



Stoel Rives_{LLP}

Environmental Baseline & the evaluation of existing structures

Presented by Cherise Gaffney
Endangered Species Act Conference
January 28, 2021

Implications of the changing concept of the environmental baseline

- 2019 changes to regulatory definition of “environmental baseline”
- 2018 National Marine Fisheries Service (NMFS) West Coast Region guidance on assessing effects of existing structures
 - Together, these represent an evolution in how existing structures are evaluated in Section 7 consultations

Role of the Environmental Baseline

- A biological opinion must include an analysis of the *environmental baseline*, to which the proposed action and cumulative effects are added.
- An analysis of past and ongoing human and natural factors that lead to the current status of the species – a “snapshot” of the species’ health.
(March 1998 Endangered Species Handbook p. 4-22)
- Existing structures have generally been part of the baseline, while their ongoing operations may be an effect of the action.
- Changes in the Services’ approach to the baseline complicate treatment of existing structures.

2019 Definition

“Environmental baseline refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. **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.**”

Agency Discretion

- Baseline now includes “consequences ... from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify”
 - If agency does not have discretion to modify/remove, then structure is part of the baseline
 - On its face, applies to “agency facilities”
- Unclear how the Services will treat facilities where there *is* discretion to modify (84 Fed. Reg. 44,978-79)
 - Consultation “does not de facto pull in all of the possible discretionary actions or authorities of the Federal agency.”
 - Requires “case-by-case” analysis by Service and action agency during consultation

NMFS's 2018 West Coast Policy

- April 18, 2018 Regional Administrator Memorandum: *Guidance on Assessing the Effects of Structures in Endangered Species Act Section 7 Consultation*
- Applies to consultations on replacement, maintenance, repair or alteration of existing structures
 - Policy applies to formal and informal consultations
- Confirms that historical and present impacts of a structure are part of the environmental baseline
- But future impacts from structure's existence may be:
 - *Part of the environmental baseline, OR*
 - *Considered an effect of the action*



April 18, 2018

MEMORANDUM FOR: West Coast Region

FROM: Barry A. Thom 
Regional Administrator

SUBJECT: West Coast Region's Guidance on Assessing the Effects of Structures in Endangered Species Act Section 7 Consultation

I am pleased to share with you the West Coast Region's (WCR) new Guidance on Assessing the Effects of Structures in Endangered Species Act (ESA) Section 7 Consultation for immediate implementation. This guidance is provided to assist in determining when the future impacts of a structure (i.e., effects associated with its presence in the environment, separate from effects associated with its construction) are considered 'effects of the action' in an ESA Section 7 consultation.

The guidance includes General Principles to apply when making an effects determination. Table 1 provides examples of Federal agency actions associated with structures, such as docks, shoreline armoring, roads, and new buildings, and clarifies when future impacts of a structure should be considered 'effects of the action.'

Implementing this guidance will help us to improve consistency and legal defensibility across the region. If you have questions, please contact your division ESA Section 7 coordinator.

Attachment

Concept of “extending the life” of a structure

- When does the proposed action “extend the useful life” of the structure”?
 - aka “perpetuating the baseline”
- Policy says to consider:
 - *Current condition of structure*
 - *How much is being replaced, repaired, strengthened*
 - *How long would it last irrespective of proposed action*

Category ³	Proposed Action	Future impacts from the structure considered effects of the action?	Examples
1. New structure	Action agency proposes to permit, fund, or carry out construction of a new structure.	Yes	<ul style="list-style-type: none"> • Navy proposes to construct a new overwater structure. • HUD proposes to fund construction of a new apartment complex. • Forest Service proposes construction of a new road.
2. Replacement	Action agency proposes to permit, fund, or carry out replacement of an existing structure.	Yes, this would likely be treated like a new structure	<ul style="list-style-type: none"> • Corps proposes to issue a permit to replace a residential dock that has reached the end of its useful life. • Corps proposes to issue a permit to replace a failing bulkhead armoring the shoreline of a marine area. • FEMA proposes to fund replacement of a public boat launch. • Corps proposes to issue a permit to replace a privately owned water supply dam.
3. Repair	Action agency proposes to permit, fund, or carry out repair of a structure that extends the useful life of the structure in a meaningful way.	Yes, depending on the scale and urgency of the repair ⁴	<ul style="list-style-type: none"> • Corps proposes to issue a permit for replacement of eight piles on a commercial wharf supported by a total of 10 piles. The structure is currently unsound. • Corps proposes to issue a permit for repair of rip rap. The riprap is currently functional but is likely to start to dissipate over the next few years. The new riprap is expected to remain in place for many years.

³ These categories are presented to aid in determining the effects of the action under ESA section 7. These categories are not established by regulation and do not correspond directly to terms used in the ESA Consultation Handbook.

⁴ Non-urgent or minor repairs would be classified as maintenance (category 4).

Category ³	Proposed Action	Future impacts from the structure considered effects of the action?	Examples
4. Maintenance	Action agency proposes to permit, fund, or carry out minor repairs or maintenance on a structure that do not extend the useful life of the structure in a meaningful way.	No	<ul style="list-style-type: none"> • Corps proposes to issue a permit for replacement of five damaged piles on an industrial wharf supported by hundreds of piles. The wharf is functional and would remain so without the proposed action. • BLM proposes to grade and re-rock an existing gravel road. • Corps proposes annual pre-flood inspections of a Corps-owned dam.
5. Alteration	Action agency proposes to permit, fund, or carry out alteration of a structure that changes the design, purpose, or function of the structure in a meaningful way. ⁵	Yes, although in some cases adverse effects would be less than that of the previous structure	<ul style="list-style-type: none"> • FEMA proposes to fund conversion of a rock revetment to a bioengineered approach. • HUD proposes to fund upgrades to a wastewater treatment plant. • Corps proposes to fund a levee setback project.
6. Action ⁶ related to a structure for which we have already completed consultation.	Action agency proposes to permit, fund, or carry out repair, maintenance, or alteration on a structure that has been the subject of a previous consultation.	Determined on a case by cases basis. Many factors can affect determination (e.g., is there a previous consultation that specifically analyzed the effects of the structure's existence and, if so, for what time period?; Does	<ul style="list-style-type: none"> • Corps proposes to issue a permit for replacement of two piles on a residential dock for which we have completed a consultation 5 years ago.

⁵ Although alteration actions may not extend the *useful life* of the structure, there will often be a causal relationship between the action and the nature or scope of future effects of the structure. Thus, the rationale is conceptually similar, although the explanation is slightly different from other categories.

⁶ This action could include any of the categories above.

Application of Policy

- NMFS assumes that effects of the existing structure for an interim period are *not* the result of the repair
- But effects of existing structure beyond interim period are evaluated as an effect of the proposed action
- Not clear how interim period is being established
 - Recommend action agency/applicant provide factually based information in BA/BE on structure's integrity and anticipated life with/without repair
- Is it fair to say the structure will go away without the repair? Would lack of repair result in consequences to listed species?
- Given delay, should ITS terms and conditions apply during the interim period, *i.e.* when effects are not a result of the proposed action?

Important questions

- Is moving existing structures to the effects analysis consistent with Section 7?
- Section 7 is intended to evaluate potential effects of *proposed future actions*:
 - “any *action* authorized, funded or carried out....” (16 USC §1536(a)(2))
 - “action” defined as “activities or programs” (50 CFR § 402.02)
 - Existing federal structures are part of the baseline, not because of agency discretion, but because the structures already exist --
 - “the agencies may not now be said to ‘authorize, fund, or carry out’ the basic existence of the FCRPS dams.” *Nat’l Wildlife Fed’n v. NMFS*, 481 F.3d 1234, 1236 (9th Cir. 2007)
 - Requirement to initiate consultation for construction projects does not apply to those initiated prior to November 10, 1978 (16 U.S.C. § 1536(c)(1))
 - Upgrades to an existing structure don’t cause the structure to become part of the proposed action:
 - “[T]he test is not whether the fuse plug in some way assists or facilitates in the continued operation of the pre-existing project, but instead whether the water project could not exist ‘but for’ the fuse plug. Because the dam would exist independent of the federally mandated upgrades, “the biologist would not consider the effects of the dam to be effects of the [proposed] action under consultation” (ESA Handbook at 4-28)

Important questions

- Will these changes lead to more “jeopardy” determinations?
- Can a “jeopardy” determination on the basis of ongoing effects of *existing structures* be squared with the Services’ position on baseline jeopardy?
 - 2019 rule clarified that species are not “in jeopardy”; determinations are made about the federal action, “[t]hey are not determinations made about the environmental baseline for the proposed action or about the pre-action condition of the species.” (84 Fed. Reg. at 44,987)
- How will these new approaches impact consultations on existing infrastructure
 - Does a significant repair to I-5 “extend the life” of the whole freeway?
 - Is the fact that an agency has discretion to do more (modify/remove) relevant to analyzing what the agency is actually proposing?
 - Why wasn’t considering existing structures in the baseline sufficient?



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