Testimony of Dena Horton, Deputy Director, Pacific Northwest Waterways Association

Before the Water, Wildlife and Fisheries Subcommittee of the House Committee on Natural Resources titled,

"Legislative Hearing on H.R. 276, H.R. 845, H.R. 1897 & H.R. 1917"

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Chairman Westerman, Chairwoman Hageman, Ranking Member Hoyle, and Members of the Subcommittee; Thank you for the opportunity to provide this testimony. My name is Dena Horton, and I serve as the Deputy Director of the Pacific Northwest Waterways Association (PNWA). PNWA is a non-profit, non-partisan trade association that advocates for federal policies and funding in support of regional economic development. Founded in 1934, our membership has grown to over 150 entities and includes ports, public utilities, farmers, forest product producers, and public agencies that support navigation, transportation, energy, trade, and economic development throughout the Pacific Northwest.

We take our mission of providing economic development and jobs for our region seriously along with ensuring environmental stewardship so our navigation infrastructure can coexist with species and their critical habitat. We support the goal of the Endangered Species Act (ESA) to prevent extinction of species and the negative effects extinction has on ecosystems that also support human life.

Environmental Baseline and Conservation Calculator

In order for ports, marine terminals, and marinas to perform maintenance on their existing infrastructure and to build new infrastructure in environments with ESA listed species in the area, they must secure permits. Most often these maintenance or new project permits are through the U.S. Army Corps of Engineers as the lead agency, but if grants from other federal agencies are involved, then sometimes the U.S. Department of Transportation's Maritime Administration (MARAD) or Federal Highways Administration or even the Federal Rail Administration may be the lead agency for a permit. The lead agency will need to consult with NOAA Fisheries and U.S. Fish and Wildlife Service (USFWS) to ensure the ESA Section 7 consultation process is completed for the maintenance or new project permit.

As we understand it, Congressional intent for the ESA and other environmental legislation is that the law be implemented consistently across the country by federal agencies. While species, topography, climate, and other ecosystem factors may be different from region to region, the process by which the laws are interpreted and implemented through regulation by federal agencies is intended to be consistent. Consistent application of regulations and procedures in implementing the ESA will ensure that no one region is put at a competitive disadvantage compared to others. Regardless of which port, marine terminal, or marina is applying for a maintenance or development permit, the process to receive the permit and to determine the appropriate level of mitigation should be the same.

However, beginning in 2018, without conducting any economic impact analysis or stakeholder engagement with the regulated public, the West Coast Region Office of NOAA Fisheries internally began applying a different definition of the environmental baseline than what was commonly understood from previous practice under ESA Section 7 consultation for maintenance and building permits. Rather than considering the existing structure and its

effects as part of the environmental baseline condition, the NOAA Fisheries West Coast Region Office definition of environmental baseline no longer included the existing structure for the effects analysis. As a result, in addition to mitigating for the maintenance or building action, applicants were also expected to mitigate for the effects of the structure's continued existence in the environment on species and habitat for decades into the future, typically between 30-50 years. This essentially required all port and marina maintenance projects to undergo lengthy formal consultation even for the most basic maintenance work and the effects calculation dramatically increased the costs of maintenance and other projects.

The Corps initially did not agree with the new interpretation and did not believe they had the authority to require mitigation for maintenance projects under the ESA. NOAA Fisheries negotiated and entered into a Memorandum of Resolution with the Corps in 2022. Under the Memorandum, the Corps agreed to adopt NOAA Fisheries' new interpretation of environmental baseline and increased mitigation requirements for maintenance projects under the Corps' regulatory program and to apply it nationwide. However, the only region where this agreement was being formally implemented was in the West Coast Region, most acutely in Puget Sound. In May 2023, Representative Cliff Bentz (OR-2) requested a formal legal opinion from NOAA Fisheries' counsel explaining how the Memorandum did not constitute Administrative Rulemaking. To my knowledge, he did not receive a formal reply.

In June 2023, NOAA Fisheries and USFWS proposed the Agency Coordination rulemaking to formally change the environmental baseline and increase mitigation (also known as "conservation offsets") for maintenance projects during the ESA Section 7 consultation process. Under this new interpretation of environmental baseline, the agencies are not including the existing structure and its current/previously permitted effects as part of the existing baseline condition. The rule was finalized in March 2024 as proposed noting that public comments were dismissed.

As you can imagine, the mitigation or conservation offset requirements for the existence of the entire project for 30-50 years substantially increases costs to even the most basic maintenance project. It also makes projects such as removing creosote pilings and replacing them with steel and removing overwater dock structures and replacing them with light penetrating grated decking excessively costly even though the end result would improve water quality and salmon habitat, maintain the existing footprint of the structure, and not change the structure's intended purpose.

Under this new conservation offset scheme, there is no more "one and done" mitigation for a project. Under this new environmental baseline interpretation, if an entity performs maintenance and pays the conservation offset, they will have to pay it again in the future. If maintenance is needed again or on a different segment of the structure, then more conservation offsets would be required even though it was paid under the previous maintenance permit. The amount of conservation offset would take into account the amount previously paid, but the entity would be responsible to pay for the entire structure's existence for the length of time the structure's useful life was extended beyond the last time conservation offsets were paid. Applicants end up mitigating for the structure's existence over and over again.

To implement this policy on the ground and assess the conservation offsets required, the West Coast Region Office of NOAA Fisheries developed a conservation calculator that is applied to the Puget Sound only and nowhere else in the country. This calculator was designed based on waterfront residential development and not permanently modified industrial environments like those found at ports, marine terminals, and marinas. Unfortunately, the conservation calculator results generate excessively high mitigation costs even for the most routine maintenance activities that previously were permitted through informal consultation and rarely required additional mitigation.

PNWA has port members that have seen their maintenance project costs for marina dredging, dock repairs, and other activities increase between 20% to 80%. In some cases, the cost of the conservation offset mitigation exceeds the cost of the maintenance project. As a result, one of our rural ports has completely given up trying to perform in-water maintenance work on their docks. At some point, their docks will not be safe for human use and will eventually fail. Infrastructure that cannot be maintained and collapses into a water environment has a negative effect on species and the habitat too.

As a result of undergoing formal consultation, Corps nationwide permits for maintenance projects are delayed and often take two or three years to complete. In addition to hiring more consultants to complete modeling, studies, and permit applications, the project costs also increase over time as the costs of materials, mitigation, and inflation increase. PNWA has members with federal and state grants in jeopardy of being returned because permits cannot be secured in a timely manner to execute or obligate the grant funding and the amount of funds from the grant may no longer cover the increased cost of the project and the mitigation. This leaves the applicant scrambling to find additional funds by delaying other projects or potentially deferring the maintenance project altogether.

Real Stakeholder Engagement and Economic Impact Analysis

For the 2024 Agency Coordination rule finalized by NOAA Fisheries and USFWS, the agencies pre-determined that the rule was not an "economically significant rule" on the front end of the process so they did not perform robust economic impact analysis and stakeholder engagement from the start. The agencies acknowledged they received input from stakeholders and essentially finalized the rule as they proposed it. During the ESA Section 7 consultation process, when ports point out that the conservation calculator results represent dramatic increases in costs, NOAA Fisheries response is that they cannot consider the cost, only what is best for the species. When the agencies fail to engage the regulated community in advance of rulemaking, fail to do adequate economic impact analysis on the front end of rulemaking, and then ignore comments from the regulated public during rulemaking, they should not act surprised when applicants raise concerns about the dramatic cost increases the agencies ignored from the beginning. The rulemaking process does not feel like a transparent, inclusive process that ends up achieving buy-in from the regulated public. PNWA supports more robust economic impact analysis and stakeholder engagement on the front end of the rulemaking process.

Addressing Additional Significant Delays in the Consultation Process

Currently, NOAA Fisheries and USFWS have 135 days to process a formal consultation under ESA Section 7 once the agencies determine the project permit application is complete. However, this is not truly reflective of the time it takes for consultation.

It typically takes about six months of working with the action agency, like the Corps, before the Corps has enough project information to transmit the application to NOAA Fisheries and USFWS for ESA Section 7 consultation. The 135 day clock does not commence once the Corps transmits the application information. It begins once NOAA Fisheries and USFWS have assigned a project number, assigned a biologist to review the application for sufficiency, and once the agencies have determined they have enough information about the project to proceed to consultation. If they don't have enough information, the applicant will likely need to do additional modeling, research, and respond to the agencies' questions which can take even more time. It can take 9 months to a year to get to the point where NOAA Fisheries and USFWS have enough information to proceed to consultation. From the applicant's perspective, eighteen months have passed since their application was first submitted to the Corps and the agencies are finally ready to start the 135-day consultation shot clock. Meanwhile, the applicant cannot start putting out their project for bid because they don't have permits in hand and their two-year grant funding time limit is running out. Improvements are needed to cut down on the delay caused by the time it takes for NOAA Fisheries and USFWS to acknowledge receipt of the application, assign a project number, complete the sufficiency review, and ensure completion of the consultation within the statutory time limit.

Conclusion

PNWA supports the environmental baseline clarification in H.R. 1897, the Endangered Species Act Amendments Act of 2025 as it aims to restore the widely accepted definition of environmental baseline for ESA Section 7 consultations related to maintenance and building permits. This legislation will ensure that only the maintenance action and effects of the maintenance action are addressed in the permitting process. This legislation will promote a consistent application of the environmental baseline nationwide and ensure that mitigation costs are reasonable for proposed activities. Ports, marine terminals, and marinas need a timely, predictable, and cost-effective permitting process to maintain infrastructure, supply chains, competitive trade while promoting sustainable waterways for navigation and species.