

PROTECTION OF FISHERIES HABITAT

Eldon V. C. Greenberg

Galloway & Greenberg
Washington, D.C.

PROTECTION OF
FISHERIES HABITAT

By

Eldon V.C. Greenberg*

Presented at the
1990 National Fishery Law Symposium
Washington Athletic Club
Seattle, Washington
October 11-12, 1990**

*Partner, Galloway & Greenberg, Washington, D.C.

**Written materials, submitted as of September 24, 1990, to be updated as appropriate at the Symposium.

Maintenance of productive fisheries habitat is, it goes without saying, essential to the maintenance of productive fisheries. Without viable salmon spawning streams in the Pacific Northwest, there will be no salmon resource to harvest in future years. Without coastal marshes in Louisiana, there will be no future shrimp fishery in the Gulf of Mexico. Thus, such activities as the filling of wetlands or the ocean dumping of dredged harbor spoil directly implicate the interests of seafood harvesters and processors.

In such circumstances, lawyers representing seafood harvesters, processors and trade associations must be able to advise their clients about the prospects for taking action to protect and restore fisheries habitat. In fact, in this new era, where at least lipservice to environmental protection seems to be the order of the day, there may well be enhanced opportunities for taking such action. Just how the fishery lawyer can best serve his client in this new era is, however, not always immediately obvious.

The topic of habitat protection per se is vast. Innumerable private and public activities in wetlands, in the coastal zone and in the oceans themselves have the potential to adversely affect fisheries habitat. At the same time, the thicket of Federal, state and local regulations governing such activities is immense and complex, while programs for habitat restoration and enhancement are burgeoning. Sorting through the regulatory thicket and counseling clients on effective habitat protection strategies is consequently no easy task.

This Symposium is not the place to provide what could be

nothing less than a short course on the full range of environmental law. Rather, I hope that, by way of a few general strategic thoughts, selective illustrations, identification of several key players, and suggestion of future directions the law is taking, I can provide some useful guidance. I will start by discussing overall strategic considerations relevant to decisions to mount a habitat protection challenge. I will then direct my attention to two illustrative areas of Federal law -- wetlands protection and ocean dumping -- where the regulated activities typically have a direct impact on habitat. I will next proceed to discuss the specific roles of the National Marine Fisheries Service ("NMFS") and the Regional Fishery Management Councils (the "Councils") in the habitat protection process, since they are both responsive to fisheries interests and have a defined role to play in habitat protection matters. Finally, I will touch on several new Federal legislative initiatives which may dramatically broaden the possibilities for habitat protection.

I. STRATEGIC CONSIDERATIONS: APPROACHING THE PROSPECTS FOR HABITAT PROTECTION

The decision when and where to challenge a particular activity adversely affecting fisheries habitat is often a daunting one. In the course of a year, the U.S. Army Corps of Engineers ("COE"), for example, issues literally thousands of permits to fill in wetlands. While the cumulative impact is great, individual permits often involve alteration or destruction of only a few acres of wetlands. Typically, no one fish harvester or processor is

G-4

drastically affected by any one particular activity. Further, the costs of opposition can be quite high, especially if litigation is necessary. These costs are magnified if the permit applicant or responsible Federal agency is strongly committed to the project and can expend substantial resources to defend its position. Consequently, it is important to weigh carefully the circumstances in which challenge is advisable. Several considerations are relevant to the calculus:

A. Look for High Payoff -- Obviously it is desirable to pick a challenge that can be won. Because there are so many activities affecting habitat and because often one particular activity in and of itself will not have a major adverse impact on the resource as a whole, projects should be evaluated for their precedential impact. Establishing a principle in a small case may be as important as stopping a single, large project. At the same time, a small project may be easier to stop where neither the permit applicant nor the responsible agency has a major commitment to its completion. Finally, it may be sensible to attack projects where a complete win is not essential and where the applicant and/or responsible agency may be willing to concede appropriate compensatory and mitigation measures in order to assure ultimate approval.

B. Work Through Fisheries Trade Associations -- Fisheries trade associations can often afford to do what an individual company cannot. A trade association, representing a large group of affected users of the resource, is the logical advocate to

challenge actions which pose a common threat but where damage to any one individual user may be small. Numerous trade associations have become involved in habitat protection initiatives. For example, the Organized Fishermen of Florida was active in opposing ocean dumpsite designations for the disposal of dredged spoil from Tampa Bay, Florida, while the Pacific Coast Federation of Fishermen's Associations ("PCFFA") has brought a variety of cases aimed at protecting habitat, i.e., challenging the failure of the Environmental Protection Agency ("EPA") to promulgate water quality standards to protect beneficial uses of the San Francisco Bay delta, opposing COE plans to dump dredged spoil from Oakland harbor in Half Moon Bay, etc.

C. Search Out Private Allies -- Even the pooled resources of the industry acting through its trade associations may be insufficient to mount successful habitat challenges. The search for allies is therefore essential. Given the dollars and time involved in a serious regulatory challenge, there is every incentive to piggyback on the resources of other organizations. In particular, national environmental organizations often have the mandate, expertise and money to take the lead on habitat matters. In turn, such organizations are generally pleased to have fisheries organizations joining with them in habitat challenges, since such participation helps demonstrate that a particular project causes economic, not just environmental, injury -- often a persuasive factor both with agencies and the Courts. In many instances, it is most sensible -- and cost effective for the client -- to rely

on lawyers for environmental organizations as lead counsel. The Sierra Club Legal Defense Fund, for example, is representing PCFFA in its challenge to EPA's failure to promulgate water quality standards for the San Francisco Bay delta. Counsel for seafood companies and organizations can perform an essential back-up function in providing liaison with the lead attorneys and supplying fishery-specific economic and biological evidence.

D. Solicit Public Agency Support -- If private allies are useful, so, too, are public agency allies. At the Federal level, in particular, EPA, NMFS and the U.S. Fish and Wildlife Service ("FWS") all have mandates to protect habitat and water quality. They can be lobbied by their constituents, such as fishery organizations, to take the lead in particular habitat challenges. NMFS, for example, in the late 1970s, led opposition to the issuance of National Pollution Discharge Elimination System ("NPDES") permits under Section 402 of the Clean Water Act, 33 U.S.C. § 1342 (the "CWA"), necessary for construction of new oil refineries at Eastport, Maine, and Portsmouth, Virginia. As discussed later, the involvement of Federal agencies on behalf of fisheries habitat can materially affect, and, in some cases, i.e., wetlands protection and ocean dumping, actually dictate the outcomes of the regulatory process.

II. INVOKING SPECIFIC FEDERAL STATUTORY AUTHORITIES

The list of Federal statutory authorities which may come into play in connection with projects that may affect fisheries habitat

is long, including, inter alia: the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667e; the National Environmental Policy Act, 42 U.S.C. § 4231, et seq. ("NEPA"); the Endangered Species Act, 16 U.S.C. § 1531, et seq. (the "ESA"); the Coastal Zone Management Act, 16 U.S.C. § 1451, et seq. (the "CZMA"); the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, et seq. (the "OCSLA"); the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, et seq.; Title III of the Marine Protection, Research and Sanctuaries Act, 16 U.S.C. §§ 1431-1445 (the "Marine Sanctuaries Act"); the Coastal Barrier Resources Act, 16 U.S.C. §§ 3501-3510 (the "CBRA"); and, here in the Pacific Northwest, the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 837-839h. Rather than run through these and other statutes seriatim (and in all their permutations and combinations), I want to focus by way of illustration on two particular regulatory regimes where the activities at issue are frequently directly related to fisheries habitat and typically of interest to seafood companies and organizations: (a) the permitting of activities to dredge and fill wetlands under Section 404 of the CWA, 33 U.S.C. § 1344; and (b) the regulation of ocean dumping of dredged spoil under Title I of the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §§ 1401-1421 (the "Ocean Dumping Act"). My focus on these two regimes should not be deemed to stand for the proposition that they are the only or the most likely profitable avenues of habitat protection but rather that, while important in their own right, they are indicative of the kinds of prospects, both positive and

negative, which exist for habitat protection.

A. Wetlands Protection Under Section 404 of the CWA

(1) Loss of wetlands through dredge and fill activities permitted by COE is undoubtedly one of the major problems facing fisheries habitat around the country. In Louisiana, for example, which contains some 40 percent of the Nation's total wetlands, approximately 100 acres of marsh and swamp are lost each day. The primary mechanism for controlling such loss is Section 404 of the CWA.

(2) Section 404(a) specifies that the Secretary of the Army, acting through COE, "may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material in the navigable waters at specified disposal sites." Permits are required for any activity which alters or destroys a wetland. Section 404(a), however, contains no express standards to govern the issuance or denial of permits.

(3) Under Section 404(b) of the CWA, COE must base its decisions regarding permits on "guidelines" developed by EPA. These guidelines (the "404(b)(1) Guidelines") are published at 40 C.F.R. Part 230. The overall standard of the 404(b)(1) Guidelines is that discharges shall not be permitted "which will cause or contribute to significant degradation of the waters of the United States." 40 C.F.R. § 230.10(c). Among other matters, the 404(b)(1) Guidelines further specify that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative" to the proposal that would have "less adverse impact

on the aquatic ecosystem." 40 C.F.R. § 230.10(a). In addition to relying on the 404(b)(1) Guidelines, COE permitting decisions are based on an administratively developed "public interest" test which involves the balancing of economic, environmental, social and other factors. See 33 C.F.R. § 320.4.

(4) Acting upon the recommendations of the National Wetlands Policy Forum, and fulfilling a campaign pledge of President Bush, EPA and COE have entered into a Memorandum of Agreement, dated February 6, 1990 (the "MOA"), which establishes a National policy goal of "no overall net loss" of wetlands. Copies of the MOA and the Federal Register notice announcing its adoption are attached at Tab A. However, the MOA expressly recognizes that this goal "may not be achieved in each and every permit action."

(5) As specified in Section 404(a) itself, there must be public notice and opportunity for comment on individual COE permits. COE regulations spell out in considerable detail the notice, comment and hearing processes. See 33 C.F.R. Parts 325, 327. The public comment period is generally 15 to 30 days. Any person may request, in writing, a public hearing, and, while the decision to hold a hearing is discretionary, COE regulations provide that hearing requests "shall be granted unless the District Engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing." 33 C.F.R. § 327.4(b) (emphasis added). Either an environmental assessment or environmental impact statement under NEPA is normally

prepared, thus providing further opportunity for public review and input. See 33 C.F.R. § 325.2(a)(4); 33 C.F.R. Part 230. State water quality certifications under Section 401 of the CWA, determinations of consistency under Section 307 of the CZMA and endangered species consultations under Section 7 of the ESA may also be required, creating yet other avenues of approach. See 33 C.F.R. §§ 325.2(b)(1), (2), (5).

(6) NMFS and FWS can play an important role in the permit application review process. Not only are they specifically advised of each permit application and "consulted" by COE, see 33 C.F.R. § 320.4(c), but they often take a strong position where issuance of the proposed permit could have adverse impacts on fisheries and wildlife. Under Memoranda of Agreement with COE, entered into under Section 404(q) of the CWA, if they object to an initial permitting decision, they may seek to elevate that decision to the Secretary of the Army. However, elevation is not mandatory, and, in any event, there is no requirement that COE ultimately defer to the positions of the resource agencies. E.g., Sierra Club v. Alexander, 484 F. Supp. 445 (N.D.N.Y. 1980), aff'd, 633 F.2d 206 (2d Cir. 1981). A copy of the current Department of Commerce agreement with COE, dated March 25, 1986, is attached at Tab B.

(7) EPA, for its part, under Section 404(c) of the CWA, has veto power over any COE decision to issue a permit. That veto authority, exercisable upon a determination that a discharge would have "an unacceptable adverse effect on municipal water supplies, shellfish beds and fishing areas ... wildlife, or recreation

areas," has in fact been exercised in a handful of cases. See generally Bersani v. EPA, 674 F. Supp. 405 (N.D.N.Y. 1987), aff'd sub nom. Bersani v. Robichaud, 850 F.2d 36 (2d Cir. 1988), cert. denied sub nom. Robichaud v. EPA, 109 S. Ct. 1556 (1989).

(8) The effectiveness of the Section 404 process is limited. It is rare that an opponent wins entirely and persuades COE to deny (or EPA to veto) a permit. COE, as noted earlier, has broad discretion under the CWA, and it is generally in the business of issuing, not denying, permits. Nonetheless, the process can effectively be used to delay issuance of a permit, which may compromise a project's economic viability. Moreover, it is often possible to secure, in what is basically a process of negotiation, conditions on the permit and/or mitigation measures which are beneficial to fisheries.

B. Regulation of Disposal of Dredged Spoil Under the Ocean Dumping Act

(1) Until quite recently, the disposal of wastes at sea, governed by the Ocean Dumping Act, presented a variety of problems, including the dumping of industrial wastes, municipal sewage sludge and dredged spoil. At the end of 1988, Congress enacted the Ocean Dumping Ban Act of 1988, Pub. L. No. 100-688, 102 Stat. 4139 (November 18, 1988), which bans the ocean dumping of all sewage sludge and industrial waste as of December 31, 1991, thus putting an end to many dumping controversies. Nonetheless, the dumping of spoil from harbor dredging remains a significant activity affecting fisheries habitat.

(2) More than 60 million cubic yards of dredged material are dumped at more than 100 offshore disposal sites annually. These sites are fairly evenly distributed along both coasts and in the Gulf of Mexico. Studies by the Council on Environmental Quality and the National Academy of Sciences have confirmed that dredged materials in inner harbors frequently contain a variety of toxic elements, including heavy metals, notably mercury, lead and cadmium, organic pollutants, such as PCBs, pesticides and herbicides, and industrial solvents and chemicals. See generally S. Rep. No. 339, 101st Cong., 2d Sess. 6-7 (June 27, 1990). The presence of such toxic pollutants in both the environment and the food chain is suspected of causing significant stress on marine life, such as lesions, tumors, fin rot and ulcers.

(3) The primary mechanism for regulation of ocean dumping of dredged material is the Ocean Dumping Act. Section 2 of that Act states the following findings and conclusions:

(a) Unregulated dumping of material into ocean waters endangers human health, welfare, and amenities, and the marine environment, ecological systems, and economic potentialities.

(b) The Congress declares that it is the policy of the United States to regulate the dumping of all types of material into ocean waters and to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.

33 U.S.C. §§ 1401(a), (b). In effect, the Act reflects a preference to avoid ocean dumping if other alternatives, such as land-based disposal, are available.

(4) COE has permit authority for the transportation and dumping of dredged materials into the ocean. Section 103 of the Ocean Dumping Act provides that, based on criteria developed by EPA, the Secretary of the Army, acting through COE,

may issue permits, after notice and opportunity for public hearings, for the transportation of dredged material for the purpose of dumping it into ocean waters, where the Secretary determines that the dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.

33 U.S.C. § 1413(a). Where a Federal project is involved, such as COE's own civil works operations and maintenance, Section 103(e) of the Act, 33 U.S.C. § 1413(e), permits the Secretary, in lieu of a permit procedure, to "issue regulations which will require the application to such projects of the same criteria, other factors to be evaluated, the same procedures and the same requirements...." The Secretary, while applying EPA criteria, makes an "independent determination" as to "the need for dumping," "other possible methods of disposal" and "appropriate locations for the dumping." Act, Section 103(b), 33 U.S.C. § 1413(b). COE has issued regulations which govern both permit issuance, see 33 C.F.R. Part 324, and its own activities. See 33 C.F.R. Parts 335-338.

(5) EPA's ocean dumping criteria are established in accordance with Section 102 of the Ocean Dumping Act, 33 U.S.C. § 1412, which specifies nine factors which must be considered, including, inter alia:

(C) The effect of such dumping on fisheries resources, plankton, fish, shellfish, wildlife, shore lines and beaches.

(D) The effect of such dumping on marine ecosystems....

* * * *

(H) The effect on alternate uses of oceans, such as scientific study, fishing, and other living resource exploitation....¹

Criteria are set out at 40 C.F.R. Part 227. They provide, inter alia, that ocean dumping is not to be permitted if there is "no need for the dumping, and alternative means of disposal are available"; there are "unacceptable adverse impacts on aesthetic, recreational or economic values"; or there are "unacceptable adverse effects on other uses of the ocean...." 40 C.F.R. § 227.2(a)(1)-(3). The basic criteria for acceptability are that:

the proposed disposal will not unduly degrade or endanger the marine environment and that the disposal will present:

(a) No unacceptable adverse effects on human health and no significant

¹ EPA also specifies criteria for and designates disposal sites. See 40 C.F.R. Part 228. For a typical EPA designation and process description, see, e.g., 55 Fed. Reg. 37234 (Sept. 10, 1990). The designation of dumpsites obviously can provide yet another avenue of challenge in ocean dumping controversies.

damage to the resources of the marine environment.;

(b) No unacceptable adverse effect on the marine ecosystem;

(c) No unacceptable adverse persistent or permanent effects due to the dumping of the particular volumes or concentrations of these materials; and

(d) No unacceptable adverse effect on the ocean for other uses as a result of direct environmental impact.

40 C.F.R. § 227.4. Despite this strict language, application of the standards in practice reflects a certain flexibility and does not necessarily lead to the prohibition of all harmful dumping. See 2 Rodgers, Environmental Law § 4.34 at 497-500 (West 1986). See generally National Wildlife Federation v. Costle, 629 F.2d 118 (D.C. Cir. 1980).

(6) EPA's criteria for determining whether dumping is permissible must be applied, and an ultimate veto power rests with EPA. However, Section 103(d), 33 U.S.C. § 1413(d), provides a waiver procedure if the Secretary of the Army determines that "... there is no economically feasible method or site available," in which case he so notifies the Administrator of EPA and the EPA Administrator must grant a waiver within 30 days "...unless [he] finds that the dumping of the material will result in an unacceptably adverse impact on the municipal water supplies, shellfish beds, wildlife, fisheries (including spawning and breeding areas), or recreational areas."

(7) In addition to following EPA ocean dumping criteria, COE has its own valulative factors. In the case of permits, the same "public interest" review carried out under Section 404 of the CWA is also carried out under Section 103 of the Ocean Dumping Act. See 33 C.F.R. §§ 320.4, 324.1. Moreover, for its own operation and maintenance activities, COE has developed detailed regulatory criteria. See 33 C.F.R. §§ 336.1, 336.2. The guiding principle is whether, consistent with the statutory standard, "the proposed disposal will unreasonably degrade or endanger human health, welfare or activities, or the marine environment, ecological systems or economic potentialities." 33 C.F.R. § 336.2(d)(1). As under Section 404, other authorities, such as NEPA, the ESA, the CZMA and the CWA, may come fully into play in the authorization process. See, e.g., 33 C.F.R. §§ 336.1(b)(6) (NEPA compliance), 336.1(b)(8) (CWA water quality certification), 336.1(b)(9) (CZMA consistency).

(8) The public notice, comment and hearing processes for ocean dumping parallel those for wetlands permitting. As noted earlier, Section 103(a) requires public notice and opportunity for a hearing prior to permitting and under COE regulations essentially the same procedures apply to Federal projects. See 33 C.F.R. Parts 324, 325, 327, 336 and 337. COE regulations for its own operation and maintenance activities in fact specifically cross-reference its generic permitting procedures. See, e.g., 33 C.F.R. §§ 336.1(b)(2), 336.2(b), 337.1(c).

(9) COE's agreements with the wildlife agencies such as NMFS and FWS extend to ocean dumping as well as wetlands permitting. Consequently, these agencies may again play an influential role and can act as surrogates for seafood companies and organizations in the permitting/authorization process, under appropriate circumstances even seeking to raise the decision to the Secretary of the Army level.

(10) While once again there are extensive public processes under the Ocean Dumping Act, the likelihood of succeeding in halting all dumping at a particular dump site is often problematical. COE, especially when it comes to its own maintenance dredging programs, is in some sense "the fox in the henhouse." Nonetheless, in particular instances, if public outcry is great enough, and if enough allies can be enlisted in the cause, success is possible. Thus, for example, PCFFA and others were able to halt dumping at Half Moon Bay.

III. NMFS, THE COUNCILS AND MAGNUSON ACT AUTHORITY

Because seafood companies and trade associations likely have close relations, or at least familiarity, with NMFS and the Councils, and because NMFS and the Councils may in fact be responsive to constituent requests for help, special attention should be played to the role of these entities in the Federal habitat protection process. Several aspects of their role, as defined by their statutory mandate and adopted policies, thus deserve comment:

A. The NMFS Habitat Conservation Policy -- In 1983, NMFS adopted a "Habitat Conservation Policy" 48 Fed. Reg. 53142 (November 25, 1983), a copy of which is attached at Tab C. The Policy provides a "focus" for its habitat conservation activities. Among other matters, the Policy indicates that NMFS will

direct its habitat conservation activities to assist the Agency in (1) meeting its resource management, conservation, protection or development responsibilities contained in the Magnuson Fishery Conversation and Management Act, the Marine Mammal Protection Act, and the Endangered Species Act; and (2) carrying out its responsibilities to the U.S. commercial and marine recreational fishing industry....

48 Fed. Reg. at 53146, col. 3. Within this context, NMFS committed to seek "to influence decisions about important habitats identified by NMFS ... [including] decisions regarding dredge and fill projects, OCS oil and gas development, ocean dumping, water diversion, artificial impoundments, energy facilities siting, water quality degradation and removal or degradation of tidal and intertidal wetlands." Id. at 53147, col. 3. The focus of the Policy on fisheries under management and industry interest in principle serves to enlist the agency in support of habitat protection advocacy sought by concerned seafood companies and trade associations.

B. The NMFS-COE Habitat Restoration Program -- One significant initiative of NMFS under the Habitat Conservation Policy was its entry into an agreement, dated November 25, 1985,

with COE to "conduct a 3-year pilot study to investigate the practicability of a national program for restoring and creating fisheries habitats within each agency's existing authorities, resources and capabilities." A copy of the agreement is attached at Tab D. A final report on the pilot project was issued on February 9, 1990, and has recommended an expanded program, National in scope, of coordination for restoration and creation purposes. The Executive Summary and Conclusions and Recommendations of the Report are attached at Tab E. Such a program, it is estimated, would cost about \$3.6 million to get underway. Neither NMFS nor COE has yet made a final decision to implement that expanded program. However, if it is approved and funded, there will be new opportunities for concerned seafood companies to work with NMFS on the creation/restoration side of the habitat conservation equation.

C. Council Habitat Authority -- The Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801, et seq. (the "Magnuson Act"), vests the Councils with specific authority on habitat protection matters. Section 302(i) of the Magnuson Act, 16 U.S.C. § 1852(i), provides:

Each Council may comment on, or make recommendations concerning any activity undertaken, or proposed to be undertaken, by any State or Federal agency that, in the view of the Council, may affect the habitat of a fishery resource under its jurisdiction. Within 45 days after receiving such a comment or recommendation from a Council, a Federal agency must provide a

detailed response, in writing, to the Council regarding the matter.

Fishery management plans, moreover, are required under Section 303(a)(7) of the Magnuson Act, 16 U.S.C. § 1853(a)(7), to "include readily available information regarding the significance of habitat to the fishery and assessment as to the effects which changes to that habitat may have upon the fishery." A number of Councils have been active in pursuing habitat protection initiatives. Seafood companies and organizations can nevertheless certainly press to have the Councils do more on particular projects of concern under Section 302(i).

D. Proposed Magnuson Act Modifications -- Pending Magnuson Act reauthorization bills would enhance the Councils' habitat powers, particularly as regards anadromous species. Section 109(g) of the Senate bill (S. 1025) and Section 206(g) of the House bill (H.R. 2061) both would amend Section 302(i). Section 109(g) of H.R. 2061 would change Section 302(i), in language basically identical to that of S.1025, to read:

"(1) Each Council --

(A) may comment on, or make recommendations concerning, any activity undertaken, or proposed to be undertaken by any State or Federal agency that, in the view of the Council, may affect the habitat of a fishery resource under its jurisdiction; and

(B) shall, in a timely manner, comment on and make recommendations concerning any activity that, in the view of the Council, may affect the habitat of an anadromous fishery resource under its jurisdiction.

(2) Within 45 days after receiving a comment or recommendation under paragraph (1) from a Council, a Federal agency shall provide a detailed response, in writing to the Council regarding the matter. In the case of a comment or recommendation under paragraph (1)(B), the response shall include a description of measures being considered by the agency for mitigating or offsetting the impact of the activity concerned on the habitat of the anadromous fishery resource.

Since both the House and Senate are in agreement on this provision, it is likely to become law if and when the reauthorization passes. At that time, there will be a mandatory obligation on the Councils, especially relevant in the Pacific Northwest, to comment on activities which may significantly affect salmon habitat and, at the same time, the sponsoring or permitting agency must develop mitigating measures. This augmented tool for habitat protection could be of use in focusing greater attention on habitat and at least assuring identification, if not implementation, of mitigation measures.

IV. EMERGING NEW STATUTORY AUTHORITIES

This past year has witnessed the emergence of a number of new habitat protection initiatives in Congress. Just which initiatives will or will not pass is as yet uncertain. However, even if some initiatives do not succeed this year, they will likely find their way onto the agenda in future years. The Congressional cauldron, which is boiling, thus obviously bears

watching. Four pieces of legislation considered by the Congress over the past year are of special note:

A. Wetlands Protection and Restoration -- S. 1731, introduced by Senator Breaux of Louisiana, marked-up on June 12, 1990, and passed by the Senate in late July, is designed, in particular, to preserve Louisiana's wetlands. However, it also has National ramifications. Section 7 of the bill would generally authorize a program of "National coastal wetlands conservation grants," administered by the Secretary of the Interior. Grants to states would be up to 50 percent of the cost of the projects and 75% if the state has established a trust fund to acquire coastal wetlands. A special wetlands fund would have to be created to support the expenditures. See S. Rep. No. 375, 101st Cong., 2d Sess. (July 17, 1990).

B. Coastal Water Quality Standards -- S. 1178, introduced by Senator Mitchell of Maine and H.R. 2647, introduced by Congressman Studds of Massachusetts, seek to enhance coastal water quality, making several critical changes in CWA, the CZMA and the Ocean Dumping Act in response to concerns about continued degradation of coastal waters by toxic metals, chemicals and sewage. S. 1178 was marked-up by the Senate Environment Committee on June 12, 1990. See S. Rep. No. 339, 101st Cong., 2d Sess. (June 27, 1990). H.R. 2647 was adopted by the House Merchant Marine and Fisheries Committee on April 18, 1990. See H.R. Rep. No. 605, 101st Cong. 2d Sess. (July 16, 1990). S. 1178, known as the "Coastal Protection Act," provides new authority for marine

research and monitoring programs, expands coastal water quality protection programs and seeks to better address the ocean dumping of dredged material. For its part, H.R. 2647, known as the "Coastal Defense Initiative," would, inter alia: accelerate the development of coastal water quality criteria and standards; call on the states to adopt "aquatic resources protection programs" linked to their overall coastal zone management plans; strengthen compliance and enforcement authority; establish coastal water quality programs for high priority coastal waters; and create a "Coastal Defense Fund", supported through fees charged to nonmunicipal coastal water polluters, fines and penalties assessed under the CWA and Ocean Dumping Act and Outer Continental Shelf revenues, to pay for administration of Federal and state programs.

C. CZMA Expansion -- H.R. 4030, introduced by Congressman Jones of North Carolina and marked-up by the House Merchant Marine and Fisheries Committee on April 18, 1990, and S. 2782, introduced by Senator Kerry of Massachusetts and marked-up by the Senate Commerce Committee on June 27, 1990, represent major expansions of the CZMA. S. 2782, for example, would, among other matters, provide a stronger link between existing state water quality agencies and state coastal zone management agencies; call on state coastal zone management agencies to implement plans that preserve, restore and protect coastal waters and otherwise enhance the coastal zone, i.e., by ensuring "no net loss" of wetlands; authorize substantial sums for development and implementation of such plans; and reverse the 1984 Supreme Court decision, Secretary

such plans; and reverse the 1984 Supreme Court decision, Secretary of the Interior v. California, 464 U.S. 312 (1984), to apply the Federal consistency provisions of the CZMA to Outer Continental Shelf lease sales and other activities seaward of the outer boundary of the territorial sea. See S. Rep. No. 445, 101st Cong., 2d Sess. (August 30, 1990). H.R. 4030, for its part, is a major rewrite of the CZMA which seeks to reorient programs toward improvement of coastal resource protection.

D. Coastal Barrier Resources Protection - H.R. 2840, introduced by Congressman Studds and approved by the House Merchant Marine and Fisheries Committee on June 27, 1990, see H.R. Rep. No. 657, 101st Cong., 2d Sess. (August 2, 1990), and S. 2729, introduced by Senator Chafee, would expand the Nation's coastal barriers protection system under the CBRA. The Coastal Barriers Resource System is designed to protect the barrier islands along the coasts from further development. It prohibits Federal subsidies for development on undeveloped coastal barriers. The changes in the law would expand the definition of coastal barriers and facilitate new additions to the System, approximately doubling the shoreline miles and tripling the acreage in the System.

CONCLUSION

In conclusion, what I hope to leave you with is a sense of a growing universe of possibilities for habitat protection activities by affected seafood companies and trade associations. Lawyers for such companies and associations, if they are sensitive to the availability of Federal habitat protection measures, can

provide invaluable assistance to their clients in helping to secure the protection of the resources which are at the base of their clients' livelihood.

TAB A

Handwritten scribbles at the top right of the page.

Dated: February 9, 1990.

Steven Newburg-Rinn,

*Acting Director, Information Management
Division, Office of Toxic Substances.*

[FR Doc. 90-3608 Filed 2-14-90; 8:45 am]

BILLING CODE 6560-50-D

**ENVIRONMENTAL PROTECTION
AGENCY**

DEPARTMENT OF DEFENSE

Department of the Army

[FRL: 3723-7]

**Memorandum of Agreement (MOA);
Clean Water Act Section 404(b)(1)
Guidelines**

AGENCIES: Environmental Protection
Agency, Department of the Army.

ACTION: Notice.

SUMMARY: On November 15, 1989, the Environmental Protection Agency and the Department of the Army signed a Memorandum of Agreement (MOA) that provides clarification and general guidance regarding the level of mitigation necessary to demonstrate compliance with the Clean Water Act section 404(b)(1) Guidelines ("the Guidelines"). The agencies developed the MOA in response to questions that had arisen with respect to mitigation requirements under the Guidelines applicable to the review of applications for standard section 404 permits. The intent of the MOA is to improve consistency in the implementation of the Guidelines and to eliminate misunderstanding and confusion on the part of agency personnel. Accordingly, we anticipate that the MOA will increase the effectiveness of the section 404 program by reducing delays in permit processing, minimizing ambiguity in the regulatory program and by providing agency field personnel with a clearer understanding of the procedures for determining appropriate and practicable mitigation under the Guidelines.

The Domestic Policy Council, through its Inter-Agency Task Force on Wetlands, of which both the Environmental Protection Agency and the Army Corps of Engineers are members, has been tasked by the President to develop recommendations regarding attainment of the goal of no net loss of the Nation's wetlands. While the section 404 regulatory program, including this MOA, can contribute to the attainment of that goal, neither the 404 program nor this MOA establish a no net loss policy for the Nation's wetlands. In meeting this charter, the Task Force will hold a series of public

meetings around the country to solicit public views on appropriate strategies for achieving the no net loss of wetlands goal, including both regulatory and non-regulatory approaches. These public meetings will also address specific issues such as losses associated with agricultural activities in wetlands, and losses in specific geographic areas such as the Mississippi River Delta and along the Louisiana Gulf coast. The Task Force will also consider the challenges posed in Alaska where a high proportion of developable land is wetlands and where technical difficulties exist regarding opportunities for compensatory mitigation. The Task Force will also address issues such as the important roles of state and local government and private conservation groups; the need to ensure maximum possible coordination between section 404 permitting actions and other environmental laws, including the National Environmental Policy Act; the role of market based strategies; mitigation policy, including mitigation banking; and the role of legislation in achieving the goal. The MOA will be reconsidered in light of development of a comprehensive no net loss policy.

The MOA interprets and provides internal guidance and procedures to the Corps and EPA field personnel for implementing existing section 404 permit regulations. The MOA does not change substantive regulatory requirements. Rather, it provides a procedural framework for considering mitigation, so that all Corps and EPA field offices will follow consistent procedures in determining the type and level of mitigation necessary to ensure compliance with the section 404(b)(1) Guidelines. The MOA also maintains the flexibility of the Guidelines by expressly recognizing that no net loss of wetlands functions and values may not be achieved in each and every permit action. Specifically, the MOA recognizes that compensatory mitigation may not be required if mitigation is not practicable (as defined in § 230.3(q) of the Guidelines), feasible or would result in only inconsequential environmental benefits. For example, in areas of the country where wetlands constitute a majority of the land type, minor losses of wetland functions may not need to be mitigated by offsite compensatory mitigation. In making this determination field personnel may consider, among other things, the nature of the wetlands functions, cumulative effects on the watershed or ecosystem and whether wetlands in the contiguous area are protected through public ownership or permanent easement. The MOA does not establish any new mitigation

requirements beyond those currently found in the Guidelines or modify the Guidelines in any way.

Since signing the MOA, the agencies have conducted discussions with affected Federal agencies regarding the MOA. As a result of those discussions, and in an attempt to clarify the agencies' intent regarding the scope and effect of the MOA, specific changes have been made to the language of the MOA. A copy of this revised MOA is published with this Notice.

DATES: The November 15, 1989 version of the MOA was modified as reflected in the following final document. The effective date of this MOA is February 7, 1990.

ADDRESSES: Copies of the MOA are available from:

Office of Wetlands Protection (A-104F),
U.S. Environmental Protection
Agency, 401 M Street SW.,
Washington, DC 20460.

Office of the Assistant Secretary of the
Army, Department of the Army, Room
2E569, The Pentagon, Washington, DC
20310-0301.

Headquarters, U.S. Army Corps of
Engineers, (CECW-OR), 20
Massachusetts Avenue NW.,
Washington, DC 20314-1000.

FOR FURTHER INFORMATION CONTACT:

Suzanne E. Schwartz of the
Environmental Protection Agency at the
address given above; telephone 202/475-
7799, (FTS) 475-7799; or David Barrows
of the Department of the Army at the
address given above; telephone 202/695-
1376, (FTS) 695-1376.

Lajuana S. Wilcher,

Assistant Administrator for Water.

Robert W. Page,

*Assistant Secretary of the Army (Civil
Works).*

[FR Doc. 90-3604 Filed 2-14-90; 8:45 am]

BILLING CODE 6560-50-M; 3710-08-M

FEDERAL MARITIME COMMISSION

Notice of Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, D.C. Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10220. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the Federal Register in which this notice appears. The requirements for

Handwritten number: 4-28



MEMORANDUM OF AGREEMENT
BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY
AND THE DEPARTMENT OF THE ARMY CONCERNING
THE DETERMINATION OF MITIGATION UNDER THE
CLEAN WATER ACT SECTION 404(b)(1) GUIDELINES



I. Purpose

The United States Environmental Protection Agency (EPA) and the United States Department of the Army (Army) hereby articulate the policy and procedures to be used in the determination of the type and level of mitigation necessary to demonstrate compliance with the Clean Water Act (CWA) Section 404(b)(1) Guidelines ("Guidelines"). This Memorandum of Agreement (MOA) expresses the explicit intent of the Army and EPA to implement the objective of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, including wetlands. This MOA is specifically limited to the Section 404 Regulatory Program and is written to provide guidance for agency field personnel on the type and level of mitigation which demonstrates compliance with requirements in the Guidelines. The policies and procedures discussed herein are consistent with current Section 404 regulatory practices and are provided in response to questions that have been raised about how the Guidelines are implemented. The MOA does not change the substantive requirements of the Guidelines. It is intended to provide guidance regarding the exercise of discretion under the Guidelines.

Although the Guidelines are clearly applicable to all discharges of dredged or fill material, including general permits and Corps of Engineers (Corps) civil works projects, this MOA focuses on standard permits (33 CFR 325.5(b)(1))¹. This focus is intended solely to reflect the unique procedural aspects associated with the review of standard permits, and does not obviate the need for other regulated activities to comply fully with the Guidelines. EPA and Army will seek to develop supplemental guidance for other regulated activities consistent with the policies and principles established in this document.

This MOA provides guidance to Corps and EPA personnel for implementing the Guidelines and must be adhered to when considering mitigation requirements for standard permit applications. The Corps will use this MOA when making its determination of compliance with the Guidelines with respect to mitigation for standard permit applications. EPA will use this MOA in developing its positions on compliance with the Guidelines for

¹Standard permits are those individual permits which have been processed through application of the Corps public interest review procedures (33 CFR 325) and EPA's Section 404(b)(1) Guidelines, including public notice and receipt of comments. Standard permits do not include letters of permission, regional permits, nationwide permits, or programmatic permits.

proposed discharges and will reflect this MOA when commenting on standard permit applications.

II. Policy

A. The Council on Environmental Quality (CEQ) has defined mitigation in its regulations at 40 CFR 1508.20 to include: avoiding impacts, minimizing impacts, rectifying impacts, reducing impacts over time, and compensating for impacts. The Guidelines establish environmental criteria which must be met for activities to be permitted under Section 404.² The types of mitigation enumerated by CEQ are compatible with the requirements of the Guidelines; however, as a practical matter, they can be combined to form three general types: avoidance, minimization and compensatory mitigation. The remainder of this MOA will speak in terms of these more general types of mitigation.

B. The Clean Water Act and the Guidelines set forth a goal of restoring and maintaining existing aquatic resources. The Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources, and for wetlands, will strive to achieve a goal of no overall net loss of values and functions. In focusing the goal of no overall net loss to wetlands only, EPA and Army have explicitly recognized the special significance of the nation's wetlands resources. This special recognition of wetlands resources does not in any manner diminish the value of other waters of the United States, which are often of high value. All waters of the United States, such as streams, rivers, lakes, etc., will be accorded the full measure of protection under the Guidelines, including the requirements for appropriate and practicable mitigation. The determination of what level of mitigation constitutes "appropriate" mitigation is based solely on the values and functions of the aquatic resource that will be impacted. "Practicable" is defined at Section 230.3(q) of the Guidelines.³ However, the level of mitigation determined to be appropriate and practicable under Section 230.10(d) may lead to individual permit decisions which do not fully meet this goal because the mitigation measures necessary to meet this goal are not feasible, not practicable, or would accomplish only inconsequential reductions in impacts. Consequently, it is recognized that no net loss of wetlands functions and values may not be achieved in each and every permit action. However, it remains a goal of the Section 404 regulatory program to contribute to the national goal of no overall net loss of the nation's remaining wetlands base. EPA and Army are committed to working with others **through the** Administration's interagency task force and other avenues to help achieve **this national goal.**

²(except where Section 404(b)(2) applies).

³Section 230.3(q) of the Guidelines reads as follows: "The term practicable means available and capable of being done after taking into consideration *cost, existing technology, and logistics in light of overall project purposes.*" (Emphasis supplied)

C. In evaluating standard Section 404 permit applications, as a practical matter, information on all facets of a project, including potential mitigation, is typically gathered and reviewed at the same time. The Corps, except as indicated below, first makes a determination that potential impacts have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be mitigated to the extent appropriate and practicable by requiring steps to minimize impacts and, finally, compensate for aquatic resource values. This sequence is considered satisfied where the proposed mitigation is in accordance with specific provisions of a Corps and EPA approved comprehensive plan that ensures compliance with the compensation requirements of the Section 404(b)(1) Guidelines (examples of such comprehensive plans may include Special Area Management Plans, Advance Identification areas (Section 230.80), and State Coastal Zone Management Plans). It may be appropriate to deviate from the sequence when EPA and the Corps agree the proposed discharge is necessary to avoid environmental harm (e.g., to protect a natural aquatic community from saltwater intrusion, chemical contamination, or other deleterious physical or chemical impacts), or EPA and the Corps agree that the proposed discharge can reasonably be expected to result in environmental gain or insignificant environmental losses.

In determining "appropriate and practicable" measures to offset unavoidable impacts, such measures should be appropriate to the scope and degree of those impacts and practicable in terms of cost, existing technology, and logistics in light of overall project purposes. The Corps will give full consideration to the views of the resource agencies when making this determination.

1. **Avoidance.**⁴ Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative.⁵ The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a) requires that no discharge shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact to the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. In addition, Section 230.10(a)(3) sets forth rebuttable presumptions that 1) alternatives for non-water dependent activities that do not involve special aquatic sites⁶ are available and 2) alternatives that do not involve special aquatic sites have less adverse impact on the aquatic environment.

⁴Avoidance as used in the Section 404(b)(1) Guidelines and this MOA does not include compensatory mitigation.

⁵It is important to recognize that there are circumstances where the impacts of the project are so significant that even if alternatives are not available, the discharge may not be permitted regardless of the compensatory mitigation proposed (40 CFR 230.10(c)).

⁶Special aquatic sites include sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle pool complexes.

Compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a).

2. Minimization. Section 230.10(d) states that appropriate and practicable steps to minimize the adverse impacts will be required through project modifications and permit conditions. Subpart H of the Guidelines describes several (but not all) means for minimizing impacts of an activity.

3. Compensatory Mitigation. Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required. Compensatory actions (e.g., restoration of existing degraded wetlands or creation of man-made wetlands) should be undertaken, when practicable, in areas adjacent or contiguous to the discharge site (on-site compensatory mitigation). If on-site compensatory mitigation is not practicable, off-site compensatory mitigation should be undertaken in the same geographic area if practicable (i.e., in close physical proximity and, to the extent possible, the same watershed). In determining compensatory mitigation, the functional values lost by the resource to be impacted must be considered. Generally, in-kind compensatory mitigation is preferable to out-of-kind. There is continued uncertainty regarding the success of wetland creation or other habitat development. Therefore, in determining the nature and extent of habitat development of this type, careful consideration should be given to its likelihood of success. Because the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, restoration should be the first option considered.

In the situation where the Corps is evaluating a project where a permit issued by another agency requires compensatory mitigation, the Corps may consider that mitigation as part of the overall application for purposes of public notice, but avoidance and minimization shall still be sought.

Mitigation banking may be an acceptable form of compensatory mitigation under specific criteria designed to ensure an environmentally successful bank. Where a mitigation bank has been approved by EPA and the Corps for purposes of providing compensatory mitigation for specific identified projects, use of that mitigation bank for those particular projects is considered as meeting the objectives of Section II.C.3 of this MOA, regardless of the practicability of other forms of compensatory mitigation. Additional guidance on mitigation banking will be provided. Simple purchase or "preservation" of existing wetlands resources may in only exceptional circumstances be accepted as compensatory mitigation. EPA and Army will develop specific guidance for preservation in the context of compensatory mitigation at a later date.

III. Other Procedures

A. Potential applicants for major projects should be encouraged to arrange preapplication meetings with the Corps and appropriate federal, state or Indian tribal, and local authorities to determine requirements and documentation required for proposed permit evaluations. As a result of such meetings, the applicant often revises a proposal to avoid or minimize adverse impacts after developing an understanding of the Guidelines requirements by which a future Section 404 permit decision will be made, in addition to gaining an understanding of other state or tribal, or local requirements. Compliance with other statutes, requirements and reviews, such as NEPA and the Corps public interest review, may not in and of themselves satisfy the requirements prescribed in the Guidelines.

B. In achieving the goals of the CWA, the Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources. Measures which can accomplish this can be identified only through resource assessments tailored to the site performed by qualified professionals because ecological characteristics of each aquatic site are unique. Functional values should be assessed by applying aquatic site assessment techniques generally recognized by experts in the field and/or the best professional judgment of federal and state agency representatives, provided such assessments fully consider ecological functions included in the Guidelines. The objective of mitigation for unavoidable impacts is to offset environmental losses. Additionally for wetlands, such mitigation should provide, at a minimum, one for one functional replacement (i.e., no net loss of values), with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan, recognizing that this minimum requirement may not be appropriate and practicable, and thus may not be relevant in all cases, as discussed in Section II.B of this MOA.⁷ In the absence of more definitive information on the functions and values of specific wetlands sites, a minimum of 1 to 1 acreage replacement may be used as a reasonable surrogate for no net loss of functions and values. However, this ratio may be greater where the functional values of the area being impacted are demonstrably high and the replacement wetlands are of lower functional value or the likelihood of success of the mitigation project is low. Conversely, the ratio may be less than 1 to 1 for areas where the functional values associated with the

⁷For example, there are certain areas where, due to hydrological conditions, the technology for restoration or creation of wetlands may not be available at present, or may otherwise be impracticable. In addition, avoidance, minimization, and compensatory mitigation may not be practicable where there is a high proportion of land which is wetlands. EPA and Army, at present, are discussing with representatives of the oil industry, the potential for a program of accelerated rehabilitation of abandoned oil facilities on the North Slope to serve as a vehicle for satisfying necessary compensation requirements.

area being impacted are demonstrably low and the likelihood of success associated with the mitigation proposal is high.

C. The Guidelines are the environmental standard for Section 404 permit issuance under the CWA. Aspects of a proposed project may be affected through a determination of requirements needed to comply with the Guidelines to achieve these CWA environmental goals.

D. Monitoring is an important aspect of mitigation, especially in areas of scientific uncertainty. Monitoring should be directed toward determining whether permit conditions are complied with and whether the purpose intended to be served by the condition is actually achieved. Any time it is determined that a permittee is in non-compliance with mitigation requirements of the permit, the Corps will take action in accordance with 33 CFR Part 326. Monitoring should not be required for purposes other than these, although information for other uses may accrue from the monitoring requirements. For projects to be permitted involving mitigation with higher levels of scientific uncertainty, such as some forms of compensatory mitigation, long term monitoring, reporting and potential remedial action should be required. This can be required of the applicant through permit conditions.

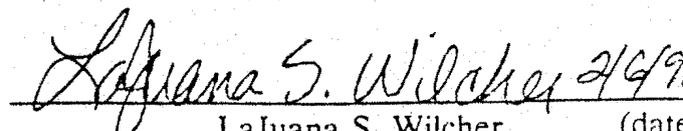
E. Mitigation requirements shall be conditions of standard Section 404 permits. Army regulations authorize mitigation requirements to be added as special conditions to an Army permit to satisfy legal requirements (e.g., conditions necessary to satisfy the Guidelines) [33 CFR 325.4(a)]. This ensures legal enforceability of the mitigation conditions and enhances the level of compliance. If the mitigation plan necessary to ensure compliance with the Guidelines is not reasonably implementable or enforceable, the permit shall be denied.

F. Nothing in this document is intended to diminish, modify or otherwise affect the statutory or regulatory authorities of the agencies involved. Furthermore, formal policy guidance on or interpretation of this document shall be issued jointly.

G. This MOA shall take effect on February 7, 1990, and will apply to those completed standard permit applications which are received on or after that date. This MOA may be modified or revoked by agreement of both parties, or revoked by either party alone upon six (6) months written notice.

 2/6/90

Robert W. Page (date)
Assistant Secretary of the Army
(Civil Works)

 2/6/90

LaJuana S. Wilcher (date)
Assistant Administrator for Water
U.S. Environmental Protection Agency

A-34



TAB B

A-35



MEMORANDUM OF AGREEMENT BETWEEN
THE DEPARTMENT OF COMMERCE AND
THE DEPARTMENT OF THE ARMY

1. Authority: Section 404(q) of the Clean Water Act.
(33 USC 1344(q)).
2. Purpose: The purpose of this agreement is to establish policies and procedures to implement Section 404(q) of the Clean Water Act to "minimize, to the maximum extent practicable, duplication, needless paperwork and delays in the issuance of permits."
3. Applicability: This agreement shall apply to applications for permits to be issued by the Department of the Army under:
 - a. Section 10 of the River and Harbor Act of 1899.
 - b. Section 404 of the Clean Water Act.
 - c. Section 103 of the Marine Protection, Research and Sanctuaries Act, except as pertains to compliance with EPA established ocean dumping criteria.
4. General rules: Policy and procedures for review of permit applications are established in 33 CFR 320 through 330.
5. Policy for Interagency Coordination:
 - a. The final permit decision will be made by the District Engineer (DE) in the vast majority of cases, and the need for reopening the record of a case developed by the DE will be minimized.
 - b. The Administrator, National Oceanic and Atmospheric Administration (NOAA) will request review of a district engineer's decision only when the Administrator finds that (1) the case involves the development of significant new information, (2) there is necessity for policy-level review of issues of national significance, or (3) there has been insufficient interagency coordination at the district level.

what does this mean

If full consideration to the recommendations of NOAA, including recommended permit conditions, is not given by the DE, it will constitute insufficient coordination at the district level. This may result in a request for elevation when, in the opinion of the Administrator, NOAA, the project would result in sufficient adverse environmental effects to warrant such a request.

In all these instances, the Administrator, NOAA will state how the matters of concern are clearly within the Department of Commerce's (DOC) authority.

- c. For projects of other Federal agencies, Army and DOC will accept, where appropriate and legally permissible, the environmental documentation and decisions of those agencies.
 - d. Where DOC is the applicant, DOC will be the lead agency for environmental documentation. Both agencies will cooperate fully in early and continuing coordination during development of projects, environmental documentation, and public involvement processes, including joint public notices and, if required, joint hearings. As referenced in paragraph 5.c., the Army will, where appropriate and legally permissible, accept DOC's findings on all environmental and regulatory matters or activities requiring an Army permit.
6. Procedures at the initial decisionmaking levels:
- a. The National Marine Fisheries Service (NMFS) will be the point of contact for initial level coordination at DOC.
 - b. In order to be eligible for referral under the procedures provided for under paragraph 7, DOC comment letters including recommended permit denial letters, letters recommending project modifications, or requests for extensions of the comment period, shall be signed by the Regional Director (RD) or a specified designee (such designee will not be below the level of Division Director). Where the RD has delegated such signature authority to a regional official, the RD shall provide in writing, to each Division and District Engineer in the region, the title of the designated official.

H-37

- c. The DE will take reasonable steps to ensure that public notices are promptly transmitted to the appropriate NMFS office. NMFS will submit its comments, if any, during the basic comment period specified in the public notice. NMFS will comment only on matters clearly and directly within its authority. Where the basic comment period is less than 30 calendar days, the DE shall upon request of the RD or designee extend the comment period to 30 calendar days. Otherwise, extensions of the basic or extended comment period will be authorized only upon written request to the DE from the RD or designee. The request must be received during the comment period sought to be extended and must provide the reason for the extension. The DE will respond in writing to the request within five calendar days of the date of the letter of request. Transmittal provisions of paragraph 7.f. will apply to this response.
- d. The DE's and RD's will develop local procedures at the field level to resolve differences, where possible, prior to the Notice of Intent to Issue. These local procedures will include informal consultation, initiated by the DE, after the close of the comment period to alert the RD or designee of an upcoming decision which will be contrary to a recommendation by NMFS for permit or project modification. At the request of the RD or designee, consultations will consist of such actions as telephone calls, electronic mail messages, visits, meetings, or other actions. The consultation period should not exceed 10 working days from the time the DE initiates the consultation unless the DE extends it and will include a discussion of the anticipated decision and of the rationale leading to that decision. It is incumbent on NMFS to ensure that any additional views regarding the action are finalized and communicated to the DE as expeditiously as possible. In specific cases, the DE and RD or designee may determine that the informal consultation should include the applicant. If the applicant is not included, and the consultation results in any substantive action on the application, the DE or designee will inform the applicant of the substance of the consultation and will provide the opportunity for the applicant to comment. This consultation will not affect the time requirements specified in other parts of this MOA or in 33 CFR 320-330.

- e. If, at the conclusion of the consultation identified at 6.d. above, the DE intends to issue the permit over NMFS's objections or to issue it without conditions recommended by NMFS, the DE will formally notify the RD. When requested by the RD within 7 calendar days of such notification, the DE will not issue a Notice of Intent until after the RD has had the opportunity to discuss the application with the appropriate Division Engineer during a mutually agreed to meeting. If no meeting has been scheduled within 14 calendar days of the RD's request to delay the Notice of Intent letter and no conference call occurs where there has been a reasonable opportunity for discussion within such 14 days, the DE may proceed to issue the Notice of Intent letter pursuant to subparagraph 7.c.
- f. Meetings may be scheduled between the RD and Division Engineer as necessary to discuss issues of mutual interest including problems involving individual permit decisions or patterns of concern such as the consistency and appropriateness of comment letters, to ensure proper coordination on enforcement matters, to review the nature and frequency of elevation requests, and to monitor program implementation to minimize duplication and red tape. This consultation is intended to reduce potential delays in the permit process by raising major issues to the RD/Division Engineer level during the permit process thereby shortening or eliminating the time required for additional consultation and review.
- g. The agencies agree to cooperate fully in the transfer of all information necessary for the agencies to carry out their respective responsibilities. In special cases requiring copying of voluminous documentation, the parties shall make mutually agreeable arrangements to ensure prompt and effective transfer of required information.
- h. Both parties will transmit this document to their DE's and RD's and will take the internal measures necessary to assure that the letter and spirit of this agreement are understood at all levels within their agency.

7. Procedures for Referral:

- a. General. In the vast majority of cases, the entire process of consultation and referral outlined in this paragraph, when activated, should be completed within 90 calendar days of the DE's notice of intent to issue a permit; in no cases should the elevation process exceed 120 calendar days.
- b. If during the comment period, NMFS recommends that a proposed permit be denied or that the activity be modified as a condition of the permit and the matter has not been resolved under the consultation process provided at subparagraphs 6.c. through 6.f. above, the DE will so notify the RD by letter (Notice of Intent to Issue) and will defer final action pending completion of the procedures in subparagraphs 7.c. and 7.d. The DE's letter to the RD will include a brief summary of how NMFS comments were considered, together with a copy of the Statement of Findings of the DE in support of his decision.
- c. Within 20 working days of the DE's Notice of Intent to Issue, if the case has not been resolved to the satisfaction of the Administrator, NOAA and the Administrator determines that it meets the criteria in paragraph 5.b., the Administrator, NOAA may request of the Assistant Secretary of the Army (Civil Works) (ASA(CW)) that the permit decision be made at a higher level in the Department of the Army. The Administrator, NOAA will identify those items of the district engineer's statement of findings with which NOAA takes issue including items relating to:
 - (1) the affected fish and wildlife resources;
 - (2) the impacts of the applicant's proposed project on such resources;
 - (3) the net resource losses expected by project implementation as proposed by the district engineer and why the DE's proposals will not offset environmental losses;
 - (4) the mitigation proposed by the NMFS and how NMFS's proposal will offset environmental losses.

A-40

- (5) specify in what ways the mitigation recommended by the NMFS did not receive full consideration in the DE's decision.

The Administrator, NOAA will also state the way in which acceptance of the Administrator's, NOAA, recommendations would result in a better decision.

- d. Within 15 working days of the date of the letter of the Administrator, NOAA, the ASA(CW) will decide whether or not the permit decision will be made at a level higher than the DE and, if so, at what level the final decision will be made. The ASA(CW) will notify in writing the agency officials involved. Should the ASA(CW) decide that the permit decision will not be made at a higher level, the ASA(CW) will respond to the Administrator, NOAA in writing presenting the results of the evaluation. The ASA(CW) notification will include specific discussions of each of the items with which the Administrator, NOAA took issue. The ASA(CW) will state Army's position (concurrence or nonconcurrence) with the Administrator, NOAA's positions on each of these items, and will include relevant supporting data. The parties acknowledge that the final determination of mitigation is the responsibility of the Corps.
- e. The official designated by the ASA(CW) to decide a referred case will reach a decision within the time specified in paragraph 7.a. above and will immediately notify the applicant and appropriate officials of both agencies. The Statement of Findings of the deciding official will include a discussion of items raised by the Administrator and will be furnished to the Administrator by the ASA(CW).
- f. Each agency will ensure that all letters and other notifications to the other agency as required by this paragraph will be received within one day of signature using messenger, electronic transmittal or other appropriate means.
- g. DOC and Army desire to avoid the use of duplicative review mechanisms. A permit decision will not be subject to the elevation process when Army and DOC agree in advance that an adequate separate review mechanism exists and has been invoked.

A-41

- 8. This agreement is effective immediately upon the last signature date below and will continue in effect until modified or revoked by agreement of both parties, or revoked by either party alone upon 30 days written notice.

- 9. The Memorandum of Agreement between the Secretary of DOC and the Secretary of the Army on permit processing dated July 2, 1982, is terminated. Those permit applications which have already been referred to the ASA(CW) under the July 2, 1982, MOA shall be processed according to its terms. Those permit applications for which Notices of Intent to Issue have been sent by the DE within 20 days prior to the effective date of this MOA, but which have not yet been referred to the ASA(CW) shall be governed by this agreement, except that the time periods specified in subparagraphs 7.c. and 7.d. shall run from the date of this agreement rather than from the date of the DE's letter.

Michael Baldwin
Secretary of Commerce

MAR 03 1986

Date

John D. Marshall Jr.
Secretary of the Army

25 March '86

Date

Anthony J. Calio
Administrator, National
Oceanic and Atmospheric
Administration

2/18/86

Date

W. H. Danner
Assistant Secretary
of the Army (Civil
Works)

1/17/86

Date

4-42

TAB C

A-43

Notices

Federal Register

Vol. 48, No. 228

Friday, November 25, 1983

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF COMMERCE

International Trade Administration

1A-528-015]

Television Receiving Sets, Monochrome and Color, From Japan; Final Results of Administrative Review of Antidumping Finding

AGENCY: International Trade Administration, Commerce.

ACTION: Notice of Final Results of Administrative Review of Antidumping Finding.

SUMMARY: On August 18, 1983, the Department of Commerce published preliminary results of its administrative review of the antidumping finding on television receiving sets from Japan. The review covered the 21 known Japanese manufacturers and/or exporters of this merchandise to the United States currently covered by the finding and the period April 1, 1980 through March 31, 1981. These final results cover only Otake Trading Co., Ltd., the exclusive seller of television receiving sets produced by Orion Denki, Ltd.

We gave interested parties an opportunity to submit oral or written comments on the preliminary results for Otake. The only comments received were from Otake and no changes in our preliminary results were requested. Based on our analysis, the final results of review for Otake are the same as those presented in the preliminary results.

EFFECTIVE DATE: November 25, 1983.

FOR FURTHER INFORMATION CONTACT: Stephen F. Munroe, Michael A. Hudak, or David R. Chapman, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, D.C. 20230, telephone: (202) 377-2923.

SUPPLEMENTARY INFORMATION:
Background

The Department of Commerce ("the Department") published in the Federal Register (48 FR 37506-37507) the preliminary results of its last administrative review of the antidumping finding on television receiving sets from Japan (36 FR 4597, March 10, 1971). The Department has now completed that review with respect to Otake Trading Co., Ltd.

Scope of the Review

Imports covered by the review are shipments of television receiving sets, monochrome and color, from Japan. Television receiving sets include, but are not limited to, units known as projection televisions, receiver monitors, and kits (containing all the parts necessary to receive a broadcast television signal and produce a video image). Not included are certain monitors not capable of receiving a broadcast signal, certain combination units (combinations of television receivers with other electrical entertainment components such as tape recorders, radio receivers, etc.), and certain sub-assemblies not containing the components essential for receiving a broadcast television signal and producing a video image. We have reached no decision on whether or not "component televisions" are within the scope of this finding and therefore will consider this issue (raised in Zenith Radio Corporations' submission of March 16, 1983) during the next administrative review of this finding.

Final Results of the Review

Interested parties were invited to comment on the preliminary results. The Department received only comments from Otake concurring with the preliminary results of review.

Based on our analysis, the final results of review are the same as those presented in the preliminary results of review, and we determine that weighted-average margin for Otake is 0.03 percent.

The Department shall determine, and the U.S. Customs Service shall assess, dumping duties on all appropriate entries during the time period involved. The Department will issue appraisement instructions directly to the Customs Service.

The Department waives the cash deposit requirement, provided for in § 353.48(b) of the Commerce

Regulations, for Otake because the weighted-average margin for Otake is less than 0.5 percent and, therefore, *de minimis* for cash deposit purposes.

This waiver is effective for all shipments of Japanese television receiving sets exported by Otake entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice. This waiver shall remain in effect until publication of the final results of the next administrative review. The Department intends to begin immediately the next administrative review. The Department encourages interested parties to submit applications for protective orders, if desired, as early as possible after the Department's receipt of the information during the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act of 1930 (19 U.S.C. 1673(a)(1)) and § 353.53 of the Commerce Regulations (19 CFR 353.53).

Alan F. Holmer,

Deputy Assistant Secretary for Import Administration.

November 21, 1983.

[FR Doc. 83-31028 Filed 11-25-83; 8:45 am]

BILLING CODE 3510-DS-M

National Oceanic and Atmospheric Administration

[Docket No. 31028-211]

Habitat Conservation; Policy for National Marine Fisheries Service (NMFS)

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of effective NMFS habitat conservation policy.

SUMMARY: NOAA issues a policy for the National Marine Fisheries Service (NMFS) which provides a focus for NMFS' habitat conservation activities, while at the same time integrating habitat conservation considerations throughout the major programs and activities of the Agency. The policy also encourages greater participation by the Regional Fishery Management Councils, the States and others in habitat conservation matters. This action is necessary in order to allow NMFS to focus its habitat conservation activities on those species for which NMFS is

8-44

primarily responsible or which are the subject of a NMFS program. The effect of this policy will be to make NMFS' habitat conservation activities more responsive to the goals and objectives of the Agency as set forth in the NMFS Strategic Plan, and to allow priorities to be set and defended.

EFFECTIVE DATE: November 21, 1983.

FOR FURTHER INFORMATION CONTACT: Herbert L. Blatt, Chief, Policy Group, NMFS, 202-653-7551, or Kenneth R. Roberts, Chief, Habitat Conservation Division, NMFS 202-634-7490.

SUPPLEMENTARY INFORMATION:

Background

The NMFS has primary Federal responsibility for the conservation, management, and development of living marine resources and for the protection of certain marine mammals and endangered species under numerous Federal laws. The Agency also has responsibilities to the U.S. commercial and marine recreational fishing industry, including fishermen, and to the States and the general public. These responsibilities are inherent in NMFS' mission which is "To achieve a continued optimum utilization of living marine resources for the benefit of the Nation." NMFS is vitally concerned about the habitats that support living marine resources since the well-being of these resources and the fishing industry depends upon healthy and productive habitats.

The U.S. commercial and marine recreational fishing industry makes an important contribution to the Nation's economy. The commercial fishing segment of the industry produces food and industrial goods that contribute \$7 billion annually to the gross national product. Including fishing vessels and shoreside businesses, the commercial fishing segment employs nearly 300,000 persons. Marine recreational fishing provides opportunities for recreation as well as a substantial quantity of food for 15 to 20 million anglers in the United States. Catch by marine recreational fishermen accounts for an estimated 30 to 35 percent of the total U.S. finfish harvest used for food. Expenditures by these fishermen, the value of associated industries (such as tackle, boat, and trailer manufacturers, and the party and charter boat industries), and the value of the recreational fishing experience itself are significant components of the U.S. economy. Direct expenditures by marine recreational fishermen are estimated to be at least \$5 billion annually, not to mention the indirect economic impacts generated from these expenditures.

Marine mammals and endangered species are also important to the Nation in terms of their domestic and international significance—aesthetic, recreational, ecological and economic.

Coastal and estuarine areas and their associated wetlands are vitally important as spawning and nursery grounds for both commercial and marine recreational fishery resources. Approximately two-thirds of our important fishery resources depend upon these areas which also serve as habitat for many species of marine mammals and endangered species. However, population shifts to coastal areas and associated industrial and municipal expansion have accelerated competition for use of the same habitats. By 1990, 75 percent of the U.S. population will live within 50 miles of the coastlines. Increasing efforts to develop new or alternate sources of energy are further stressing important living marine resource habitats. As a result, these habitats have been substantially reduced and continue to suffer the adverse effects of dredging, filling, coastal construction, energy development, pollution, waste disposal, and other human-related activities. In the case of wetlands, from 1954 to 1978 there was an average annual loss of 104,000 acres which was a ten-fold annual increase in acreage lost between 1780 and 1954.

Recognizing the importance of habitat to the management and conservation of living marine resources, NMFS proposed a new habitat conservation policy for the Agency. The notice of proposed policy, published in the *Federal Register* on July 19, 1983 (no. 139), at 48 FR 32847, solicited public comments.

Response to Public Comments

During the comment period, twenty-five letters were received from other Federal agencies, State governments, Regional Fishery Management Councils, and organizations representing millions of citizens. The commenters, in general, supported the proposed policy, stating it is long overdue and commending the approach. However, certain of the commenters had specific concerns which are set forth below along with NMFS' response.

Policy

Comment: Implicit in the goal and mission statement of NMFS is the assumption that populations concerned would be usable. This should be clarified.

Response: NMFS agrees that the policy should make clear that the habitat conservation activities of the agency are to maintain or enhance the

capability of the environment to, among other things, produce fish and shellfish that are safe and wholesome. The wording has been amended accordingly.

Comment: Several commenters caution against too narrowly defining scope of policy. It should signify the need to give priority attention to those species for which direct management presently is Agency responsibility and it should clearly state that NMFS has stewardship responsibility for all living marine resources under Federal jurisdiction.

Response: NMFS does not believe the language needs modification. While NMFS has overall responsibility for living marine resources, it is necessary to focus NMFS' habitat conservation activities on those resources over which it can influence management regimes throughout the range of the species. NMFS' activities with respect to one species could benefit other species that depend on a particular habitat.

Policy Framework

Comment: Suggest clarifying paragraph 1, Policy Framework, to indicate NMFS also has management responsibility for species for which no Fishery Management Plans are planned, such as squid or herring in the Gulf of Mexico. This could be accomplished by rewording clause "(1) covered or to be covered" to "(1) covered or subject to being covered."

Response: For clarity, NMFS agrees to suggested change.

Implementation

Comment: The coordination mechanism for policy's implementation is not described. It is also not clear how interested public and conservation groups will be able to interact and have input into this important decision.

Response: The coordination mechanism will be developed by each region, following national guidelines, during the implementation phase. It is expected that NMFS Regional and Center Directors will discuss their programs with their constituents in order to make determinations with respect to priorities.

Comment: In Implementation Strategy No. 4, second sentence, urge addition of "artificial impoundments" to list of activities which have potential for habitat degradation.

Response: NMFS agrees to this addition.

Comment: Under Implementation Strategy No. 7, suggest policy cover catadromous as well as anadromous species.

A-45

Response: Suggestion refers to NMFS' involvement in fresh water. While catadromous species are not excluded, NMFS intends to focus on anadromous species.

Comment: Implementation Strategy No. 3(a) implies that fishermen may be a threat to fishery habitats. Statement should be clarified to address possible conditions under which fishing poses a threat to habitat.

Response: Under certain conditions, fishermen can cause damage to habitats, e.g., bottom gear fishing, vessel discharges, etc. The Regional Fishery Management Councils may deal with such under the Magnuson Fishery Conservation and Management Act (Magnuson Act), but may not control actions by others. There was no intention to single out fishermen as a threat to habitat as they realize the importance of healthy habitats and are beneficiaries of such.

Comment: Implementation Strategy No. 3(a) states that Fishery Management plans should include "proposal of measures to preserve, protect and restore habitat." Should be clarified to indicate range of "measures" which could be implemented. Should also indicate that no measures may be required in many fisheries where habitat issues are not significant.

Response: The range of measures is intentionally left up to each Regional Fishery Management Council, depending on needs of the fishery. The Councils will have the same prerogatives regarding habitat conservation that they have with respect to any other management measure contained in the Fishery Management Plans. The language of 3(a) has been modified to indicate that measures will be proposed only where appropriate.

Role of Regional Fishery Management Councils

Comment: Implementation Strategy No. 3(a) imposes strict requirements on the Regional Fishery Management Councils above and beyond the requirements of the Magnuson Act. Talk of a partnership between NMFS and the Councils is contradicted by a clear threat to disapprove Fishery Management Plans that do not meet requirements proposed by NMFS. Moreover, this strategy is an attempt to reduce the responsibilities of the Councils assigned by Congress.

Response: Implementation Strategy No. 3(a) strengthens, not weakens or reduces, the role of the Councils regarding habitat conservation. This strategy does not impose requirements beyond the Magnuson Act, since habitat

is an important element in fishery management.

Comment: It would be appropriate to refine the planning and implementation strategies to assure the Councils a partnership level role in any actions taken under the policy once it is implemented. If workshops to further develop the policy format are being considered, the Councils would appreciate an opportunity to participate.

Response: The Councils are intended to have an important partnership role and NMFS expects to contact them from time to time during policy implementation planning and development.

Comment: Minimum Fishery Management Plan descriptions called for could impose an impractical burden on plan development. For example, 80% of salmon catch in Alaska includes fish from habitat areas outside Alaska. The Councils are conscious of importance of habitat and need to protect it, but the Councils are not in a position to carefully review the work of everyone on the coasts and oceans and assess or restate the assessments of other agencies which do monitor the impact those actions may have on the environment.

Response: NMFS believes an erroneous impression was created by wording in Implementation Strategy No. 3(a) which stated "The Regional Fishery Management Councils should address habitat considerations in their Fishery Management Plans, where applicable, based on the best available information from all sources which can be coordinated by NMFS/NOAA." The underlined words have been deleted to make clear the Councils will be obliged to review only information made available to them by NMFS/NOAA and others during their plan deliberations. This will be an evolutionary process and will not impose an impractical burden on the Councils in plan development. NMFS will work closely with the Councils to make them aware of habitat conservation matters they might need to consider.

Comment: Several commenters stated that Implementation Strategy No. 3 outlines the development of a potentially powerful framework for building a constructive partnership between the Councils and NMFS for habitat conservation. Although the Councils presently may become as involved in maintenance of habitat as their authorities allow, they have played a minor role in habitat conservation to date. If this strategy is to be implemented successfully, NMFS will have to be highly responsive to Council needs with technical assistance and

information delivered both timely and adequately. Perhaps Implementation Strategies Nos. 1 and 2 should make an even stronger reference to development of research priorities and programs in response to Council needs.

Response: NMFS expects that Implementation Strategy No. 3(b) will result in NMFS providing the Councils with needed information and support. Again, this will be an evolutionary process so as not to place an undue burden on the Councils. The products resulting from implementation of Strategies Nos. 1 and 2 will provide the basis for the information provided to the Councils.

Comment: Suggest following change in Implementation Strategy No. 3(a), second paragraph: "Where appropriate, existing FMPs should be amended to meet these standards."

Response: NMFS agrees to recommended change.

Comment: Caution against over reliance on Councils as their desires may not always lead to non-overfishing or non-resource exploitation policies that NMFS supports in conjunction with wetlands protection and fisheries management.

Response: NMFS has every confidence that the Councils, in partnership with NMFS, will not undertake actions that will lead to overfishing or over exploitation of the resource.

NMFS' Role Vis-a-Vis Regional Fishery Management Councils and States

Comment: Several commenters believe that a number of statements within the policy convey the impression that NMFS intends to inject itself into an active role of fishery management in the Fishery Conservation Zone (which is the responsibility of the Regional Councils) and within the territorial seas (which is under States' jurisdiction). Overall conclusion is that the policy, as written, suggests the intention of assigning to NMFS a role in fishery management which heretofore has been filled by the Councils and concerned coastal States.

Response: The policy recognizes a partnership between NMFS and the Councils under the Magnuson Act and does not create any greater role for NMFS or the Councils than that which is currently required under the Act. The policy is not intended to usurp the Council's responsibilities. It provides the basis for considering habitat during the Councils' development of Fishery Management Plans. Moreover, the policy does not provide for NMFS' intervention in State management of State resources in State waters. It indicates that NMFS

and the Councils have an interest in conservation of the habitats of species managed under the Magnuson Act.

Comment: The policy should provide for recognition of States' roles in habitat conservation and for more definitive mechanisms for working with States in this regard. Several opportunities exist: (a) Under Implementation Strategy No. 1, Regional Directors should include State programs in their inventory of strategies to address habitat issues. There should be formal consultation with, and opportunity for comment by, States prior to adoption of regional habitat protection plans; (b) existing grant programs should recognize the validity of habitat conservation matters; and (c) procedures for NMFS' coordination with the States regarding Fish and Wildlife Coordination Act reviews should be adopted.

Response: Implementation of the policy will be in full recognition of States' roles in habitat conservation. The policy in no way evasions a reduction of State activities. It is expected that States will be consulted during planning and implementation. It is expected that NMFS' grant programs, as well as other programs, will consider habitat as part of the integration process.

Interactions With Other Agencies

Comment: One State commented that the Corps of Engineers has been traditionally recognized as the Federal agency for coastal habitat protection. The Corps' working relationship with coastal States is a long proven process. Implementation of the policy will add another layer of Federal involvement to what is already in place.

Response: The policy does not provide for replacement of the Corps of Engineers or any other agencies having interests in habitat conservation. NMFS, under the Fish and Wildlife Coordination Act, will continue to provide recommendations to the Corps regarding its issuance of permits for construction which could have an impact on living marine resources. The Corps will continue to make final decisions on issuance of permits.

Comment: Several commenters stated that NMFS should coordinate its habitat conservation programs not just with other elements of NOAA, but also with other key Federal and State agencies which have interests in or responsibilities for habitat conservation.

Response: In this regard, NMFS has every expectation of building in other Federal and State agencies. Implementation Strategy No. 6 specifically addresses this concern.

Comment: Suggest development of interagency memorandum between NMFS and the Fish and Wildlife Service, perhaps with Army involved also, to remove duplication of effort when commenting on Corps of Engineers water resource projects and permit applications.

Response: If needed, such a memorandum could be one of many provided for in Implementation Strategy No. 6.

Benefit of Proposed Policy to Other Wildlife

Comment: Recommend inserting at appropriate place, language that states that migratory birds will benefit from policy.

Response: NMFS agrees. Language has been added to reflect that implementation of the policy will be beneficial to other wildlife resources, including migratory birds.

Impact of Energy Development

Comment: Quoting a statement in the Background section that coastal habitats "have been substantially reduced and continue to suffer the adverse effects of . . . energy development . . ." one commenter suggested that unless NMFS could fully document the statement, it should be deleted.

Response: The impacts of energy development on living marine resource habitats were listed along with impacts of other human-related activities such as dredging, filling, coastal construction, pollution and waste disposal. In the case of wetlands, actual loss figures were quoted from *The Coastal Almanac for 1980—The Year of the Coast* (Ringold and Clark, 1980).

Predator-Prey and Ecosystem Relationships

Comment: Recommend adding language that specifically addresses the predator-prey relationship.

Response: The proposed policy implicitly recognized the importance of prey species which support species of importance to man. However, for clarity, the policy has been revised to specifically recognize the importance of the predator-prey relationship by using the language recommended by several of the commenters.

Comment: Several commenters stated that marine life is part of an aquatic ecosystem where food and nutrient sources are so interwoven as to make precise determination of relationships between managed and non-managed species extremely difficult. Proposed policy seems not to provide explicit credence to value of ecosystems in maintaining diversity of species.

Response: The importance of ecosystem planning and research is clearly recognized and dealt with in Implementation Strategies Nos. 1 and 2. This matter is also addressed in the amendment to the policy with respect to the predator-prey relationship.

Funding/Resources

Comment: Several commenters stated that for effective implementation of the policy, an adequate funding base for habitat research and conservation activities must be maintained. Moreover, while delegation of authority to States may be appropriate, lack of money may prevent it from working properly.

Response: Implementation of the policy is not premised upon an increase in funding, but better utilization of funds available. Recognizing that State and local governments also face budget constraints, NMFS expects they will set priorities regarding utilization of resources. The Federal Government will help to the extent it can, such as acting as a catalyst.

Comment: The policy would demand a redirection of NMFS' effort. With no mention of funding for increase in habitat conservation effort, development programs and interests must necessarily diminish as environmental protection programs and emphasis expand.

Response: Although the policy is not intended to significantly diminish specific programs, NMFS cannot forecast the effect on such programs with adoption of the policy. NMFS will deal with the direction of habitat conservation and other activities during its strategic planning efforts.

Research

Comment: Applaud scientific/research thrust, but would like to see requirement for sharing research findings with a variety of non-Federal organizations concerned with habitat conservation.

Response: Implementation Strategy No. 2 has been amended to clearly reflect NMFS' obligation to disseminate information to the public.

Comment: NMFS' role in research activities should receive greater emphasis than is implied in proposed policy statement.

Response: Implementation Strategies Nos. 1, 2 and 3(b) reflect NMFS' desire to give greater emphasis to habitat research activities.

International Habitat Activities

Comment: Regarding NMFS' participation in international habitat activities in support of obligations of the

U.S. under international agreements, it occurs that negotiations with foreign nations who are seeking fishing rights in U.S. waters, may offer opportunities for international habitat protection activities. Foreign nations with the best habitat protection records might be given preferential treatment in the fisheries allocation process.

Response: The policy does not preclude this suggestion. NMFS will bring it to the attention of the Department of State with which NMFS cooperates in making allocation determinations. Implementation Strategy No. 6 recognizes the need for interagency cooperation and agreements.

For the reader's benefit, the modified Statement of Policy follows.

Policy Framework

Traditionally, the habitat conservation activities of NMFS have been based primarily on the policies developed in response to the Fish and Wildlife Coordination Act (FWCA) and the National Environmental Policy Act (NEPA). These laws give NMFS an important advisory role, primarily with respect to reviewing and commenting on proposed Federal projects, licenses, permits, etc. which could affect living marine resources. Because of this advisory role, NMFS' habitat conservation activities have been determined largely by the policies, actions, and deadlines of others. For the most part, these activities have dealt primarily with general concerns of habitat loss and degradation and not with specific habitat problems relating to the species of living marine resources for which NMFS has primary management responsibilities, i.e. species (1) covered or subject to being covered under Fishery Management Plans developed under the Magnuson Fishery Conservation and Management Act (Magnuson Act) and (2) assigned to NMFS under the Marine Mammal Protection Act and the Endangered Species Act. Within this framework these activities have been successful in carrying out the objectives of the FWCA and NEPA. However, evolving mission and programs require the Agency to focus its activities on habitats important to the species referred to above.

In addition to the need for a change resulting from the foregoing, a number of events have occurred that give NMFS the opportunity to enhance substantially its overall role in habitat conservation. These include opportunities to use all of NMFS' legislative authorities to take an active role in habitat conservation and to ensure that it is appropriately considered in all of NMFS' programs,

and opportunities to make the program more effective through strategic planning. Additional events include changing Federal and State roles under Administration policies and reduced Federal budgets.

Although NMFS' past role in habitat conservation was largely determined by the FWCA and NEPA, significant recent legislation, particularly the Magnuson Act gives NMFS broader authority and more opportunities for achieving habitat conservation objectives. This Act also provides comprehensive authority to integrate habitat conservation throughout the Agency's conservation, management, and development programs. This can be accomplished through the Agency's strategic planning process which is the mechanism for setting priorities based on NMFS' resources and responsibilities.

Changes in traditional Federal and State roles are expected to occur as a result of sorting out responsibilities among Federal, State, and local governments and shifting decisionmaking and responsibility for a variety of policy, budgetary, and regulatory matters to State and local governments. Implementation of this policy will give State and local governments more control over activities that may be more appropriately conducted at those levels and, as a consequence, reduce direct Federal expenditures and involvement.

With respect to living marine resources and their habitats, the sorting out of responsibilities between State and Federal governments is complex. Generally, the States have overall responsibility within their inland and coastal waters (0-3 miles from shore) for management of living marine resources with the exception of marine mammals and endangered species. NMFS has been assigned the Federal management responsibility, in partnership with the Regional Fishery Management Councils, for fishery resources in the U.S. Fishery Conservation Zone (generally 3-200 miles). However, the Magnuson Act recognizes a need for management throughout the range of the species. Moreover, many of the species of living marine resources for which NMFS is responsible spend a portion of their life cycles in habitats primarily located in State waters such as rivers, wetlands, and estuaries. Many of these common property resources cross State as well as international boundaries. Therefore, consistent with the Magnuson Act, NMFS clearly has a role with respect to certain living marine resource habitats located in State, interstate and international waters. NMFS also has a long history of cooperation and

interaction with the States on State/Federal fisheries activities under number authorities other than the Magnuson Act.

Policy

Habitat conservation activities will be responsive to the mission and programs of NMFS. The goal of NMFS' habitat conservation activities will be to maintain or enhance the capability of the environment to ensure the survival of marine mammals and endangered species and to maintain fish and shellfish populations which are used, or are important to the survival and/or health of those used, by individuals and industries for both public and private benefits—jobs, recreation, safe and wholesome food and products.

NMFS will direct its habitat conservation activities to assist the Agency in (1) meeting its resource management, conservation, protection, or development responsibilities contained in the Magnuson Fishery Conservation and Management Act, the Marine Mammal Protection Act, and the Endangered Species Act; and (2) carrying out its responsibilities to the U.S. commercial and marine recreational fishing industry, including fishermen, and the States pursuant to programs carried out under other authorities.

Since most of NMFS' programs under its broad mandates are influenced by habitat considerations, habitat conservation will be considered and included in the Agency's decisionmaking in all of its programs. NMFS will bring all of its authorities to bear in habitat conservation. These authorities include those which give NMFS an active, participatory role and those, particularly the Fish and Wildlife Coordination Act, which give NMFS an advisory role.

In carrying out its programs, NMFS' activities will be conducted in a fashion designed to achieve necessary, orderly coastal development in a timely fashion, while the renewability and productivity of the Nation's living marine resources are maintained or, where possible, enhanced. This action will also benefit other wildlife resources, such as migratory birds.

Also, NMFS will use its scientific capabilities to carry out the research necessary to support its habitat conservation objectives

Implementation

Implementation of the policy will be governed by general Federal policies such as the multiple use of coastal areas. Also, implementation will be

4-48

governed by the principle that the Federal Government has an obligation to conserve the habitats of living marine resources for which it has primary management responsibility or which are the subject of NMFS program, whether such habitats are under State or Federal jurisdiction. This will require close cooperation and coordination by NMFS with other NOAA elements, Federal and State agencies, the Regional Fishery Management Councils, and the commercial and recreational fishing constituencies. It is particularly important that NMFS and the States work cooperatively to define their respective roles with each directing its habitat conservation activities according to its responsibilities and capabilities.

While this policy emphasizes NMFS' domestic habitat conservation responsibilities, it does not preclude NMFS' participation in international habitat activities in support of obligations of the U.S. under international agreements. International habitat issues will continue to be addressed on a case-by-case basis depending upon the demands of the United States under the provisions of the governing treaty or convention.

Implementation Strategies

In consultation with its Regions and Centers, NMFS' Central Office will prepare guidance for the policy implementation recognizing that each Region has unique resource and/or development issues that require flexibility in addressing particular problems. The following implementation strategies will be used.

1. Each Region, working with the appropriate Center, and the Central Office, will establish a formal planning and coordinating mechanism to implement this policy on a continuing basis. At a minimum, this mechanism will be used to: (1) identify the living marine resources of importance and the major habitat threats to these resources; (2) enumerate the identified habitat issues in order of priority; (3) develop strategies to address these issues; and (4) oversee the integration of habitat considerations throughout all NMFS' programs. To accomplish the purposes of this planning and coordinating mechanism, NMFS will call on the Assistant Administrators of other elements of NOAA (e.g., Office of Ocean and Coastal Resource Management, Office of Oceanography and Marine Services), the States, the Regional Fishery Management Councils and others, as appropriate. The results of this mechanism will be incorporated into the objectives and subobjectives of

NMFS' Strategic Plan as well as the performance contracts of its employees.

2. NMFS Research Centers will conduct environmental and ecological research, including long-term studies necessary to implement this policy. Research efforts will be coordinated with other elements of NOAA (e.g., National Ocean Service), the States and others, as appropriate. Research results will provide an integral part of the informational basis for NMFS' activities related to its conservation, management, protection, and/or development responsibilities. The needs of NMFS' decisionmakers will be the essential consideration in determining research priorities. Specific research objectives and activities will be determined through Regional and Center collaboration using the planning and coordinating mechanism described previously. Dissemination of information to the public is and will remain one of NMFS' major objectives.

3. Since the opportunities afforded by the Magnuson Act are important factors in developing and adopting this policy, in the future NMFS will rely to a greater degree on its partnership with the Regional Fishery Management Councils in habitat conservation as it affects those fisheries subject to Fishery Management Plans developed by the Councils. The Councils provide a unique mix of representatives from the commercial and recreational fishing industries, conservation groups, State and Federal Governments, and the general public. Under this partnership, NMFS will assist the Councils to the extent possible.

(a) The Regional Fishery Management Councils should address habitat considerations in their Fishery Management Plans, where applicable, based on the best available information. While threats to fishery habitat posed by sources other than fishermen are not subject to regulation under the Magnuson Act, an adequate description of the fishery, its maximum sustainable yield, or its optimum yield may require significant discussion of important habitat and threats to it.

At a minimum, Fishery Management Plans should include identification and descriptions of habitat requirements and habitats of the stock(s) comprising the management unit; assessment of the condition of these habitats, to the extent possible, as they relate to the continued abundance and distribution of the species; identification, where possible, of causes of pollution and habitat degradation; description of programs to protect, restore, preserve and enhance the habitat of stock(s) from destruction

or degradation; and, where appropriate, proposal of measures intended to preserve, protect, and restore habitat determined to be necessary for the life functions of the stock(s). Failure to describe adequately the condition of the fishery habitat and any likely changes to it may raise questions under several of the national standards and under section 303(a)(1) of the Magnuson Act. Where appropriate, existing Fishery Management plans should be amended to meet these standards.

(b) NMFS must be prepared to respond to the Councils in an agreed upon time when support or information is requested. Section 304(e) of the Magnuson Act authorizes NMFS to acquire the basic knowledge necessary to meet the Councils' needs. Equally important, NMFS will establish a mechanism to systematically consider and follow up on the Councils' recommendations for habitat conservation. If Councils' recommendations are not accepted, NMFS will notify them of the reasons. If Councils' recommendations are accepted, NMFS will adopt them and keep the Councils informed on a continuing basis regarding the results of actions taken to implement the recommendations. If the Secretary does not have the authority to carry out the Councils' recommendations, the Secretary will submit the recommendations to the authorities having jurisdiction over the matter.

4. NMFS will continue to use procedures and options available under the FWCA and other advisory authorities to influence decisions about important habitats identified by NMFS. These activities will include addressing decisions regarding dredge and fill projects, OCS oil and gas development, ocean dumping, water diversion, artificial impoundments, energy facility siting, water quality degradation, and removal or degradation of tidal and intertidal wetlands.

5. NMFS will work closely with the States, the Interstate Marine Fisheries Commissions, and the Regional Fishery Management Councils to ensure that State/Federal Fishery Management Plans and the Councils' Fishery Management Plans are fully coordinated with regard to living marine resource habitat conservation. This coordination can be served through the Coastal Zone Management, or State/Federal Action plan process which could also provide mechanisms for sharing responsibilities and costs.

6. Since other Federal, State and local agencies are involved in living marine resource habitat matters, NMFS will

support existing or new interagency operating arrangements to help define and assign appropriate roles and responsibilities. These arrangements may be informal or formal.

7. NMFS will focus its freshwater habitat activities on anadromous species. This does not preclude NMFS involvement in a freshwater project if the project could adversely affect living marine resources for which NMFS has primary management responsibility or which are the subject of a NMFS program.

8. Where possible, NMFS will become more actively involved with governmental agencies and private developers during preapplication or early planning stages. This involvement will allow NMFS to better anticipate problems, identify alternatives for achieving objectives, reduce possibility of conflict, and minimize adverse effects on living marine resources and their habitats. In the case of essential public interest projects where practical alternatives are unavailable, NMFS will recommend measures to mitigate habitat losses. Also, when appropriate, NMFS will recommend habitat enhancement measures including rehabilitation.

9. As habitat considerations are integrated across all program lines, each major program office of NMFS will review its authorizing legislation and implementing regulations in conjunction with the Office of General Counsel to determine if these adequately provide for consideration of habitat. Legislative or regulatory changes will be recommended as needed.

10. Recognizing NOAA's broad responsibilities for ocean management, NMFS will continue to cooperate with other NOAA program elements in environmental activities conducted by these elements and will emphasize those activities affecting living marine resources for which NMFS has primary responsibility. NMFS will also seek assistance from other NOAA elements with expertise in areas relating to living marine resources and their habitats.

11. During the implementation of the Federal regulatory reform processes, NMFS, particularly its Central Office, will actively review and participate in the development of evolving Federal and State laws, regulations, policies and actions (e.g., Section 404 of the Clean Water Act) that affect habitats of species for which NMFS has primary management responsibility or which are the subject of a NMFS program to ensure that habitat conservation is appropriately considered.

12. To generate greater interest in perpetuating healthy living marine resource habitats, NMFS will emphasize

greater communication of its habitat conservation activities to its constituency. This includes commercial and marine recreational fishing interests, academia, environmental groups, coastal residents, marine-oriented industries, the general public, and the Congress.

Dated: November 21, 1983.

William G. Gordon,

*Assistant Administrator for Fisheries,
National Marine Fisheries Service.*

FR Doc. 83-21541 Filed 11-21-83; 4:27 pm

BILLING CODE 3510-22-M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjusting Import Charges for Certain Wool Textile Products From the Republic of Korea

November 21, 1983.

A CITA directive dated August 24, 1983 (48 FR 39113) established a level of restraint of 30,065 dozen for women's, girls' and infants' wool coats in Category 435, produced or manufactured in the Republic of Korea and exported during 1983. That level is now filled. It has been determined, however, that 6,379 dozen have been improperly charged to the level. Accordingly, 6,379 dozen are being deducted from the charges made to the level established for Category 435 during 1983.

EFFECTIVE DATE: November 25, 1983.

FOR FURTHER INFORMATION CONTACT: Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, Washington, D.C. (202/377-4212).

Walter C. Lenahan,

Chairman, Committee for the Implementation of Textile Agreements.

FR Doc. 83-21536 Filed 11-21-83; 4:45 am

BILLING CODE 3510-02-M

COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED

Procurement List 1984; Proposed Additions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Proposed additions to procurement list.

SUMMARY: The Committee has received proposals to add to Procurement List 1984 a commodity to be produced by and services to be provided by workshops for the blind and other severely handicapped.

Comments must be received on or before December 28, 1983.

ADDRESS: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202.

FOR FURTHER INFORMATION CONTACT: C. W. Fletcher, (703) 557-1145.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2), 85 Stat. 77. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

If the Committee approves the proposed additions, all entities of the Federal Government will be required to procure the commodity and services listed below from workshops for the blind or other severely handicapped.

It is proposed to add the following commodity and services to Procurement List 1984, October 18, 1983 (48 FR 46415):

Class 7510

Clip, Paper, Binder, Small; 7510-00-232-8207

SIC 0732

Grounds Maintenance; Social Security Administration Computer Center 6201 Security Boulevard Baltimore, Maryland.

SIC 4789

Operation of the USDA Central Shipping and Receiving Facility; U.S. Department of Agriculture, South Building, 12th and C Street, SW., Washington, D.C.

SIC 7369

Commissary Shelf Stocking and Custodial Service, Peterson Air Force Base, Colorado.

C. W. Fletcher,

Executive Director.

FR Doc. 83-21534 Filed 11-21-83; 4:45 am

BILLING CODE 6920-33-M

Procurement List 1984; Additions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Additions to procurement list.

SUMMARY: This action adds to Procurement List 1984 commodities to be produced by and services to be provided by workshops for the blind and other severely handicapped.

EFFECTIVE DATE: November 25, 1983.

ADDRESS: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202.

FOR FURTHER INFORMATION CONTACT: C. W. Fletcher, (703) 557-1145

TAB D

A-51



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Washington, D.C. 20235

NOV 25 1985

F/M42:KRR
F/S1:JB
COE:PP

TO: Office, Regional and Center Directors, NMFS
USACE Division and District Commanders

FROM: *William G. Gordon*
William G. Gordon
Assistant Administrator for Fisheries, NMFS

H.J. Hatch
H.J. Hatch
Major General, U. S. Army, Director of Civil Works

SUBJECT: Memorandum of Agreement Between NOAA and the Department
of the Army for a Pilot Study to Restore and Create
Fisheries Habitat

Attached for your information is a Memorandum of Agreement signed by the Administrator, National Oceanic and Atmospheric Administration, and the Acting Assistant Secretary of the Army (Civil Works). Under this agreement the National Marine Fisheries Service (NMFS) and the U.S. Army Corps of Engineers (CE) will conduct a 3-year pilot study to investigate the practicability of a national program for restoring and creating fisheries habitats within each agency's existing authorities, resources, and capabilities.

The agreement is intended to merge the NMFS's interest in the Nation's fisheries productivity and the Corps' water resources development program, engineering expertise and experience. Participating NMFS/CE offices will work cooperatively to identify and pursue innovative approaches to habitat restoration and creation. Habitats restored and/or created under this program will be primarily to restore fisheries habitats that were degraded or destroyed in the past or to create totally new habitats.

We jointly express our strong support for this agreement and are confident that all participating NMFS and CE field offices will cooperate fully to make this pilot study a success. General guidance on implementing the pilot study will follow in the near future once participating NMFS and CE field offices have been identified. The identification of potential participating NMFS and CE field offices is currently underway.

Attachment



COOPERATIVE AGREEMENT
BETWEEN THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
AND
DEPARTMENT OF THE ARMY
FOR A PILOT STUDY TO INVESTIGATE THE PRACTICABILITY
OF A NATIONAL PROGRAM FOR RESTORING AND
CREATING FISHERIES HABITAT

Background: Within the National Oceanic and Atmospheric Administration, the National Marine Fisheries Service (NMFS) has the primary Federal responsibility for the conservation, management, and development of the Nation's living marine resources. The NMFS Habitat Conservation Policy recognizes that mankind will inevitably alter marine, estuarine, and anadromous fish habitats which are essential to maintaining the Nation's fisheries. The ability of these habitats to support fisheries production is diminishing, while pressures for conversion to other uses are continuing. In accordance with this policy, NMFS is proceeding to: (1) promote, support, and originate habitat restoration and creation programs by Federal, State, and local resource, construction, and regulatory agencies and the private sector; and 2) work directly with Federal resource, construction, licensing, and regulatory agencies in developing policies, guidelines, and rulemaking to promote the conservation of coastal and anadromous fisheries habitats.

Within the Department of the Army, the U.S. Army Corps of Engineers (CE) has general authority and broad experience, expertise, and capability to work within coastal and inland areas of the United States. It also has general authority to create wetlands using dredged material associated with the construction and

maintenance of civil works projects. The CE has conducted extensive basic and applied research in the beneficial uses of dredged materials, and has demonstrated that under the proper conditions the restoration and creation of wetlands, seagrass beds, and other aquatic habitats is both possible and feasible.

Purpose: The purpose of this Memorandum of Agreement (MOA) is to conduct a cooperative pilot study by the NMFS and CE to determine the practicability of establishing, within existing authorities, resources, and funding, a NMFS-CE nationwide habitat restoration and creation program. Such a national program would contribute towards balancing fisheries habitat conservation with the orderly development and management of the Nation's water resources. The pilot study will assess the process of identification and selection of restoration and creation sites; planning, design, construction and maintenance of selected measures; and, as appropriate, the progress of plan implementation accomplished within the study period. The pilot study will also assess the cost effectiveness of the restoration and creation measures and the institutional arrangements required with affected Federal, regional, state, and local agencies in the above cited process.

Statutory Basis: This MOA is consistent with the following statutes:

1. Fish and Wildlife Act (PL 84-1024).
2. Fish and Wildlife Coordination Act of 1958 (PL 85-624, as amended).
3. National Environmental Policy Act of 1969 (PL 91-190, as amended).
4. Magnuson Fishery Conservation and Management Act of 1976 (PL 94-265, as amended).
5. Endangered Species Act of 1973 (PL 93-205, as amended).
6. Marine Mammal Protection Act of 1972 (PL 92-522).
7. River and Harbor Act of 1899 (33 U.S.C. 403, 407).
8. Water Resources Development Act of 1976 (PL 94-587), Section 150, Establishment of Wetland Areas in Connection with Dredging.
9. Marine Research, Protection and Sanctuaries Act of 1972 (PL 92-532).
10. Clean Water Act of 1977 (PL 95-217).
11. Section 219 of the River and Harbor and Flood Control Act of 1965 (PL 89-298).
12. The Coastal Zone Management Act of 1972 (PL 92-583, as amended).

General Scope: The pilot study will be conducted over a 3-year period commencing with the signing of this agreement, and will involve Washington, D.C., headquarters and selected field offices (i.e., NMFS Regions and CE Divisions and Districts) of both agencies. The study will be carried out in two NMFS Regions, and will involve two or more CE Divisions and Districts. One to three fisheries habitat restoration and creation sites will be selected for study in each of the two NMFS Regions. The exact scope of the pilot study will be set by NMFS and CE field offices working together to locate potential fisheries habitat restoration and creation sites in areas where appropriate active CE projects, programs and/or studies provide the necessary authority for CE participation.

Responsibilities: Selected NMFS Regions will furnish participating CE Divisions and Districts with proposed areas and sites of fisheries habitat restoration and creation, and will identify the fisheries resources expected to benefit. The appropriate CE Divisions and Districts will determine the extent of their authorities and capabilities to carry out the proposed restoration and creation actions. Based on this information and in consultation with the NMFS and CE Washington, D.C., headquarters offices, the involved field offices will jointly select specific fisheries habitat restoration and creation sites for inclusion in the pilot study. Implementation of the fisheries habitat restoration and creation activities included in the pilot study will be a team effort that combines NMFS

technical fisheries expertise with the CE's broad water resource planning, engineering, design and construction expertise and capability. Development of any specific field-level interagency working agreements associated with the pilot study will be left to the discretion of the participating NMFS Regional Directors and CE Division and District Engineers.

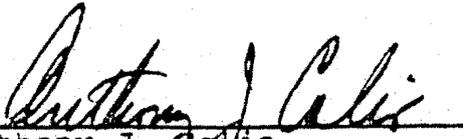
Funding: Each agency will be responsible for funding necessary for its participation both at the National and Field levels.

Reports and Documentation: On an annual basis, participating NMFS and CE field offices will prepare a joint progress report and submit it to their respective Washington headquarters offices. These reports will be evaluated by NMFS and CE headquarters staff and consolidated into a single annual progress report for appropriate Washington-level review. At the conclusion of the study, a joint NMFS-CE final assessment report will be submitted to the Administrator, NOAA, and the Assistant Secretary of the Army (Civil Works). This report will include conclusions and recommendations with regard to the practicability of implementing a NMFS-CE nationwide fisheries habitat restoration and creation program.

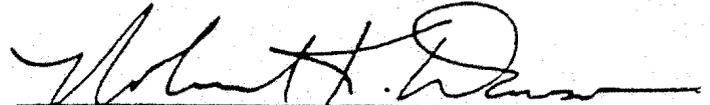
Effective Date and Duration: This MOA will become effective upon signature by both parties, and will remain in effect for three years. Either party may terminate the agreement 30 days after written notice to the other party.

NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION

DEPARTMENT OF THE ARMY



Anthony J. Gallo
Administrator, NOAA



Robert K. Dawson
Acting Assistant Secretary
of the Army (Civil Works)

OCT 23 1985

25 OCT 1985

A-58

TAB E

A-59

**Pilot Study to
Determine the Feasibility
of Establishing a
Nationwide Program of
Fisheries Habitat
Restoration and Creation**

February 9, 1990

Office of Protected Resources and Habitat Programs
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
Silver Spring, MD

and

Operations, Construction, and Readiness Division

and

Policy and Planning Division
Directorate of Civil Works
U.S. Army Corps of Engineers
Washington, D.C.

A-60

NMFS-CORPS PILOT STUDY

EXECUTIVE SUMMARY

Of particular importance to our Nation's marine fisheries is the loss each year of marine and estuarine habitats due to wetlands destruction, acid rain, nonpoint and point discharges, eutrophication, waste dumps, and other human impacts. Despite coastal planning efforts, human population growth and development continue to impart this net loss. Efforts to protect and preserve, while vital and in need of expansion, are only part of the answer. The Nation must either acquiesce to the inevitable habitat losses or pursue alternatives that will routinely restore fishery productivity as it is lost.

One alternative is systematic restoration and creation of fishery habitats along the Nation's coasts and rivers. While fishery habitat restoration technology needs much improvement, some techniques exist which will increase fisheries production and harvest. Research and monitoring efforts are currently underway to evaluate the effectiveness of other techniques which are unproven, but potentially valuable. In an increasing number of cases, available authorities and funding for habitat improvement have led to specific restoration features now in place or underway.

In October, 1985, an agreement was signed by the Administrator¹, National Oceanic and Atmospheric Administration (NOAA) and the Assistant Secretary of the Army (Civil Works). The agreement called for a three year Pilot Study to be conducted jointly by the National Marine Fisheries Service (NMFS) and the U.S. Army Corps of Engineers (Corps). The purpose was to determine the practicability of establishing, within existing authorities, resources, and funding, a nationwide NMFS-Corps program of fisheries habitat restoration and creation. It was envisioned that the resulting program also would more efficiently use the Corps planning, construction, and Operations and Maintenance (O&M) activities, while improving the overall cost-effectiveness of the Civil Works Program.

The cooperative Pilot Study occurred over the period November 1985 through October 1988. The first year involved startup and interagency selection of restoration and creation sites across the NMFS Northeast, Southeast and Southwest Regions. Projects within the Corps' O&M Program were screened for opportunities to restore and create habitats. Six sites were selected: two in California, two in Maryland, one each in North Carolina and Texas. Second and third year work consisted of contracting, construction, and monitoring at the six sites by the Corps, NMFS, and other participating agencies.

¹. Title has become Under Secretary of Commerce For Oceans and Atmosphere, U.S. Department of Commerce.

NMFS-CORPS PILOT STUDY

Pilot Study Findings

- o Fisheries habitat restoration features can be identified and implemented in some Corps projects at no net increase in Corps project costs.
- o Participating NMFS-Corps field offices of both agencies cited a high degree of interagency cooperation throughout the Pilot Study.
- o Other Federal, state, and local agencies, and other parties generally were supportive of the intent of the Pilot Study. Many participated in screening, selection, approval, planning and/or monitoring.
- o Generally, Pilot Study activities were readily integrated into the District project O&M work. Civil Works project purposes were achieved readily. Habitat construction was completed at all Pilot Study sites with the exception of Prospect Island, CA.
- o Limited resources within NMFS constrained the number and location of selected Pilot Study sites; reduced the scope, extent, and nature of monitoring studies; and displaced other NMFS habitat program activities. Available resources are a major constraint to NMFS participation in an expanded program.
- o Implementation of some habitat features (e.g., Pilot Study wetlands creation in North Carolina and Texas), which exhibit potential, but unproven, fishery productivity benefits, requires the inclusion of multi-year monitoring programs.
- o A consensus of participating NMFS-Corps offices recommended an expanded program of National scope. Expanded NMFS participation would be contingent upon additional manpower and funding. Also, the Corps will need to dedicate appropriate manpower and funding to carry out its responsibilities.

Pursuant to the agreement, this final report has been prepared jointly by the NMFS and Corps for submission to the Assistant Secretary of the Army (Civil Works) and the Department of Commerce Under Secretary For Oceans and Atmosphere. It includes recommendations for the establishment of a nationwide NMFS-Corps program of fisheries habitat restoration and creation to be conducted within the Civil Works Program.

NMFS-CORPS PILOT STUDY

I. CONCLUSIONS AND RECOMMENDATIONS

(1) Proposal For An Expanded National Program

Based on the positive NMFS-Corps experience under the 1985 NOAA-Army agreement, a National marine fisheries habitat restoration and creation program has a high probability of success. The NMFS-Corps Pilot Study demonstrated that fisheries habitat restoration and creation opportunities can be selected and implemented at no net increase in Corps project costs. It also demonstrated general cooperation and support by field offices of the U.S. Fish and Wildlife Service (U.S. FWS), the U.S. Environmental Protection Agency (EPA), state and local agencies, and others. Such a program would provide an interagency combination of authorities, resources, and expertise to mutually accomplish the Corps water resources mission and the habitat conservation missions of NMFS and other participating agencies.

Recommendations:

- (1a) The Department of the Army and NOAA should establish a cooperative, nationwide NMFS-Corps program of fisheries habitat restoration and creation.
- (1b) NOAA and Army should assist each other to the extent possible to secure needed resources that would enable such a National habitat program to achieve full success.
- (1c) The program's goal should be to enhance the nation's marine fisheries productivity, while allowing orderly, environmentally compatible development of the Nation's water resources.
- (1d) Restoration and creation opportunities should be selected from within the overall Civil Works Program, although most will probably be found among the Corps Federal projects and O&M activities.
- (1e) Habitat features constructed under the program should be designed to result in a net increase of habitat when compared with current conditions.²

². The objective of the program should not be confused with that of constructing mitigation features designed to offset damages associated with proposed Corps construction and/or regulatory programs.

- (1f) The program should be implemented in all geographic areas mutually covered by the respective jurisdictions of NMFS and the Corps.
- (1g) Individual habitat restoration or creation features should be implementable with at least no net increase in Corps project costs and in a manner consistent with and not disruptive of project operations.
- (1h) The program should be designed to enlist the cooperation and support of the Service, FWS, the U.S. Environmental Protection Agency, state and local agencies, and to obtain public awareness and citizens advisory inputs.

(2) Directly Implementable Habitat Features

Restoration and creation features (hereafter referred to as "habitat features"), which involve relatively minor or no monitoring requirements (e.g., Pilot Study artificial reef at Mission Bay, CA) can be planned and constructed within the annual Civil Works planning, construction, and O&M cycles of involved Corps Districts. However, limited funding, staff, and travel ceilings are a major constraint to NMFS participation in an expanded National program. Without provision of basic program resources, NMFS participation under an expanded agreement would consist of token, case-by-case involvement.

Recommendations:

- (2a) Habitat features should be cooperatively and routinely identified, evaluated, and, if justified, implemented by NMFS, the Corps, and other agencies for fisheries habitat restoration and creation opportunities identified within the Civil Works Program.
- (2b) In addition to minor research and monitoring requirements, selected habitat features should have reasonably predictable benefits to important fish and shellfish species.
- (2c) Manpower and funding of NMFS offices and laboratories should be increased to permit full NMFS participation in the expanded program.
- (2d) The Corps should structure its manpower and funding, as appropriate, to establish and maintain participation.

(3) Features With Substantial Monitoring Requirements

Some habitat features, hereafter referred to as "research features," require substantial monitoring programs (e.g., Pilot Study wetlands creation in North Carolina and Texas). Contributions of such features to fishery productivity are unproven, but potentially valuable. In such cases, the primary purposes become understanding and improving effectiveness of fisheries habitat restoration techniques and, ultimately, furthering restoration and creation technology. During the Pilot Study, the interagency pooling of research and construction talents led to habitat construction and monitoring of a quality and scale not generally available otherwise. Generally, costs of multi-year research and monitoring requirements would exceed the guideline of no net increase in Corps project costs and would exceed the normal operational resources presently available to NMFS. Therefore, monitoring work associated with such features will require alternative funding sources.

Recommendations:

- (3a) As part of the nationwide NMFS-Corps program, the two agencies should cooperatively develop a proposal for a joint, coordinated Habitat Restoration Research & Monitoring Program. Development of the proposal should be coordinated with the Corps Wetland Research Program.
- (3b) Because of NMFS' living marine resource mandates and technical marine science expertise and the Corps habitat restoration, enhancement and research and construction capabilities, monitoring programs on research features will be cooperatively designed and conducted by NMFS and the Corps. Additional base funding and manpower should be placed within NMFS to meet the monitoring needs of the nationwide program.
- (3c) The primary objective of the Research and Monitoring Program, as well as the individual research features selected under it, should be to contribute to the improvement of fishery habitat restoration and creation technology, while expanding our understanding of the effectiveness and value of existing techniques.
- (3d) Joint approval of individual features should be based upon their potential to understand the effectiveness of existing habitat restoration and creation techniques in increasing fisheries productivity and to improve restoration technology.

A-65

(4) Need For Corps Authority To Purchase Lands at Prospect Island

Removing levees along Prospect Island, California would eliminate O&M costs for levee maintenance, while restoring almost 1,400 acres of valuable wetlands and fishery habitat. If implemented, this particular feature would increase fishery productivity and assist the State's goal of increasing the amount of California wetlands. Despite these benefits, the Corps lacks authority to purchase these lands and it has been necessary to shelve the feature. Such authority is desirable to assure that project efficiencies, fisheries habitat, and other environmental benefits are not lost.

Recommendations:

- (4a) The Army should identify and pursue appropriate means of acquiring lands at Prospect Island so that the area can be restored as a wetland and turned over to a natural resources agency for management. Suitable ways to address such opportunities as they arise in the future should be identified and the means to implement these features should be established.

(5) Undertaking An Expanded Program

Initiation of an expanded National program would require the development of a new NOAA-Army agreement. Also needed would be: (a) policies and guidance to the field, which reflect the experience gained through the Pilot Study; and (b) a process by which to cooperatively pursue identified legislative and funding needs.

Recommendation:

- (5a) The Corps and NMFS should be directed to cooperatively develop a new NOAA-Army agreement and plan of implementation, and, as appropriate, take steps jointly to initiate plan implementation. The agreement and plan should be completed by July, 1990. Initial phases of the program should be underway in all NMFS regions by October, 1990.

September, 1990

ELDON VAN CLEEF GREENBERG

Eldon Greenberg is a partner in the Washington, D.C. law firm of Galloway & Greenberg (1835 K Street, N.W., Suite 801, Washington, D.C. 20006; tel.: (202) 833-9084). A graduate of Harvard College and Harvard Law School, he was General Counsel of the National Oceanic and Atmospheric Administration, United States Department of Commerce, from 1978 to 1981. In 1977, he was Deputy General Counsel of the Agency for International Development. Prior to 1977, he was in private practice in both Washington, D.C. and New York. His experience covers all phases of practice in Washington, including presentation of testimony to Congress, participation in agency proceedings and litigation. He specializes in environmental and natural resources problems, with a particular focus on fisheries management.

Eldon is past chairperson of the Steering Committees of the Environmental Law and Administrative Law and Agency Practice Divisions of the District of Columbia Bar and a former member of Secretary of State's Advisory Committee on the Law of the Sea. He is currently a member of Editorial Advisory Board of the Marine Fisheries Management Reporter. He is Co-Chairman of the Annual National Fishery Law Symposium, sponsored by the University of Washington and the American Bar Association. He also teaches international negotiation as an adjunct professor at Georgetown University Law Center.

G-67