter, however, the Agencies would still evaluate whether the existing structure will have future effects in the Section 7 analysis, and the Agencies acknowledge that not all maintenance-type activities would result in the structure having future effects.

It remains to be seen whether USFWS (not a party to this Memorandum) will apply this same understanding of Section 7 consultation requirements for existing structures. Accordingly, the scope of the effects analysis could depend on whether a listed species or designated critical habitat involves NMFS or USFWS’s jurisdiction.

Additionally, the Memorandum explicitly states that it is not a change or substitute for law or regulation, that it is not legally enforceable, and that it does not impose any new or additional requirements on actions agencies, applicants, or NMFS. Despite these caveats, the Memorandum comes at a time when the Biden Administration’s focus on the need for maintenance and other work on port facilities, piers, and other critical infrastructure may lead to increased Corps permitting activity—and thus, application of the interpretation of Section 7 consultations on existing structures outlined in this Memorandum.

## For More Information

Van Ness Feldman closely monitors and counsels clients on the Endangered Species Act and other regulatory developments. If you would like more information about the Army Corps’ and NMFS guidance, or on other ESA Compliance issues, please contact [Duncan Greene](#), [Molly Lawrence](#), [Rachael Lipinski](#), or [Sophia Amberson](#) or any member of the firm’s Environmental practice in Seattle, WA at (206) 623-9372, or in Washington D.C. at (202) 298-1800.

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