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Craig Aubrey  
U.S. Fish and Wildlife Service  
Ecological Services  
Division of Environmental Review  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

Tanya Dobrzynski  
National Marine Fisheries Service  
Office of Protected Resources  
Endangered Species Interagency Coop. Div.  
1315 East-West Highway  
Silver Spring, MD 20910

RE: Docket Numbers: FWS-HQ-ES-2025-0044, Interagency Cooperation Regulations

Dear Mr. Aubrey and Ms. Dobrzynski:

On behalf of the Pacific Northwest Waterways Association (PNWA), I write to offer comments on the proposed Endangered Species Act (ESA) Section 7 Interagency Cooperation revised rule. Overall, PNWA is pleased to see U.S. Fish and Wildlife Service and NOAA Fisheries (the Services) are proposing to return to the 2019 definitions of “environmental baseline” and “effects of the action” and removing the conservation offsets and mitigation requirements established in the 2024 Interagency Cooperation rulemaking. PNWA supports the effort to align the Interagency Cooperation rule with Supreme Court decisions, including *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) (*Loper Bright*) and keeping the rule in line with the statutory text of the ESA. PNWA believes the 2019 definitions are more legally defensible and provides more certainty and clarity for ESA Section 7 compliance obligations. The proposed Interagency Cooperation rule should expedite the completion of ESA Section 7 consultations. PNWA members fully support this effort.

In 2023, the Northwest Seaport Alliance, which represents the ports of Seattle and Tacoma alone, supported more than 265,000 jobs, generated \$17.7 billion in wages and benefits, and nearly \$55 billion in business output. Also in 2023, the Columbia Snake River System handled 51.1 million metric tons of cargo valued at \$25.3 billion and serves as the third largest grain export gateway in the world. A 2024 report showed the 23 ports in Oregon directly support 106,799 jobs, contribute \$7.1 billion in labor income, and support a total of \$19 billion in total economic output. One out of six Oregon jobs is directly or indirectly tied to cargo, recreation, industrial, commercial or other activities at Oregon’s ports. In 2021, the Port of Lewiston supports 2,136 direct jobs and contributed \$686 million in direct regional spending in Idaho. PNWA has over 150 members, including ports, barge companies, steamship operators, grain

elevator operators, agricultural producers, electric utilities, irrigation districts, and union labor throughout Washington, Oregon, and Idaho. 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.

Ports, especially those in the Pacific Northwest, take their role as stewards of waterfront property very seriously and many PNWA members have developed robust environmental programs, restored hundreds of acres of habitat, and even developed mitigation banks. We remain steadfast partners on environmental issues and species recovery. PNWA supports the revisions to the Interagency Cooperation rule to ensure critical maintenance to waterway and other infrastructure is able to be performed in a timely and cost-effective manner to maintain efficient and globally competitive navigation, trade, and supply chains.

1. Proposed Revisions to Section 402.17: “Activities that are reasonably certain to occur” and “Consequences caused by the proposed action”

PNWA agrees with the Services' proposal to define what constitutes “activities that are reasonably certain to occur” and “consequences caused by the proposed action.” PNWA believes that the principal that Section 7 consultations may only consider effects of the action that are reasonably certain to occur is a ESA bedrock principal and is supported by existing judicial precedent. *Maine Lobstermen Ass'n v. NMFS*, 70 F.4th 582 (D.C. Cir. 2023). Furthermore, the Services' proposal to define “consequences caused by the proposed action” and include examples of what does not constitute such consequences creates more certainty for project applicants in Section 7 consultations.

PNWA previously opposed the 2024 changes to the definition of “effects of the action” proposed by the 2024 Interagency Cooperation rule. Under the 2024 rule, those changes created significant uncertainty as to what should be considered effects of the action, as opposed to part of the environmental baseline. Over the long term, this would have led to an increasing number of consultations going through the more time-consuming formal consultation process. Additionally, this expansion of the effects of the action would have dramatically, and unlawfully, increased the costs by requiring consideration of effects that were not reasonably certain to occur.

For projects being implemented by public entities like ports, cities, counties, and special districts, this is especially problematic because these public entities are formed to fulfill a specific public good or function and also do not have discretion over whether to maintain the infrastructure for which those entities were formed to create and operate. The 2024 rule change to the definitions of “environmental baseline” and “effects of the action” has caused these entities to defer much-needed maintenance on port and other public facilities due to delays in already time-intensive consultation processes and increasing the mitigation costs associated with the Section 7 consultations.

2. Proposed Revisions to Section 402.02: The Environmental Baseline

PNWA agrees with the Agencies' proposed revision to the definition of environmental baseline. PNWA agrees that the environmental baseline includes “ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify.” However, PNWA requests that the environmental baseline language be strengthened to expressly state that all existing structures should be included within the definition of environmental baseline, regardless of whether the proposed action might cause those structures to continue to be operated or result in the repair or improvement of those structures.

PNWA believes this clarification is needed due to an ongoing problem with consultations for maintenance projects and maintenance dredging projects in the Pacific Northwest, particularly the Puget Sound. These consultations have been backlogged for several years since NOAA Fisheries West Coast Regional Office, prior to rulemaking and with no stakeholder engagement, implemented internal guidance policy in 2018 changing the environmental baseline and requiring compensatory mitigation. The backlog was exacerbated when NOAA West Coast Regional Office put project consultations on hold during the development of the Salish Sea Nearshore Programmatic (SSNP) consultation and Conservation Calculator. In 2022, NOAA entered into a Memorandum of Resolution (Memorandum) with the U.S. Army Corps of Engineers (USACE) that agreed to apply NOAA's new interpretation of environmental baseline and effects of the action and implement conservation offsets nationwide. When the Memorandum was questioned as administrative rulemaking, the Services quickly issued the Interagency Cooperation rulemaking in 2023 and finalized it as proposed in early 2024 acknowledging that stakeholder input was not addressed in the final rule.

PNWA continues to have significant concerns about the 2022 Joint Resolution Memorandum and 2018 West Coast Regional Office Guidance currently remaining in effect. If the definition of environmental baseline is not clarified, it is likely that there will continue to be confusion and inconsistent application of these regulations which threatens the ability of ports and marinas to develop and maintain critical national infrastructure. PNWA strongly believes neither the 2018 West Coast Regional Office Guidance nor the 2022 Joint Resolution Memorandum align with the statutory text of the ESA and are not consistent with the *Loper Bright* ruling. As such, in conjunction with the adoption of these proposed rules, PNWA request the following documents be rescinded:

- The January 6, 2022, Joint Resolution Memorandum for Evaluating the Effects of Projects Involving Existing Structures on Listed Species and Designated Critical Habitat in Endangered Species Act Section 7 Consultations jointly issued by NOAA and the U.S. Army Corps of Engineers; and
- The NOAA Fisheries West Coast Region Office's Guidance on Assessing the Effects of Structures in ESA Section 7 Consultation, dated April 18, 2018.

### 3. Proposed Changes to Section 402.02: Reasonable and Prudent Measures

PNWA also supports the removal of offsets and mitigation from the definition of reasonable and prudent measures (RPMs). PNWA does not believe the Services have authority under the ESA to include mitigation and offsets as a requirement of RPMs. Under the 2024 Interagency Cooperation rule, the Services significantly expanded the scope of what was included in RPMs as part of an incidental take statement in a biological opinion. Under the 2024 rule, it allowed the Services discretion to include measures as an RPM that offset any remaining impacts of incidental take that could not be avoided and include PRMs even if they occurred outside of the action area. PNWA agrees with the Services decision to reconsider the statutory and regulatory text in view of *Loper Bright Enterprises*. PNWA is pleased to see the removal of offsets and mitigation to prevent unreasonable burden to ports and other members requiring an incidental take statement with RPMs.

The 2024 rule would have dramatically increased the costs of maintenance. For some rural communities, these costs would be so high that maintenance deferral was their only option. Furthermore, PNWA was deeply concerned that these small and disadvantaged communities would no longer benefit from economic development opportunities because these opportunities would become cost-prohibitive under the 2024 regulation. Cost is a significant factor to consider in the process as ports and other public entities are taxpayer funded and required to be responsible stewards of public funds.

In closing, we thank the Services for their attention to this matter and for the opportunity to comment on this revised Interagency Cooperation rulemaking. We recognize the Services are feeling pressure to make more progress on species recovery and habitat restoration. PNWA members have plenty of maintenance projects that would contribute to the improvement of the environment and PNWA members who are in the process of developing mitigation banks for even greater habitat and species improvement. PNWA would welcome opportunities to meet on a regular basis with the Services to look for opportunities for ports in the Pacific Northwest to be proactive in making environmental and water quality improvements while being able to utilize advance mitigation tools that incentivize both environmental improvements and economic development projects.

PNWA remains concerned about the Services' ability to maintain adequate staffing capacity to process ESA Section 7 consultations in a timely manner. Our members look forward to working with the Services to ensure needed port and other waterways projects are approved with predictable timelines and thorough environmental review. PNWA's membership remains committed to maintaining our federal waterways to promote both trade and economic development as well as environmental stewardship and sustainability.

Respectfully submitted,



Neil Maunu  
Executive Director  
Pacific Northwest Waterways Association