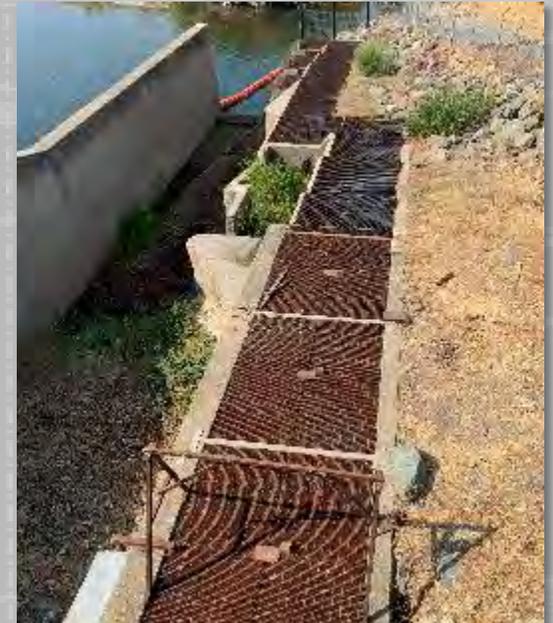


POLICY ELEVATION OF NMFS WEST COAST REGION'S GUIDANCE ON MAINTENANCE OF STRUCTURES



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US Army Corps
of Engineers®



BOTTOM LINE UP FRONT

- South Pacific Division (SPD) and Northwestern Division (NWD) have been unable to resolve policy disagreements regarding NMFS 2018 West Coast Region (WCR) Guidance for assessing effects of structures in Endangered Species Act (ESA) Section 7 Consultation.
- USACE is not disputing our duty to consult under Section 7 of the ESA to ensure our actions are not likely to jeopardize the continued existence of any listed species or adversely modify designated critical habitats.
- NMFS' implementation of the WCR Guidance is inconsistent with the manner in which ESA consultations are conducted in other NMFS regions and by U.S. Fish and Wildlife nationwide.
- Requested ASA (CW) engage Department of Commerce to elevate this policy disagreement in accordance with Section 404(q) of the Clean Water Act MOA between Commerce and Army.



WHAT IS A 404(Q) POLICY ELEVATION?



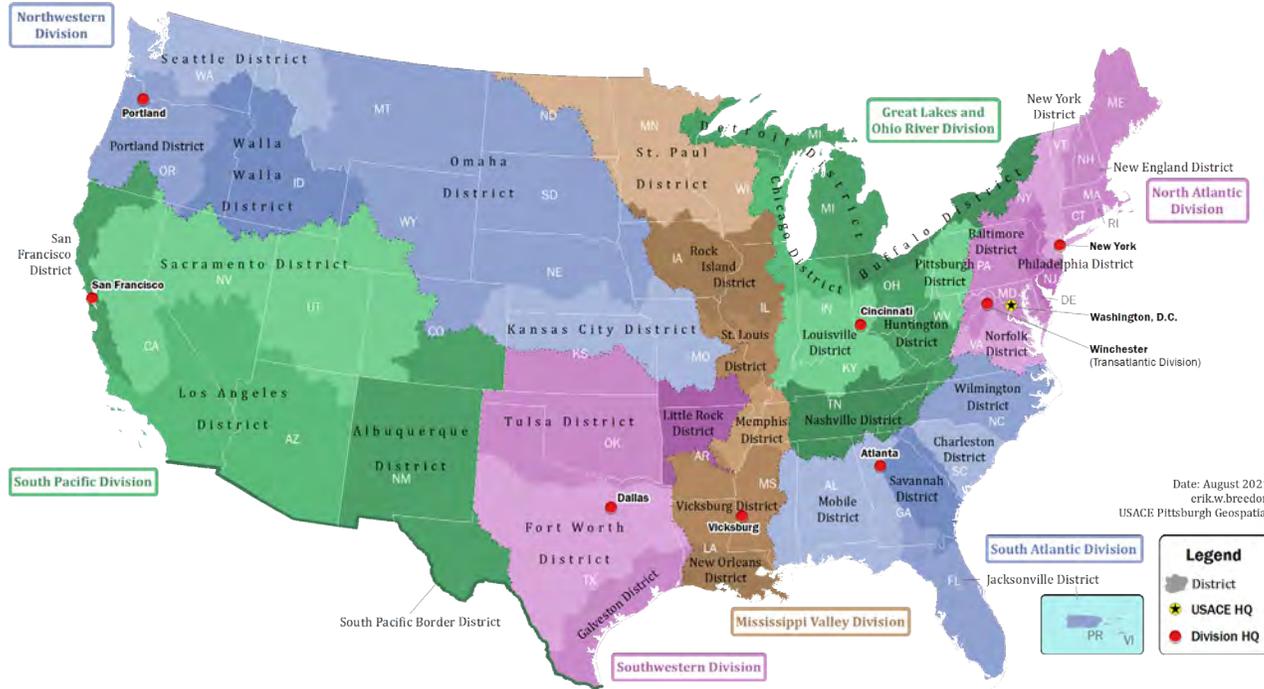
- Section 404(q) of the Clean Water Act establishes a requirement that the Secretary of the Army and the Administrator of EPA, NMFS, FWS enter into agreements assuring that delays in the issuance of permits under Section 404 are minimized. Agreements with other agencies are also encouraged.
- The 1992 MOA establishes a procedure for an expedited review of policy (Part III) and permit decisions (Part IV).
- If concerns regarding the application of policy or procedure the District/Division Engineer or Regional Administrator may initiate policy implementation review through written notification.
- If no resolution within 60 days at field level, elevate to agency heads.



USACE AND NMFS REGIONAL BOUNDARIES

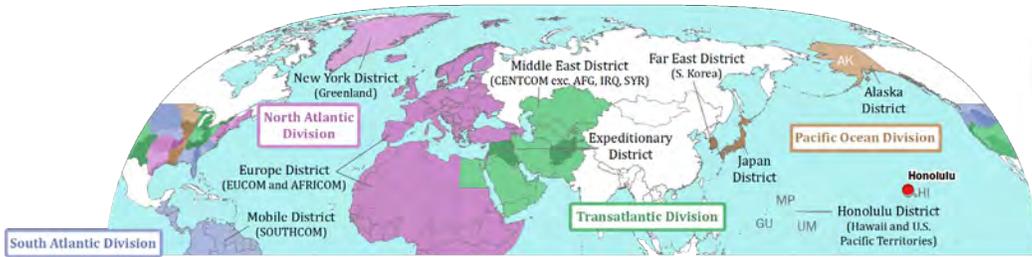
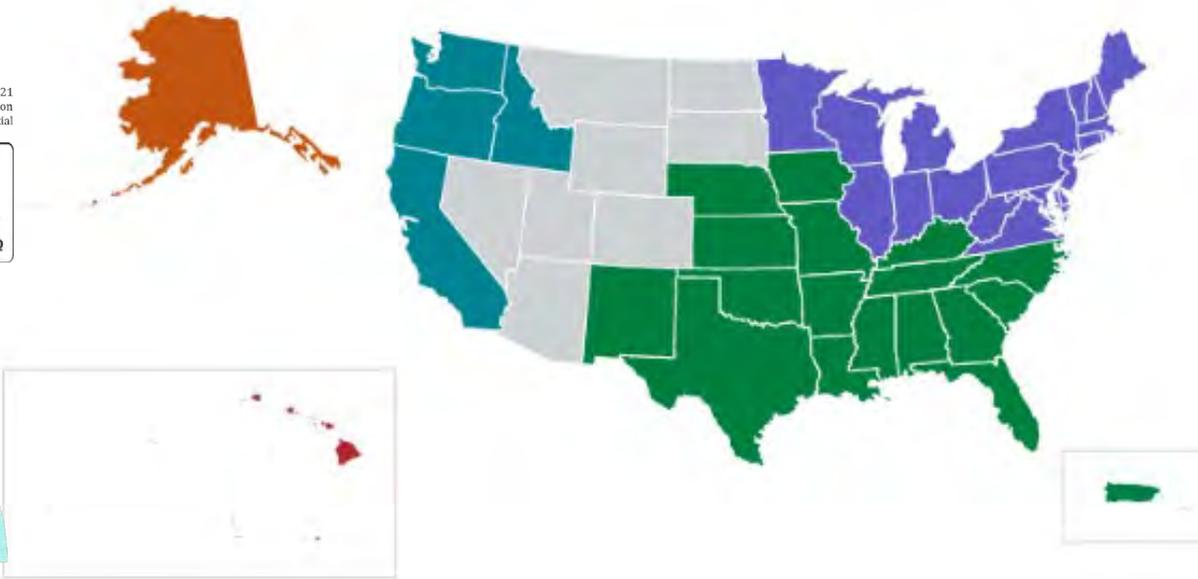


USACE Division Boundaries



NMFS Regional Boundaries

- Alaska
- New England/Mid-Atlantic
- Pacific Islands
- Southeast
- West Coast
- International



Date: August 2021
 erik.w.breedon
 USACE Pittsburgh Geospatial

Legend

- District
- USACE HQ
- Division HQ



KEY POINTS OF POLICY ISSUE BEING ELEVATED

- NMFS 2018 WCR Guidance directs NMFS staff to consider existing structures in the following manner during Section 7 ESA Consultations:
 - When considering effects of replacement, maintenance, repair, or alteration of existing structures, do not assume future impacts are not effects of the action just because the structure already exists.
 - If the proposed action extends the life of the structure the future effects are considered new effects of the maintenance action.
- The status quo for consultations under the NMFS 2018 WCR Guidance is impacting our ability to effectively implement Regulatory and Civil Works programs in NWD and SPD currently.



HOW DOES THIS CONFLICT WITH AUTHORITIES, POLICIES, AND REGULATIONS

- USACE has responsibility to maintain its civil works structures to serve their congressional authorized purposes; this is non-discretionary. The fact that maintenance extends the life of the structure is not an action subject to consultation but how and when maintenance occurs may be (reference USACE Stockdale ESA Guidance)
- 2019 revisions to the ESA section 7 regulations established a standalone definition for environmental baseline and clarified *“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.
- Regulatory Permittees have an obligation to maintain an activity/structure in good condition. Nationwide Permit 3 allows for maintenance, repair, etc. with minor deviation.
- USACE projects and permitted structures are authorized an indefinite period of time and must be maintained in good working order to ensure authorized purpose or intended use is met and ensure public safety. Maintenance activities are not “extending” the life of a structure since that structure was authorized by Congress and/or permitted to be in place in perpetuity.



HOW THIS HAS CHANGED ESA SECTION 7 CONSULTATIONS

- Actions that were previously determined by USACE to be “may affect not likely to adversely affect” with an accompanying informal consultation are being elevated by NMFS to “may adversely affect” and require a formal consultation and Biological Opinion (BiOp).
- Formal consultations take additional time and include reasonable and prudent measures that increase cost to the project proponent.
- NMFS has issued Jeopardy BiOps that often include a Reasonable and Prudent Alternative (RPA) that is costly, excessive, not economically or technically feasible, and/or outside the scope of Corps’ authority.





EFFECTS ON CIVIL WORKS PROJECTS & STUDIES



- Impacts to Operation, Maintenance, Repair, Rehabilitation and Replacement (OMRR&R) of Existing Projects
 - Requirements in BiOps that are overly extensive and costly, including removal of project features, not economically or technologically feasible, or outside USACE authority.
 - Contributes to lengthy consultations as staff try to resolve differences in related to environmental baseline.
- Impacts to Planning Studies
 - For projects that modify an existing federal project, there is the potential that NMFS will attribute a greater degree of impacts to a proposed action than would occur otherwise. This can add costs to proposed projects.
- Potential impacts to projects implemented under the Infrastructure Bill such as deferred maintenance at existing USACE projects which require consultation with NMFS.



EFFECTS ON CIVIL WORKS PROJECTS & STUDIES



- Elevation recommended in the Civil Works context even though NMFS had verbally indicated that they will defer to USACE on our interpretation of its authorities on certain projects.
- In limited contexts, NMFS has acknowledged that ongoing effects from existing Civil Works projects are not within our discretion to change and therefore in the baseline. **However:**
 - This is not a resolution of the policy issues—NMFS WCR has not agreed with the 2013 USACE Stockdale ESA Guidance memo.
 - NMFS has only stated a willingness to defer to USACE when they agree with our interpretation USACE Civil Works authority—they can still object and we expect them to do so.
 - This approach is not clearly applicable to other Civil Works contexts such as levee rehabilitation (PL 84-99) and pile dike maintenance.
 - Without broad policy resolution, this approach will allow the issue to persist as it does today.



EFFECTS ON REGULATORY PROGRAM



- Permittees have an obligation to maintain a permitted activity or structure in good condition and to ensure public safety.
 - 33 CFR 325.6(a) and (b) state: “(a) *General*. DA permits may authorize both the work and the resulting use. Permits continue in effect until they automatically expire or are modified, suspended, or revoked. (b) *Structures*. Permits for the existence of a structure or other activity of a permanent nature are usually for an indefinite duration with no expiration date cited.
 - General Condition 14, 2021 Nationwide Permits (86 FR 2868), states: “Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety....” A similar standard condition is added to every individual permit.
- Maintenance activities are not “extending” the life of a structure or fill since those facilities were permitted to be in place in perpetuity.
- If not properly maintained, permittees would be in non-compliance with their Federal permit.



EFFECTS ON PERMIT APPLICANTS



- Significant delay while the disagreement remains unresolved
- Loss of predictability crucial to long-term planning
- Continued deterioration of structures and “unaddressed” safety issues
- Applicant agreeing to project modifications/design changes that impact the project’s utility and ability to meet desired goals and objectives
- Additional mitigation (compensation) costs, some of which make projects economically infeasible
- **Regional:** Industry representatives have identified that mitigation requirements are not consistent nationally and it is placing western ports at a competitive disadvantage.



TIMELINE



- April 2018 NMFS WCR issued Guidance for assessing structures.
- NWD and SPD coordination with NMFS WCR through 2020 with no resolution.
- Engaged USACE HQ in Sep 2020 with coordination with NMFS HQ through Feb 2021.
- SPD and NWD Programs Directors elevated the issue to Mr. Barry Thom, NMFS WCR Administrator on 17 May 2021 IAW 404q MOA.
- 9 Jul 2021 Mr. Thom provided a written response which did not resolve the issue.
- 18 Aug 2021 NWD and SPD requested policy elevation IAW 404q MOA to Mr. Lee, Director of Civil Works (DCW)
- 8 Sep 2021, USACE briefed ASA (CW).
- 15 Sep 2021, USACE DCW requested policy elevation IAW 404q MOA to ASA (CW).
- Next steps pursuant to the 404q MOA:
 - ASA CW meet with AAOA within 30 days of notification to ASA (CW).
 - Agencies provide guidance within 60 days (15 Nov).



SUMMARY



- Disagreement between USACE and NMFS WCR has resulted in significant delays and cost increases to both Civil Works and Regulatory Programs in NWD and SPD.
- NMFS approach is causing consultations to move from informal to formal because the ongoing effects of existing structures are now being considered new effects -- a 180-degree change from the past.
- Opportunities for streamlining mission are being lost due to policy disagreement (e.g. programmatic BiOps).
- Other federal agencies, entities (PNWA, AAPA), and Congressional Members are looking to see if USACE can reach resolution with NMFS
- If issue is not resolved, USACE is concerned more projects will be affected by WCR Guidance such as deferred maintenance under the Infrastructure Bill or when critical habitat for Southern Killer Whale is expanded along OR and CA coasts.



QUESTIONS??



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